



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case references : **LON/00BK/LSC/2019/0124
E79YJ540**

Property : **Basement Flat 42 Kensington
Gardens Square London, W2 4QB**

Applicant : **42 Kensington Gardens
Square Limited**

Representative : **Mr Hayden-Cook (Counsel)
instructed by Volks Hedleys
Solicitors**

Respondent : **Mr David Lawrence Seliga**

Representative : **Mr Raymond Warren**

Type of application : **Transfer from the County Court;
For the determination of the
reasonableness of and the liability
to pay a service charge**

Tribunal members : **Judge S Carrott
Mr Hugh Geddes
Mr A Ring**

Venue : **10 Alfred Place, London WC1E 7LR**

Date of decision : **17 April 2020**

DECISION

This decision will be formally made on and will take effect from **18 May 2020** (“the Hand Down Date”). There is no need for any party to attend at the tribunal offices on that day.

1. **The application**

Following a transfer from the Wandsworth County Court, the Applicant seeks a determination under section 27A of the Landlord and Tenant Act 1985 as to whether service charges are payable and under Schedule 11 to the Commonhold and Leasehold Reform Act 2002 as to whether administration charges are reasonable.

2. The order for transfer dated 20 February 2019 was made under the flexible deployment of Judges pilot scheme. This means that upon the transfer of the case to the Tribunal offices, the Tribunal administered the whole of the case.

3. **The background**

The Applicant landlord is 42 Kensington Gardens Square Ltd, a company owned by the lessees of 42 Kensington Gardens including the Respondent. The Respondent is Mr David Lawrence Seliga. He owns the basement flat jointly with Ms Karyn Anne Giles.

4. The claim in the County Court was for £28,655.23 which was stated to be in respect of ground rent and services charges plus interest and costs. Default Judgment was entered on 26 June 2018 in the sum of £30,536.99. The default judgment was subsequently set aside on the application of Mr Seliga on 20 February 2019. The judgment was not set aside in respect of Ms Giles hence, Mr Seliga is the effective Respondent in these proceedings.

5. In support of the application to set aside default judgment, Mr Seliga filed a Defence. The Defence was in very general terms. It set out the following issues to be determined –

- (1) Whether the calculation of the annual service charge wrongly includes a sum for the provision of sinking fund;
- (2) Whether interest has correctly been applied to the service charge account;
- (3) Whether managing agents fees are disproportionately high;
- (4) Whether the service charges in respect gardening are recoverable under the terms of the lease; and
- (5) Whether an adjustment should be made to the service charge account to reflect sums which ought to have been held on account or repaid with interest accruing.

6. A further ground was added in the Respondents Statement in Reply to the claim namely whether or not secretarial fees were recoverable. The Statement of Reply was served late.

7. The service charge dispute in this case has been caused in part by the fact that Mr Seliga works and resides abroad and has been absent from the property for very long periods. As will be seen below, he does not have a letter box to his basement flat and letters to him are therefore delivered to the ground floor of the building. Mr Seliga apparently no longer has a key to the communal ground floor entrance hall and so for substantial periods, he has no knowledge of and does not

pay his service charges. It has therefore been necessary for the Applicant landlord to instruct either managing agents or solicitors in order to chase up recover the service charges and the problem of non-payment goes back for more than a decade. Apart from the default judgment which was made in the present proceedings, there was a previous default judgment entered against Mr Seliga in 2010. The landlord recovered £24,652.56.

8. Moreover from the chronology of events it appears that service charges and ground rent have only been paid following the threat of proceedings or as a result of a judgment debt. This has inevitably resulted in Mr Warren attempting to unravel the legality of payments made in the past and made very many years ago. That very same problem of non-receipt of documents was the reason why default judgment was entered against Mr Seliga in the present proceedings. It has also resulted in an application to debar Mr Seliga from defending the present claim.

9. **Deployment of Judge**

At the hearing of this matter, when dealing with the questions of the reasonableness and payability of Service Charges and Administration Charges, the tribunal sat as a First-tier Tribunal. When dealing with the issues of; Ground Rent, Interest and Costs, Judge Carrott sat as a Judge of the County Court (at District Judge level) and made these decisions and related orders alone without involving the other members.

