



12179

**First-tier Tribunal
Property Chamber**

(Residential Property)

Case reference : CAM/00KF/LSC/2017/0008

Property : Flat 6, 45 Kilworth Avenue,
Southend-on-Sea,
Essex SS1 2DS

Applicant : 43/45 Kilworth Avenue Southend-on-Sea
Ltd.

Represented by James Sandham of counsel (Drysdales)

Respondent : Donald Hollington
Represented by Mr. R. Yeates (lay representative)

**Date of Transfer from
the County Court at
Southend** : 5th January 2017

Type of Application : to determine reasonableness and
payability of service charges and
administration charges

The Tribunal : Bruce Edgington (Lawyer Chair)
Stephen Moll FRICS
Lorraine Hart

**Date and place of
Hearing** : 12th May 2017 at Southend Magistrates'
Court, 80 Victoria Road,
Southend-on-Sea SS2 6EU

DECISION

Crown Copyright ©

1. The Tribunal determines that of the claim for service charges of £2,220.00, the sum of £2,220.00 is reasonable and payable forthwith.
2. The Tribunal also determines that of the claim for administration charges of £200.00, the sum of £200.00 is reasonable and payable forthwith.
3. The claim is transferred back to the county court sitting at Southend under claim no. C88YM786 for determination of any court fees and small claims legal costs. The parties should note that it will be up to them to make any application to the court in relation to those matters.

Reasons

Introduction

4. Court proceedings were issued by the Applicant for the sums stated above plus unquantified legal costs on 28th September 2016. The claim is made up as to 37 monthly charges of £60 for service charges on account commencing December 2013 plus £200 'legal expenses', court fees and litigation costs.
5. A defence was filed which is handwritten and extremely difficult to read at page 27 in the bundle. Doing the best it can, the wording seems to the Tribunal to be:-

"The claim for £2,420 due under a lease is wrong because I have share of freehold! purchased by the last owner and was transferred to me when I bought the property. The solicitor who acted for Mr. Prosser, the last owner, was 'Jefferies' telephone 01702-332311. On the three balance sheets I have Mr Orr says he paid the gardener £880! but there is no garden and no gardener has been near the house since I bought it. There is just a neglected hedge around the front of the building. Have pictures to prove. The window cleaning I cancelled in Feb 14; the window cleaner to whom I spoke said OK I will adjust the price for cleaning from now on. The most ridiculous claim is for £6,110 for repairs! I am not aware of any repairs done since I bought the flat. Ask Mr. Orr for a receipt from the firm who charged him £6,110 for repairs and say what was repaired! There was some amateur painting done in that year, which a builder working here..."

6. The wording suggests that it goes on to a second page but there is none in the bundle prepared for the Tribunal. However, amongst the correspondence at page 229 in the bundle is a letter from the Respondent (undated) where he tells the Applicant's solicitors that he cannot supply a copy of his defence but he refers to some of the items in it. It does appear from that letter that the copy in the bundle does cover all relevant issues.
7. There are several letters in the bundle from the Respondent. At page 29 is a brief letter complaining about the state of repair at the building. At page 35 there is a longer letter to the court repeating some of the complaints but challenging other matters. It says (1) that the window cills are peeling, (2) the window frames are rotten, (3) the doorbell doesn't work, (4) the front step is split, (5) bedroom doors do not close and (6) there is some rising damp. He says that he has had 25 demands for gas and electricity when he has told 'them' that the property was unoccupied. He then says "*if you think I deserve to make a counter-claim any amount decided by you would be acceptable!*".
8. The Order of District Judge Foss dated 5th January 2017 is for the case to be allocated to the small claims track and then "*transferred to the First Tier Property Tribunal for determination*".

