

11132



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

Case reference : LON/00AD/LSC/2015/0256

Property : 66 Glimpsing Green, Erith, Kent
DA18 4HD

Applicant : Estmanco (Glimpsing Green) Ltd

Representative : Ms Cassandra Zanelli, solicitor

Respondent : Mr S Jaiyesimi

Representative : None

Type of application : For the determination of the
reasonableness of and the liability
to pay service charges and
administration charges

Tribunal members : Judge T Cowen
Mr T Sennett

Venue of hearing : 10 Alfred Place, London WC1E 7LR

Date of hearing : 15 October 2015

DECISION

Decision of the tribunal

- (1) The Tribunal determines that the amount payable by the Respondent by way of service charge and administrative charges in respect of the sum claimed in the county court proceedings (claim no. A6QZ286E) is £3,948.96 and is not the sum of £5,026.20 claimed in the proceedings.
- (2) For the avoidance of doubt, this does not prevent the Applicant from claiming additional sums in respect of other categories of alleged debt in the county court. It only means that the amount we have determined is the only amount covered by our jurisdiction under the Landlord and Tenant Act 1985.
- (3) The reasons for the orders made above are set out in the remainder of this decision.

The application

1. The Property is a flat. There is a lease of the Property dated 29 May 1978 for a term of 135 years. The Respondent is the current registered proprietor of the term of the lease of the Property. The Applicant is the management company which is named in the lease and which is a party to the lease. The Applicant is also the direct landlord of the Respondent by reason of being the registered proprietor of the remainder of the term of a headlease. Under the terms of the lease, the service charges are payable by the Respondent to the Applicant.
2. The Applicant commenced proceedings against the Respondent in the County Court Business Centre at Dartford claiming the sum of £6,819.79 which comprised the following amounts:

Item	Amount (£)
Service charge and admin charge arrears	5,026.20
Interest	309.56
Contractual costs	1,484.00

3. The Respondent entered a Defence in the County Court proceedings which made the following four points:
 - a. The Applicant has not rendered accurate accounts and has not complied with its contractual obligation.
 - b. The service charges claimed are disproportionate to the work done

- c. Previous proceedings had been withdrawn
 - d. The Applicant has refused to commence an application in this Tribunal.
4. On 15 June 2015, the County Court ordered that the amount of service charges recoverable by the Applicant from the Respondent be referred to this Tribunal together with any other disputes in the county court claim which are within our jurisdiction.
 5. Neither party has made any separate application to this Tribunal. Our task in this decision is therefore only to consider those service charges and administrative charges which comprise the £5,026.20 which is claimed in those proceedings.

Jurisdiction

6. The jurisdiction upon a transfer from the County Court is dictated by section 176A of the Commonhold and Leasehold Reform Act 2002 (which was inserted by The Transfer of Tribunal Functions Order 2013 [2013/1036] and came into force on 1 July 2013) which reads as follows:
 - (1) Where, in any proceedings before a court, there falls for determination a question which the First-tier Tribunal or the Upper Tribunal would have jurisdiction to determine under an enactment specified in subsection (2) on an appeal or application to the tribunal, the court—
 - (a) may by order transfer to the First-tier Tribunal so much of the proceedings as relate to the determination of that question;
 - (b) may then dispose of all or any remaining proceedings pending the determination of that question by the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal, as it thinks fit.
 - (2) The enactments specified for the purposes of subsection (1) are—
 - ...
 - (c) the Landlord and Tenant Act 1985,
 - ...
 - (3) Where the First-tier Tribunal or the Upper Tribunal has determined the question, the court may give effect to the determination in an order of the court.

7. The other relevant statutory provisions are set out in full in the appendix to this decision. In this case, sections 19, 20 and 27A(1) of the 1985 Act are particularly relevant.

The Service Charge Covenants

8. By Clause 3(1) of the said lease, the Respondent covenanted to “pay to the Lessor ... an annual service charge ... of an amount determined in accordance with the provisions of and at the times and in the manner specified in Clause 4 hereof”. Clause 4 refers to the Sixth Schedule to the lease which provides the necessary details. None of the issues before us turn on the wording of those provisions.