10. **Application to debar the Respondent from Defending**

At the commencement of the hearing the Tribunal dealt with an application to debar the Respondents. Directions had been issued by the Tribunal on 16 April 2019 but the Respondent did not comply. On 1 July 2019 the Tribunal wrote to the Respondents seeking an explanation for non-compliance. No reply was received from the Respondent and on 24 July 2019 the Tribunal sent notice to the Respondent stating that it was minded to debar the Respondent from defending the application. A letter was also received from the Solicitors acting for the Applicant requesting the Respondent be debarred from defending.

11. The Tribunal was told at the hearing that Mr Seliga did not receive the correspondence from the Tribunal because he has no letter box in his basement flat and all mail is delivered to the ground floor of the building. We were told that Applicant via its managing agent had refused to give Mr Seliga a key to the ground floor until such time as he had paid his service charges. Evidence was heard as to the large amount of mail which was found for Mr Seliga once access was gained to the ground floor. The Applicant through its managing agent was aware of the problem of access to the communal ground floor entrance hall and therefore ought to have been aware that Mr Seliga would not have received correspondence from the Tribunal. Nevertheless we accept that Mr Seliga should bear some responsibility for this state of affairs and indeed knowing that the matter had been transferred to the Tribunal, and knowing that he had a problem of access, he ought to have made arrangements with the Tribunal to ensure that he could have received his correspondence via an alternative method or at the very least ought to have notified the Tribunal of this problem.

12. We considered that there was no prejudice to the Applicant because all save for one issue in this application had previously been brought to the attention of the

Applicant in the Defence albeit in a general fashion and as for the single new issue – the gardening fees – the manner in which the Respondent raised the issue did not entail the calling of any evidence but was a discrete and simple point of law, namely whether or not under the service charge provisions, the Respondent was liable to pay this contribution. It did not require the Applicant to call any further evidence. Mindful of the fact that a debarring order, like striking out is an option which should only be exercised in the last resort where case management powers cannot deal with any imbalance to the parties caused by non-compliance or late compliance, we considered that in all of the circumstances it would not be just to debar the Respondent from defending the proceedings. As stated above the managing agent had refused to give Mr Seliga a key so that he could access his mail until the service charges were paid and therefore ought to have known that Mr Seliga did not have access to the correspondence from the Tribunal. Further, the additional point raised by the Respondent could conveniently be dealt with during the hearing by way of submissions.

13. Whether the service charge wrongly includes payments in respect of the reserve fund

Mr Warren made extensive submissions as to whether or not the lease terms made provision for the landlord to collect charges in respect of a reserve or sinking fund. He took the Tribunal through clauses 2(a) and (f)(i),(ii), (iii) and (iv). He submitted that the effect of these clauses was that the Applicant should at the beginning of each year calculate what the required amount is likely to be for the Applicant to fulfil its obligations under the lease. He submitted that this required the Applicant to reflect a best guess of what was actually required to be paid in the demand period and not for future requirements. He submitted that there was no need and indeed no provision in the lease for the creation of a reserve fund to enable the Applicant perform its covenants under the terms of the lease.

14. Construing the lease as a whole and in particular in relation to the clauses outlined by Mr Warren, we agree with his submission that the lease made no provision for a reserve or sinking fund so that the advance service charges claimed on this account were wrongly charged to the Respondent.

15. The accounts nevertheless show payments in respect of the reserve fund and the amount in issue is £3984.94.

16. Mr Hayden-Cook for the Applicant conceded that the lease made no provisions for a reserve fund but argued that in any event that the sums charged had in fact been spent.

17. However the issue raised by Mr Warren under this head was one of payability in the context of a claim for advance service charges. Mr Warren was correct to submit as he did that this amount was not payable under section 27. We agree therefore that the sum of £3984.94 is not payable under section 27.

18. Whether legal fees have been wrongly applied to the service charge

At page 82 of the bundle the Respondent's statement of account shows that two administration charges were applied to the account – £900 in respect of the CPM Admin fee - Litigation Costs and £1600 in respect of legal charges. The

person writing from CPM was in fact a solicitor as the letter showed at page 48 of the bundle. In all there were some 21 letters sent, 11 received and 3 telephone calls.