9. A bundle of documents was duly lodged on time and the Applicant has responded to the 'defence'. A brief appraisal of the Applicant's answers is:

- The Respondent has no interest in the freehold title to the property
- There is a lawn, trees, flowerbeds, plants and hedges which are maintained by a gardener
- It is denied that window cleaning services ceased. They were reduced because he was unable to gain access to the rear of the building
- It is said that there is no means by which an undisclosed counter-claim can be considered
- The allegations of disrepair are unreasonable particularly such matters as window frames, doors and doorbell because these are part of the demise.

The Lease

10. The bundle produced for the hearing included what appears to be an Office Copy of the lease which is dated for the 28th February 1991 and is for a term of 99 years from 1st January 1990 with a ground rent of £75. The lease provides that the Applicant shall insure the property and keep the building and grounds in repair. It can then recover 12.5% of the cost of so doing from the leaseholder. The building is 43 and 45 Kilworth Avenue, Southend-on-Sea which consists of 8 flats.

11. As to litigation costs, there are a number of provisions in the lease for them to be recovered. Those relied upon by the Applicant arise from paragraphs 14 and 16 in the Third Schedule to the lease. Paragraph 14 relates to costs incurred in contemplation of the preparation and service of a notice under section 146 of the **Law of Property Act 1925** i.e. for forfeiture. The clause specifically covers all expenses including solicitors' costs.

12. In **Barrett v Robinson** [2014] UKUT 0322 (LC), the Upper Tribunal considered the question of when a section 146 clause, such as in this case, became operative. At paragraph 52, the Tribunal said:-

“Costs will only be incurred in contemplation of proceedings, or the service of a notice under section 146 if, at the time the expenditure is incurred, the landlord has such proceedings or notice in mind as part of the reason for the expenditure. A landlord which does not in fact contemplate the service of a statutory notice when expenditure is incurred, will not be able to rely on a clause such as clause 4(14) as providing a contractual right to recover its costs “

13. This decision was referred to with approval by the Upper Tribunal in **Willens v Influential Consultants Ltd.** [2015] UKUT 0362 (LC). There is no evidence in this case that forfeiture has even been considered.

14. The second provision in paragraph 16 is for the tenant to indemnify the landlord against all damages costs and other liabilities resulting from any non observance or non performance of any tenant's covenants.

15. By a combination of clause 5 and Part I of the Sixth Schedule, the Applicant can claim service charges on account on the 1st January and 1st July in every year. Clauses 9(b) and 2 of that Schedule seems to be a requirement to produce a reconciliation of service charge expenditure in every year but none of the dates are entered and it is probably void for uncertainty. There is also provision for the setting up of a reserve fund.

The Law

16. Section 18 of the 1985 Act defines service charges as being an amount payable by a tenant to a landlord as part of or in addition to rent for services, insurance or the landlord's costs of management which varies 'according to the relevant costs'.
17. Section 19 of the 1985 Act states that 'relevant costs', i.e. service charges, are payable 'only to the extent that they are reasonably incurred'. This Tribunal has jurisdiction to make a determination as to whether a charge for payment on account of a service charge before it is incurred is reasonable and, if so, whether it is payable.
18. Paragraph 1 of Schedule 11 of the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act") ("the Schedule") defines an administration charge as being:-

"an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable... directly or indirectly in respect of a failure by the tenant to make a payment by the due date to the landlord."

19. Paragraph 2 of the Schedule, which applies to amounts payable after 30th September 2003, then says:-

"a variable administration charge is payable only to the extent that the amount of the charge is reasonable"

The Inspection

20. The members of the Tribunal inspected the exterior and internal common parts of the property in the presence of the witnesses Mr. Orr and Mr. Hollington together with his friend, Mr. R. Yeates and counsel for the Applicant, Mr. James Sandham.
21. It is a former pair of semi-detached houses which has been converted into 8 flats over 3 floors with 2 balconies. It has a large frontage and was said to have been built in the late 19th century of brick which is rendered to the rear. It has interlocking concrete tiles on pitched roofs. It is reasonably close to Southend town centre which has 2 rail stations with commuter trains to London.
22. The condition of the exterior of the building can only be described as fair with the main problem being the window frames and their surrounds. Having said that, some of the window frames are now uPVC. Generally the decorative condition of the window frames and surrounds is poor with some being worse than others. Whilst the windows and their frames are

demised to the tenants, it is the landlord's responsibility to keep them in good decorative order.