Further documents supplied

9. The Applicant’s solicitors have, since the hearing, supplied us with copies of various documents by which, they say, sums were demanded from the Respondent, namely:
 - Letter dated 21 September 2011 demanding payment of service charge arrears and enclosing a statement of account.
 - Letter dated 1 December 2011 demanding on-account service charges for the year ending 24 December 2012
 - Email dated 16 July 2014 attaching photograph, requiring the Respondent to repair a leak and warning him that he will have to settle the invoice of the plumber sent by the Applicant.
 - Email dated 5 August 2014 attaching plumber’s report and demanding £180
 - Another copy of the letter dated 21 August 2014 referred to below together with a summary of tenant’s rights and obligations.
10. No point has been taken by the Respondent as to the validity of service charge or other demands, so we make no determination as to that. Our determination as to payability relates only to the reasonableness of the sums claimed and disputed as follows.

The Disputed Items

11. The Defence filed by the Respondent in the county court was in very general terms – allegations that the accounts were not accurate and that the service charges were “grossly disproportionate”. By order of this Tribunal dated 14 July 2015, the Respondent was required to specify the items he disputed in a Scott Schedule. The Respondent did so and as a result, it became clear that he was challenging only the following two items:

- a. Solicitors' Fees in the sum of £2,157.04 which were charged to him in the service charge year ending 24.12.11.
 - b. A plumbing invoice and admin fee in the sum of £240 which was charged to him in the service charge year ending 24.12.14.
12. We will now deal with each of the items in turn.

Solicitor's Fees

13. It is common ground between the parties that these costs were incurred by the Applicant in previous county court proceedings which were commenced in late 2010 or early 2011. The costs were charged directly to the Respondent under clause 2(9) of the lease. It is also common ground between the parties that the county court proceedings in question were discontinued by the Applicant on 25 May 2011.
14. The Respondent's challenge is that the costs were incurred by the Applicant when pursuing proceedings which were commenced on an erroneous basis – namely that the Respondent did not owe the amount claimed. In that case, the Respondent's submission was that the costs were not reasonable incurred and should not therefore be payable.
15. The Applicant defended the challenge in two ways. Firstly, Miss Zanelli asserted that the solicitor's fees in question were not the subject of the present county court claim and that they had not therefore been referred to this Tribunal at all. They were, she said, outside our jurisdiction. In support of that submission, she produced a running statement of account of the sums owed by the Respondent since 24 December 2007. She showed us that the entry for June 2014 demonstrated an outstanding balance of £5,026.20 (as claimed in the present proceedings). She submitted that the Applicant had applied all payments received from the Respondent to the oldest outstanding charges (using the usual presumption). She then showed in the statement of account that this would exclude the solicitors' costs of £2,157.04 from the £5,026.20 claimed in the present proceedings, because the latter figure only included debts dating back to mid-way through the service charge year ending 24 December 2012. The solicitor's fees in question were incurred in the year ending 24 December 2011
16. All of those submissions are correct, if the usual pattern of allocating payments to the oldest debts is followed. However, if the receiving party (here the Applicant) has expressly allocated the payments differently, then the outcome may be different. In this case, the Applicant referred us to a letter dated 21 August 2014 sent to him by the Applicant's managing agents 8 days before the letter before action which claimed the sum of £5,026.20. The managing agents' letter

included a table of service charges payable and amounts paid since the year 2009, which showed a total of £2,338.05 outstanding. The letter also included the following sentence:

"The table does not take into account outstanding legal and debt/collection fees".