19. Mr Warren argued that no legal costs were recoverable under the lease as service charge. No proceedings were ever instituted for forfeiture and he argued that these sums would in any event not be recoverable under the service charge provisions.
20. However it is clear from a detailed consideration of the correspondence that the above sums are in fact costs arising from non-payment of sums due to the Applicant landlord. The above costs are therefore recoverable as administration charges whether described as legal fees or not. There can be no doubt that on the evidence the Respondent has gone for extended periods without making any payment in relation to the service charges whatsoever. Despite Mr Warren's able argument, it is difficult to see how these costs could be described as being other than costs arising out of the Respondents non-payment of service charges. The costs claimed are themselves reasonable and no alternative figures or breakdown of the figures having been put to the Tribunal by the Respondent to show that the sums are unreasonable, we determine that the sums are recoverable.
21. **Managing agents' fees**
Mr Warren submitted that the managing agents fees were unreasonable. He quite rightly pointed out that the lease recognised that the Applicant lessor's obligations as regards the five flats above the Respondents' flat were greater than the obligations as regards the basement flat and that for that reason the lease excluded the Respondent from any obligation in respect of the common area.
22. He further submitted that between the years 2011 to 2018 the management fees were £25,446 and if one takes 75% of this and divides it by the number of years and the number of flats then the fair proportion of the management fees should have been on average £397.00. Therefore, according to Mr Warren, the Respondent should have been charged as a fair proportion £2376 but had in fact been charged £4241. He submitted that to pay more than this would mean that the Respondent would be paying management fees for a part of the building he neither used or would have any obligation to use.
23. We do not agree. First, as the Applicant correctly pointed out, no issue was being taken by the Respondent as to the quality of the services provided by either CPM the former managing agents and the current managing agents Hillgate. Secondly, it is only very many years after the fact that Mr Seliga has attempted to raise the issue of the cost of management fees as a result of the County Court proceedings. Mr Seliga had for the most part and for very many years remained oblivious to the charges because of his absenteeism and lack of communication with the Applicant landlord. He did state in his written evidence that he had written complaining about the managing agents fees, but no copies of correspondence were provided to us.
24. More importantly no evidence was adduced by the Respondent to compare the reasonableness of the managing agents charges with the charges of other managing agents. Mr Seliga in effect was simply saying that he was paying too

much. The lease does not draw any distinction between the basement flat and the upper flats when it comes to the managing agents fees. We therefore hold that the costs claimed by the Applicant are reasonable. It may come as a shock to the Respondent that after more than 8 or so years of non payment he has to pay £4241 in relation to managing agents fees, but absent an argument as to the quality of the service provided, a general challenge to the reasonableness of the service charges in comparison to the rates of other managing agents or an argument as to the proper construction of the lease terms, the Respondents argument must fail.

25. **Surveyors fees**

Mr Warren submitted that bearing in mind that the managing agents were being paid £3000 a year there was no need to engage a surveyor. We were referred by the Applicant to a passage at paragraph 5-10 of *Tanfield* by Mr Hayden-Cook which in our view correctly states the law. Managing agents are entitled to engage the services of a surveyor for major or appropriate works and nothing in either the evidence or indeed the submissions of Mr Warren suggested that the engagement of a surveyor was unnecessary in the present case.

26. Mr Warren referred us to the decision in *Powell and Co (Property) Brighton Ltd v Mr D Patel and anor (2016) UKUT 656* which states that the First Tier Tribunal could reject the claim for payment of surveyors fees if insufficient evidence was produced by the lessor to justify such fees. He submitted that there was no evidence about what the fee was for even though the managing agent had been given an opportunity to produce the relevant invoice.

27. We accept that there has been a change of managing agents and that the current managing agent is unable to produce the documentation. We also note the delay on the part of Mr Seliga in challenging this item and the lack of any evidence on the part of Mr Seliga to suggest that there was something untoward in the service charge demand under this head. Mr Seliga has stayed away from the property for many years. There is an evidential burden when challenging service charges for the lessee to at least raise good reason why a particular charge is not recoverable. Bearing in mind that the costs under this head were not on their face unreasonable and the years of delay in challenging these costs we reject Mr Seliga's argument. Given the responsible approach by this tenant led landlord, we do not accept that it would have readily engaged the services of a surveyor had it not proved reasonably necessary.

