



11996
First-tier Tribunal
Property Chamber
(Residential Property)

Case reference : CAM/00KF/LSC/201/0086

Property : Flat 14, Estuary Lodge,
Eastern Esplanade,
Southend-on-Sea,
Essex SS1 3AE

**Applicant
Represented by** : Estuary Lodge Southend RTM Co. Ltd
Frank Rush (lay representative)

Respondent : James Pearson

**Date of Transfer from
Southend County Court** : 8th November 2016

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

The Tribunal : Bruce Edgington (Lawyer Chair)
Evelyn Flint DMS FRICS IRRV
John Francis QPM

**Date and place of
Hearing** : 7th March 2017 at Southend
County Court, Tylers House, Tylers
Avenue, Southend-on-Sea SS1 2AW

DECISION

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1. The Tribunal determines that of the claim of £4,300.59, the following decisions are made:-

<u>Item</u>	<u>Date</u>	<u>Claim (£)</u>	<u>Decision</u>
Balance arrears	02.01.13	1,019.06	nil owing
Repairs and maintenance	24.06.13	317.43	not yet payable
Repairs and maintenance	24.06.14	761.27	not yet payable
RTM administration ch.	11.12.14	50.00	payable
Repairs and maintenance	24.06.15	952.05	not yet payable
Repairs and maintenance	27.10.15	228.22	not yet payable
Administration ch.	27.10.15	205.08	not payable
Administration ch.	24.12.15	803.32	£641.13 allowed
Repairs and maintenance	24.12.15	353.56	not yet payable
Repairs and maintenance	31.03.16	<u>305.60</u>	not yet payable
		4,995.59	

Less payments and credit 745.00
4,250.59

2. Taking into account a £50 arithmetical error in the claim itself, this means that as soon as the necessary statutory demands are served, the sum of £3,609.26 will become payable. The Tribunal does not consider that either the court fees or further costs are payable arising out of these proceedings.
3. The claim is transferred back to the Southend County Court under claim no. C1QZ7X56 for possible enforcement.

Reasons

Introduction

4. Court proceedings were issued by the Applicant for the sum stated above plus interest and court fee in or about August 2016. This appears to be the 2nd court action brought by this right to manage company against this respondent which has been considered by this Tribunal. The decision relating to those earlier proceedings is dated 11th December 2014 under Tribunal reference CAM/00KF/LSC/2014/0095 (“the earlier decision”).
5. That earlier decision set out the law, some relevant provisions of the lease and a description of the property following an inspection. These matters will not be repeated here as the parties are clearly aware of them. In other words the earlier decision should be read with this one.
6. The defence filed at the county on this occasion says:-

“Estuary Lodge RTM have already taken action over this matter with the court concluding that the demanded funds were already settled by previous payments. A further hearing before Judge Ashworth ruled that the case be dismissed and the defendant not be entitled to costs. Despite this, costs continue to be claimed. Based on the accounts received from the claimant nothing is payable for various reasons and claims for costs are now causing considerable distress

Members of the RTM are causing considerable harm to the tenant of the property in an attempt to loss to me personally. I have attempted to meet with Mr. Rush of the RTM but it seems he is under instruction to pursue all costs and negotiate nothing. The previous action took many months to resolve and hundreds of hours of time on my part. This matter should be dismissed as an abuse of process or referred back to the LVT for direction as it involves complex leasehold matters”

7. The bundle filed for this hearing contains many documents which were not ordered to be lodged, which is unfortunate. The reason why, for example, the Tribunal directed that only the county court pleadings should be included i.e. the claim form and the defence, was to save a great deal of copying and to avoid the Tribunal having to go through many letters and forms which have no bearing on this decision at all.

If the Applicant was unsure what 'pleadings' are, it should have taken advice. The other unfortunate part of the bundle is that the earlier decision has been included but only every other page.

The Lease

8. The bundle produced for the hearing included a copy of the lease which is dated for the 11th February 1969 and is for a term of 199 years from 29th September 1967 with a ground rent of £25 per annum payable half yearly in arrears.
9. Of relevance to this case, the Applicant has said that it relies upon the Sixth Schedule, clauses 6 and 7. This is supplemental to clause 4(10) in the lease where the tenant covenants to pay the landlord a 'proportionate share' of the costs incurred and set out in the Sixth Schedule. The relevant clauses are as follows:-

"6. The cost of the employment and remuneration of any agent or agents whether a company or individual or individuals to manage and supervise the Estate

7. The cost to the Landlord of enforcement of any or all of the covenants herein contained other than for the payment of the rent hereby reserved in so far as the same relate to the Estate or parts thereof and not solely to the demised premises"

10. The Applicant is also claiming a management charge from the Respondent of 10% of outstanding service charges pursuant to clause 4(10) of the lease which says that a management charge can be raised which shall be determined by a surveyor or an arbitrator appointed by the RICS being "*an additional sum of not less than ten per centum of the service charge.*"
11. Section 100 of the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act") enables a right to manage company to take over responsibility for enforcing a tenant's covenant subject to reporting any breach to the landlord. The right to manage company cannot enforce by way of forfeiture because the right to manage only relates to "*services, repairs, maintenance, improvements, insurance and management*", not collection of rent (section 96(5)).
12. Section 21B of the **Landlord and Tenant Act 1985** ("the 1985 Act") states that a demand for payment of service charges "*must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges*". Schedule 11, Part 1, clause 4(1) of the 2002 Act says the same thing with regard to administration charges i.e. the amounts claimed by the Applicant for expenses in the sum of £803.32. No service or administration charges are payable until the appropriate demands are sent.
13. Section 20B of the 1985 Act says that service charges must be demanded within 18 months of expenditure. However, "*if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred*" that 18 month rule will not apply.