17. Neither the letter before action nor the county court pleadings provide a breakdown of how the £5,026.20 is made up. The above content of the letter of 21 August 2014 clearly implies that in order to get from the figure of £2,338.05 demanded there to the figure of £5,026.20 claimed in these proceedings, one needs to add "outstanding legal and debt/collection fees". Miss Zanelli confirmed that the difference between the two figures¹ included the solicitors' fees of £2,157.04.
18. In our judgment, this provides clear evidence that the sum of £2,157.04 was still outstanding at the date of the commencement of these proceedings and forms part of the £5,026.20 claimed. For whatever reason, the Applicant (through its managing agents) chose not to allocate any previous payments to "outstanding legal and debt/collection fees" and communicated that election to the Respondent by letter dated 21 August 2014.
19. We have therefore reached the conclusion that the solicitors' fees challenged by the Respondent are part of the claim which has been referred to us by the county court.
20. The Applicant's second response to the Respondent's challenge to the solicitors' costs relates to the Respondent's allegation that the proceedings were discontinued because they were erroneously commenced. The Applicant says that that is not true, in the Reply to the Defence in the county court, the Applicant said, "Those proceedings were settled by agreement between the parties". Miss Zanelli was, however, unable to tell us what were the terms of that agreement. Instead we were shown documents which demonstrated that the 2010-2011 county court proceedings were unilaterally discontinued by the Applicant.
21. After taking further instructions, Miss Zanelli told us that those proceedings had been commenced in December 2010 when the outstanding service charges were £670.88, which was the sum then claimed. By May 2011, that debt had been paid off by the Respondent. The Applicant took a view that it was not worth proceeding with the claim only in order to seek a costs order and therefore discontinued. There was, therefore, no admission by the Applicant at any stage that the proceedings had been wrongfully commenced.

¹ after correcting an arithmetical error which resulted from a typo

22. This explanation, however, did not easily co-exist with the statement in the Reply to the Defence that the proceedings were settled by agreement.

23. With the consent of the Applicant, the Tribunal was then shown copies of a without prejudice letter dated 23 May 2011 from the Applicant's then solicitors – two days before the discontinuance. The letter informed the Respondent that the solicitors' costs were £2,696.30, but that:

"As a gesture of good [will] and in a final bid to settle this matter our client will be willing to accept £1000 plus VAT in full and final settlement of this claim".

24. Miss Zanelli submitted that this without prejudice offer was never accepted and did not therefore crystallise into an agreement. The Respondent, however, gave evidence that the then solicitors for the Applicant had telephoned him and asked him whether he would accept this offer and that he did so over the telephone. He was confused as to whether this took place before or after the discontinuance and for that reason, Miss Zanelli urged us not to attach any weight to his evidence.

25. We reached the conclusion, however, that the Respondent demonstrated a clear and honest memory of a conversation in which the solicitor made an offer which he accepted. It is understandable that a non-lawyer such as the Respondent would not be able to remember the exact order of events after nearly 4 1/2 years, but we do not think he would have invented a whole phone conversation. It is, of course, impossible that the solicitor would have telephoned him to make an offer **after** the discontinuance, because at that stage there would have been nothing left to settle. We therefore find that the Applicant (through its then solicitor) and the Respondent agreed that the Respondent would pay the Applicant's costs of the 2010-2011 county court proceedings in the agreed sum of £1,000 plus VAT in full and final settlement of that claim. The Applicant then discontinued the claim in reliance upon that agreement. That accords with the statement of the Applicant in its Reply to the Defence that the proceedings were settled by agreement, which statement otherwise could not be explained by Miss Zanelli.

26. The Respondent gave further evidence that he did not immediately pay the sum of £1,000 plus VAT because he understood that it would be added to his service charge bill. We accept that evidence.

27. We have therefore reached the conclusion that only the sum of £1,200 (being £1,000 plus VAT) is payable by the Respondent by way of service charges in respect of solicitors' costs for the 2010-2011 county

court proceedings because the parties reached a binding agreement to that effect.

Plumbing Invoice and Admin Charge

28. The Respondent challenged this amount of £240 (£180 plumber and £60 admin charge) on the basis that (a) the plumber did no work and was only in the Property for about 5 minutes and (b) the amount is unreasonably high for such a service.
29. The invoice arose because there was a leak from a toilet in the Property in July 2014. The Applicant reported the leak by email dated 14 July 2014. The Respondent told us that his own plumber visited, but refused to repair the pipe because it was attached to the main pipe which belonged to the landlord. The Respondent then contacted the Applicant who arranged on 31 July 2014 for an operative from their contractor, Seasons Heating, to attend. Seasons Heating attended on 2 August 2014, inspected the leak and declared that a new toilet should be fitted. The work was done later by the Respondent's own contractor.
30. Seasons raised an invoice for £180 for 1 ½ hours work including 20 miles of travelling. The Applicant now seeks to charge that invoice to the Respondent directly under clause 2(8)(A) and (B) of the lease together with an administration charge of £60.
31. We have decided that there was work done by Seasons (namely the inspection and diagnosis of the problem) which could be recharged to the Respondent. We agree with the Respondent however that £180 is unreasonably high for a call-out charge of that nature and was therefore not reasonably incurred. We take into account that the Respondent had reported the leak on 14 July 2014, but that Seasons Heating did not attend until 2 August 2014. The Respondent suggested (based on his experience of other plumbers' call out charges) that £60 was more appropriate. Using our own experience and expertise, we have reached the conclusion that £120 (including VAT) would be a reasonable charge for the work done by Seasons, including travel time. We do not think that the Applicant was entitled to add an administration charge of £60 in circumstances where the Applicant (or its agents) would simply be exchanging a few emails and paying an invoice. We think that work should be subsumed within the general management cost of the building.
32. We therefore determine that only £120 of the £240 charged is payable.