28. **Secretarial fees**

Mr Warren submitted that the fees in respect of the Company Secretary did not fall under the terms of the lease. We agree. There was nothing in the lease terms which enabled the landlord to charge by way of service charge for the administrative costs of the company. Such costs were unrelated to the provision of services or obligations under the terms of the lease and although a landlord can engage professionals nothing in the lease allowed for the landlord to charge the tenants for the cost of the company secretary.

29. **Gardening fees**

In his initial written submissions Mr Warren challenged the garden fees on the basis that it was unclear to Mr Seliga what these charges were for because it

appeared that it was costs for a communal garden to which Mr Seliga did not have access. However following the evidence of the managing agent Mr Belgrave, Mr Warren then submitted that the costs did not fall under the terms of the lease.

30. At the hearing Mr Belgrave explained that this charge is levied against the lessor by the 'Association' which maintains the park in the square.

31. The square is not mentioned in the lease. Mr Hayden-Cook submitted that the costs were part of the estate costs recoverable under the terms of the lease. Mr Warren submitted that the square is neither part of the demise and neither is it part of the estate of the lessor and therefore not recoverable. We agree with Mr Warren that this cost is not covered under the terms of Mr Seliga's lease and is therefore not recoverable.

32. **Interest**

At the conclusion of the hearing on 19 August we requested the parties to answer two discrete questions –

(1) On what basis was the £6,102.56 charged and added to the service charge account on 2 November 2010.

(2) If such sum is found not to be payable should any credit balance have been held to his credit on his service charge account against further charges and was it held on trust.

33. The Applicant produced a letter written by Arnold Fooks Chadwick to a Ms Jodie Sedona dated 26 October 2010. The letter was headed claim for service charge arrears – Mr David Seliga". The letter confirmed that the solicitors had received the sum of £26, 569.06 from the Bank of Scotland following the entry of a default judgment against the Respondents. The letter referred to Birmingham Midshires, a division of the Bank of Scotland, as the Respondents' lender.

34. The amount credited to the service charge account on 2 November 2010 was the sum of £24,652.56. The solicitors costs of £1,916.50 were deducted from the judgment sum.

35. Mr Seliga did not challenge the evidence of the Applicant on this point nor did he adduce any evidence to the contrary. Accordingly we accept on the evidence available that the £6,102.56 was interest awarded by the County Court on the judgment debt and that the Applicant was therefore correct to add this amount to the Respondent's account . It follows therefore that we do not accept Mr Warren's submissions that this amount should now be credited to the service charge account.

36. **Reimbursement of fees**

It follows from the above that we consider that the Applicant has succeeded in its case save for the two areas that we set out above. In those circumstances we do not consider that it would be just to make an order for the reimbursement of Mr Seliga's fees. The lease makes no provision for the costs to be added to the service charges and so it therefore somewhat academic to consider the application under section 20C.

37. **County Court determination**

In the light of the evidence Mr Warren submits that the landlord has failed to prove its case. He starts his submissions by an analysis of the Claim itself. He submits that the Claim is defective because it does not state what the landlord's case is and in so doing he refers to paragraph 7 of the Particulars of Claim and a document annexed to the Particulars of Claim. He submits that the claim states that it is in respect of service charges and ground rent when in fact it is a claim for advance service charges, administration charges and ground rent and that since the claim has never been amended, it follows that the landlord has not proved its case.