23. Some of the woodwork to gable ends has been decorated but not on the higher floors which is unfortunate as this is inefficient use of scaffolding.
24. The grounds have clearly been transformed recently so that they are now laid to block paving with identified parking spaces, lawns and garden beds. There is an access road to the rear where there is a new block of 15 flats

The Hearing

25. The hearing was attended by those who attended the inspection. It was explained that Mr. Hollington is 92 years old and is deaf. He had no hearing aid. Eventually, the hearing proceeded on the basis that Mr. Hollington walked round the hearing room so that he could hear things being said by those speaking to him. In that way, he was able to fully participate in the hearing although on occasions, Mr. Yeates explained matters to him and spoke on his behalf. The lay member of the Tribunal was also careful to ensure that he understood what was going on.
26. The main difficulty was that Mr. Hollington clearly thought that he had an interest in the freehold title to the property. This matter is discussed below. He then tried to admit further evidence which counsel for the Applicant considered first. This consisted of a 'statement' and some photographs. The statement was actually a series of arguments and counsel's view was that as long as this was not admitted as evidence, he would be happy for the Tribunal to consider the points being made as written submissions. This was how they were considered.
27. Various legal points were discussed and Mr. Orr, director of the Applicant, then gave evidence. He explained that when he bought his flat 14 years ago all the paperwork for the freehold company was just left in the hall by a previous tenant. He just assumed responsibility for it and had run matters since then without assistance or fee. He said that 3 of the flats were sublet and the long leasehold owners did not really participate in the running of things. After Mr. Hollington had bought his interest in flat 6, he did not move in and Mr. Orr thought that he was going to be the same as those others. He accepted that when he moved in, he should have made more effort to involve Mr. Hollington.
28. The new garden was as a result of negotiations with the developer at the rear and had not cost the leaseholders anything. Further, he had enough money to have the rear of the building decorated and he was going to arrange that as soon as possible.
29. He was asked a number of questions about the contractors referred to in copy invoices, which Mr. Yeates asserted were either not capable of being contacted or, in one case, was deceased. As no prior notice had been given of these matters, he was really unable to say anything except to say that when the work was done, they did it. He confirmed that there was quite a large lawn to the rear of the building.

Discussion

30. In some ways, this is an extremely unusual case and in others it is typical of many situations which this Tribunal sees on a daily basis. The unusual aspect of the case is the title. At page 151 in the bundle is a letter from the Respondent from which it is clear that he thinks he has a freehold title and he does not think that the lease is relevant.
31. The Applicant has been able to produce a copy of the Respondent's contract with the person from whom he purchased and also the transfer at pages 197F and 197D respectively. The Tribunal has also seen the Land Registry entries for the freehold title and the long leasehold title from which it is clear that the Respondent has no interest in the freehold title and he is not the registered proprietor of the long leasehold title.
32. One problem seems to be that at one point in the contract are the words "freehold/leasehold" and the wrong one i.e. 'leasehold' has been crossed out. For this reason, Mr. Hollington thinks that he owns the freehold. In fact the typed words after the error make it absolutely clear that what is being bought is the leasehold title only.
33. At page 153 in the bundle is a letter from the Respondent dated 16th February 2016 wherein he says "*the land registry refused to register the flat in my name unless I provide them with proof of my identity and address; the address of the previous owner! and £190. Am tired of dealing with fools and so have not replied!*". He also refers to assurances he was given that he was buying the freehold title.
34. The Respondent must understand that he is not the registered proprietor of the property and he will not be able to sell it with a long leasehold title until he has registered it in his name. He is likely to be the owner of an equitable interest in the leasehold title to the property. The lease itself, as a title deed, is not enforceable against the Respondent. However, it is absolutely clear that he has paid for the right to occupy the property and the terms of his occupation include, in this Tribunal's view, the obligation to pay service charges. The terms of such implied contract are that in consideration of the Respondent having the equitable right to occupy the flat, he agrees to abide by the terms of the lease i.e. they are enforceable against him as a simple contract rather than a deed.
35. Mr. Sandham assisted the Tribunal by producing copies of a number of reported cases, one of which was **Brown & Root Technology Ltd. and another v Sun Alliance and London Assurance Co. Ltd.** [2001] Ch 733 in which a lease contained a right for the lessee to serve notice to terminate at the end of the 7th year of the term. The tenant assigned the lease but such assignment was not registered at the Land Registry. That same tenant then served notice to terminate on the landlord.
36. The landlord would not accept the notice because the lease had been assigned and the judge accepted that argument. On appeal, the Court of Appeal overturned the decision saying that the right to terminate was a personal right which meant (a) that only the original tenant could serve such a notice and (b) that as the assignment had not been registered, the lease was still in the name of the original tenant and notice could be served.