Application for costs

33. There was no written application under section 20C of the 1985 Act. The Respondent, however, indicated at the hearing that he intended to

make such an application in relation to the Applicant's costs of the proceedings before this Tribunal. Upon the Applicant's assurance (through its solicitors) that they will not add the costs of these proceedings to the service charges or otherwise pass them on to the Respondent under the terms of the lease, the Respondent agreed not to make an application under section 20C.

Conclusion

34. We have calculated the amounts payable as a result of the decisions made above and the resulting figures appear in the record of our decision at the beginning of this decision.

Dated this 27th day of October 2015

JUDGE TIMOTHY COWEN

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

- (1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
 - (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
 - (b) the whole or part of which varies or may vary according to the relevant costs.
- (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.
- (3) For this purpose -
 - (a) "costs" includes overheads, and
 - (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

- (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
 - (a) only to the extent that they are reasonably incurred, and
 - (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;and the amount payable shall be limited accordingly.
- (2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

- (1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
 - (a) the person by whom it is payable,
 - (b) the person to whom it is payable,
 - (c) the amount which is payable,
 - (d) the date at or by which it is payable, and
 - (e) the manner in which it is payable.
- (2) Subsection (1) applies whether or not any payment has been made.

- (3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
 - (a) the person by whom it would be payable,
 - (b) the person to whom it would be payable,
 - (c) the amount which would be payable,
 - (d) the date at or by which it would be payable, and
 - (e) the manner in which it would be payable.
- (4) No application under subsection (1) or (3) may be made in respect of a matter which -
 - (a) has been agreed or admitted by the tenant,
 - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
 - (c) has been the subject of determination by a court, or
 - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20

- (1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
 - (a) complied with in relation to the works or agreement, or
 - (b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .
- (2) In this section “relevant contribution”, in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.
- (3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.
- (4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
 - (a) if relevant costs incurred under the agreement exceed an appropriate amount, or
 - (b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.
- (5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—

- (a) an amount prescribed by, or determined in accordance with, the regulations, and
 - (b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.
- (6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.
- (7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

- (1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.
- (2) Subsection (1) shall not apply 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 and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

- (1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.
- (2) The application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
 - (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
 - (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are

- taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
- (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
 - (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.
- (3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

- (1) In this Part of this Schedule “administration charge” means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
- (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
 - (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
 - (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
 - (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.
- (2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.
- (3) In this Part of this Schedule “variable administration charge” means an administration charge payable by a tenant which is neither—
- (a) specified in his lease, nor
 - (b) calculated in accordance with a formula specified in his lease.
- (4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

- (1) An application may be made to the appropriate tribunal for a determination whether an administration charge is payable and, if it is, as to—
 - (a) the person by whom it is payable,
 - (b) the person to whom it is payable,
 - (c) the amount which is payable,
 - (d) the date at or by which it is payable, and
 - (e) the manner in which it is payable.
- (2) Sub-paragraph (1) applies whether or not any payment has been made.
- (3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.
- (4) No application under sub-paragraph (1) may be made in respect of a matter which—
 - (a) has been agreed or admitted by the tenant,
 - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
 - (c) has been the subject of determination by a court, or
 - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.
- (6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
 - (a) in a particular manner, or
 - (b) on particular evidence,of any question which may be the subject matter of an application under sub-paragraph (1).