38. He relied in particular on CPR 16(4)(1) setting out the requirements of concise statement of facts. He contended that the Particulars of Claim was defective because it did not list any service charge due to be paid in accordance with the obligations under the lease and did not make clear that the demand was for a half yearly service charge, administration fees, ground rent and legal charges. The Particulars of Claim did not provide any further details. Although it set out the amount claimed it did not differentiate between the administration charge, service charge or ground rent and there was no mention of advance service charges or administration charges.
39. Mr Warren submits that the Claimant since the filing of the Defence has had time to amend its claim and to bring evidence of the actual charges which would have then been recoverable under the concise terms of paragraph 7 of its claim but that it had not done so.
40. Paragraph 7 of the Particulars of Claim states – *Contrary to the covenants contained in the Lease referred to above the Defendant has failed to pay the service charges and ground rent lawfully due in the sum of £22,238.45 as set out in the service charge account, a copy of which is exhibited to these particulars.*
41. The attached schedule does in fact set out the half yearly service charge due, the ground rent due and also administration charges.
42. Mr Warren submitted that this was not enough and that taken as a whole the Particulars of Claim still did not set out the landlord's case. His case was that the service charges due and advance service charges payments are not the same and in those circumstances the Claimant has failed to prove its case because it has not provided the actual figures which would be required in order to determine the service charge due.
43. I disagree. When reading paragraph 7 of the Particulars of Claim together with the schedule attached it is clear that the claim is for the half yearly charge (the advance service charge) the ground rent and the administration charges. That is the basis upon which the parties have proceeded and indeed that is the basis upon which the Defence has been drafted and the Statement in Reply has been drafted. Whilst the Particulars of Claim could have been better drafted, it is not so poor as to fall foul of CPR 16.
44. Furthermore, even if there was any ambiguity in the Particulars of Claim, by the time the Case Management directions were issued by the Tribunal, all of the

issues were clearly set out for the Respondents. Indeed it was because the issues were made clear that the Respondent was able to move from the general in his defence of this claim to the specific case as set out in the Respondent's Statement of Case.

45. Mr Warren went on to submit that even if he was wrong about this, advance service charges are held in trust in accordance with section 42 of the Landlord and Tenant Act 1987. He submits that an action brought to recover advance service charges must fail since if the money were paid it would be held on trust for the Defendant and there would be no proprietary interest in the money held by the Claimant because of the operation of the trust. Mr Warren however concedes that once the costs are incurred the position changes but as such he submits there is no evidence to show that the costs were ever incurred.
46. To put Mr Warren's submissions in their factual context, in 2010 the Claimant had obtained a default judgment against Mr Seliga for non payment of service charges. The judgment debt was paid by Mr Seliga's mortgagees and the amount recovered excluding costs was £24,652.56. That is the sum which Mr Warren contends was held on trust until it was applied to the service charges and that is the sum which Mr Warren now seeks to set off against the current service charge arrears. I do not consider that Mr Seliga is entitled to go behind this default judgment or indeed that there is merit to the argument because on the facts a statement of account was placed in evidence showing how this sum was applied to the service charges.
47. Mr Warren also complained that the Claimant had failed in its disclosure obligations. I do not consider that that is correct. The Tribunal made directions for disclosure of the accounts and invoices relevant to its claim and that is what the Claimant provided. The Defence which was filed by the Claimant was both general and unspecific and indeed the Defendant's argument was not finally crystallised until the final submissions of the Respondent which were provided for the 5 September hearing. It is difficult to understand therefore how it is that the Claimant failed in its disclosure obligations. Indeed the adjourned hearing on 5 September was supposed to be a short hearing but because of the arguments and for the most part new detailed arguments raised by Mr Warren, the hearing was prolonged.
48. Whilst it is important that the matters raised by Mr Warren should have been dealt with, it is difficult to see how the Claimant could be criticised for lack of disclosure in circumstances where it was unaware of the detailed challenge to be raised. The obligation of standard disclosure does not extend beyond the issues which are actually raised in the pleadings.
49. This was a case where the Defendant last paid service charges in 2010. The service charges were paid on his behalf by his mortgagee. He paid nothing after that until the present proceedings. Mr Warren says the Defendant genuinely considered that after the payment was made by his mortgagees all payments were up to date. It is difficult to understand the basis for such belief when in fact it is clear that the 2010 proceedings would have been in respect of historical arrears whether in regard to actual or advance service charge payments.