The Inspection

14. As the conflict between the parties relates to the payability of service charges and administration charges rather than the reasonableness of service charges, the Tribunal did not feel the need to carry out a pre-hearing inspection of the property. In any event, 2 members of the Tribunal had inspected the property for the earlier decision.

The Hearing

15. The hearing was attended by Mr. Frank Rush from the Applicant company and the Respondent. The Tribunal was deeply saddened to see that the relationship between the parties had not changed, despite the advice given by the then Tribunal when giving the earlier decision.
16. The Tribunal chair took Mr. Pearson and Mr. Rush through the papers and it became clear that goodwill was non-existent. At the end, the position of the parties was that Mr. Pearson accepted that he either had or may have received summaries of expenses within the 18 month period referred to in section 20B. He denied payability because he had received no proper demands. Mr. Rush could not explain why the Applicant was claiming service charges for the period before 2014 when the earlier decision had disallowed them.
17. As to the 10% service charge, Mr. Rush confirmed that only Mr. Pearson was being charged this. He had to receive separate accounts because he did not pay the monies on account of service charges in accordance with the earlier decision. The chair pointed out the additional point made in the earlier decision that it is wise to pay service charges on account and to have a sinking fund and Mr. Pearson could agree to this on a voluntary basis. Mr. Pearson replied that as soon as the matters in this proceedings had been resolved, he was perfectly happy to have the same accounts as the other tenants and pay into a sinking fund and pay service charges on account.
18. On the question of the costs and expenses arising from the earlier decision and subsequent court cases, the Tribunal chair explained in some detail to Mr. Pearson that costs awarded in court proceedings were one thing. A quite separate means of recovering the costs of proceedings was to claim direct from the tenant if there was a term in the lease that this could be done – as there is in this lease. These are called administration charges and, subject to this Tribunal being able to decide whether they are reasonable, they are claimable as a matter of contract between the parties.
19. The much criticised case of **Freeholders of 69 Marina, St. Leonards-on-Sea v Oram & Ghoorun** [2011] EWCA Civ 1258 established that even though legal costs incurred in proceedings before this Tribunal are not recoverable within the proceedings, they can be recovered as administration charges provided the lease allows it. Despite the criticism, that case is still good law and is binding. It shows in very clear terms that whatever the court or even a statute might say about recovery of costs within and as part of proceedings, the contractual obligation will prevail.

Discussion

20. The earlier decision pointed out to the parties that the lease is in need of improvement and/or the parties need to co-operate more, but they have clearly not taken the advice given. The litigation has continued.
21. Of the amount claimed, the sums due up to 13th February 2014 were determined by the Tribunal in the earlier decision and it was found that the Respondent was in credit. No service charges for that period will be allowed which means that as at 28th January 2013, the Tribunal will start off with a nil balance.
22. As there is no serious opposition to the reasonableness of the service charges in the sums of £317.43, £761.27, £952.05, £228.22, £353.56 and £305.60, they are deemed to be reasonable and will be payable as soon as the necessary statutory demand(s) have been served.
23. As far as the management charges are concerned, these are not allowed. The lease clearly envisages that all tenants will be charged this amount and such amount has to be determined by the landlord's surveyor or by arbitration. Clause 4(10) in the lease may refer to a minimum sum but it does not remove the requirement to have the charge determined as stated.
24. In respect of costs incurred, it became clear during the hearing that the sum of £641.13 was incurred in the earlier decision and the court hearing thereafter. It is considered that those proceedings were reasonably brought. There were several issues to be determined and some, such as the matter of the road widening being a service charge rather than an improvement went against Mr. Pearson. The subsequent application to set that aside was not reasonably brought and no expenses will be allowed for that.
25. In case the Applicant is considering yet a further claim for the costs arising out of this application and the court proceedings, the Tribunal has felt it appropriate to comment on those. It is anxious that litigation does not continue. Bearing in mind that service charges already determined by this Tribunal as not being payable have been included; and bearing in mind that none of the service charges or administration charges claimed are actually payable, it is considered that no costs incurred in this hearing and the court case from which it stems, are reasonably incurred. Proper advice should have been taken before proceedings were started which could have prevented them.

Conclusions

26. The Tribunal determines that as soon as the necessary statutory demands have been served, the sum of £3,609.26 will become payable. It is understood that the other tenants, through the RTM company, will be slightly out of pocket. The Tribunal has learned, over the years, that the main reason it becomes involved in this sort of dispute, is a simple matter of one party failing to communicate properly with others. That is what has happened in this case. As it turned out, the facts were almost all agreed at the hearing. The reason for the litigation was that

neither party had taken proper advice before becoming embroiled in further litigation.

27. The Tribunal hopes that this decision will draw a line under the outstanding disputes so that in the future, Mr. Pearson will be treated like any other tenant and will pay, on a voluntary basis, for a sinking fund and for service charges on account. It is always open to any tenant to waive the right to have formal demands for payment. Their purpose is to ensure that tenants know about their rights and responsibilities. Mr. Pearson clearly does now know about those things.

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Bruce Edgington
Regional Judge
8th March 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.