In any event, if the assignment had validity, the right to serve the notice, being a personal right, ceased to have effect.

37. The Tribunal chair had explained the Tribunal's provisional view to Mr. Sandham. He was not convinced that it was correct but as his submissions would have the same effect as the Tribunal's provisional thoughts, he would not take up the time of the Tribunal in making further submissions, particularly as he would have to distinguish the **Brown & Root Technology** case. Further, he had intended to argue *estoppel* because the Respondent had bought the leasehold interest and should not be protected from its terms simply by refusing to register the title. The Tribunal indicated that such argument would be accepted in any event.
38. The more common aspect of this case is a situation where a tenant and a landlord become embroiled in a dispute which is aggravated by a failure on both sides to comply with both the spirit and terms of the law and the lease. Just expecting tenants to pay £60 per month on account (and without proper demands) without any reconciliation accounts, cannot help a tenant understand what is being spent on his behalf. Equally, Mr. Hollington's refusal to pay anything except a contribution to the insurance costs in 2014 means that all the other tenants have to pay the defaulting party's share.
39. The Tribunal had sympathy with both sides. Mr. Orr clearly can't do much without the funds from the tenants. However, he needs to understand the law. For example, if this had been an application to assess the reasonableness and payability of the actual service charges, he would have been in trouble with regard to the decoration work in 2015. One of the invoices was for £2,790 i.e. 348.75 for this flat. There had been no consultation which would have meant that the tenant's contribution would have been limited to £250 without any dispensation from consultation by the Tribunal. He also did not seem to understand the landlord's obligation to decorate the external parts of the window frames and surrounds.
40. Mr. Hollington complained about the standard of workmanship and various other matters. However, the point is that this is a claim for the Tribunal to assess whether the service charges demanded are reasonable payments on account. The claim does not relate to the actual invoices for service charges nor whether he has any counterclaim or set off. Those are matters for another Tribunal, if necessary. £720 per annum is far less than most tenants of flats have to pay and the Tribunal finds that the amounts demanded are reasonable amounts for payments on account and, now that proper demands have been sent, they are payable. Yes they should have been demanded half yearly, but the Tribunal does not see this as being an obstacle to paying for these past years.
41. As to the administration fee, it is considered that paragraph 16 of the Third Schedule is applicable and there is an invoice in the bundle from Drysdales, solicitors, for £200. As the correspondence has been seen by the Tribunal, this appears to be reasonable.

Conclusions

42. The Tribunal, having taken all the evidence and submissions into account, concludes that both the service charges and the administration charges are reasonable and payable.

.....
Bruce Edgington
Regional Judge
15th May 2017

ANNEX - RIGHTS OF APPEAL

- i. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.
- ii. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
- iii. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
- iv. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.