50. Accordingly I am not persuaded that there should be any adjustment to the service charge account to reflect sums paid under the default judgment as long ago as 2010. Moreover at the hearing the Claimant did provide evidence in the form of a schedule to show just how the advance payments had been utilised with adjustments to the advance service charges paid. I note that Mr Warren does not comment on that document placed in evidence in his extensive written submissions.
51. Mr Warren did not suggest that the ground rent had been paid and so there was no challenge to the claim for ground rent.
52. As ordered by the Deputy District Judge, Mr Seliga did pay the sum of £14,000 on the setting aside the default judgment in the present case and therefore any judgment debt needs to reflect that. Ms Giles also takes the benefit of that payment but the costs order which is made below is made in respect of Mr Seliga only.
53. Having gone through the issues raised by the Mr Seliga, and deducting the costs of the gardening fees and the secretarial fees, the amount owed by Mr Seliga is now £13,455.76. The interest on that sum is £5098.50.
54. With regard to costs it is clear that the Claimant has succeeded in its claim. The two issues upon which Mr Seliga was successful have no real impact in my view in terms of the Claimant's costs. They were issues which did not take up much time to deal with.
55. The Claimant claims costs of £9301.11 up to 19 August and £2455 in respect of the hearing for 5 September 2019.³³ – both figures being exclusive of VAT. Mr Warren, whilst not having made any specific challenge to the costs schedule states that costs are disproportionate.
56. Although the claim was perhaps made more complex and was prolonged by Mr Warren's submissions, only two of which found were found in his favour, I nevertheless share some of Mr Warren's concerns about the preparation of the case and also the hours claimed in preparation of the case. All that was necessary for the Solicitors to do in this case was to set out what was being claimed under the various heads, to produce the supporting documentation and an explanation as to how the various sums were arrived at. If the case had been prepared with that it would have taken less time to prepare and indeed would have effectively answered the various questions raised on behalf of Mr Seliga by Mr Warren and saved hearing time. Accordingly a reasonable sum would be £8817 exclusive of VAT, a reduction of the costs claimed by some 25%.
57. There will be judgment for the Claimant accordingly.

Judge S Carrott

17 April 2020

ANNEX - RIGHTS OF APPEAL

Appealing against the tribunal's decisions

1. A written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application for permission to appeal must arrive at the Regional office within 28 days after the Hand Down Date.
3. 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.
4. The application for permission to appeal must state the grounds of appeal, and state the result the party making the application is seeking.

Appealing against the decisions made by the Judge in his/her capacity as a Judge of the County Court

5. Any such application must arrive at the tribunal offices in writing before the Hand Down date. The application for permission to appeal must state the grounds of appeal, and state the result the party making the application is seeking.
6. If an application is made for permission to appeal and that application is refused, or if no application for permission to appeal is made but, in either case, a party wants to pursue an appeal, that party must file an Appellant's Notice at the County Court office (not the tribunal office) within 28 days of the Hand Down date.

Appealing against the decisions of the tribunal and the decisions of the Judge in his/her capacity as a Judge of the County Court

7. In this case, both the above routes should be followed.

General Form of Judgment or Order

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| In the County Court at Wandsworth-sitting at 10 Alfred Place, WC1E |
| Claim Number: E79YJ540 |
| Date: 18 May 2020 |

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| 42 Kensington Gardens Square Limited | Claimant |
| David Lawrence Seliga and Karyn Anne Giles | Defendant |

BEFORE Tribunal Judge Sylvester Carrott (exercising the jurisdiction of a District Judge) at 10 Alfred Place London WC1E 7LR

UPON the claim having been transferred to the First-tier Tribunal for administration on 20 February 2019.

UPON hearing Mr Hayden-Cook (Counsel) for the Claimant and the Defendant appearing in person with assistance from Mr Raymond Warren

IT IS ORDERED THAT:

- 1 The First Defendant shall within 28 days pay to the Claimant the sum of £13,455.76 in respect of unpaid service charges, administration charges and unpaid ground rent.
- 2 The First Defendant shall within 28 days pay to the Claimant the sum of £5098.50 in respect of interest.
- 3 The Defendant shall within 28 days pay to the Claimant the sum of £1095.51 in respect of interest on unpaid service charges.
- 4 The Defendant shall within 28 days pay to the Claimant the sum of £8,8817 (exclusive of VAT) in respect in respect of costs.
- 5 The reasons for the making of this Order are set out in the combined decision of the Court and the First-tier Tribunal (Property Chamber) dated 17 April 2020 under case reference number LON/00BK/LSC/2019/0124

Dated: 18 May 2020