

12297



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

Case Reference : **CAM/22UG/LSC/2017/0047**

Property : **196b, Maldon Road, Colchester CO3
3AZ**

Applicant : **Regisport Limited**

Representative : **Ms Eleanor Wheeler Counsel**

Respondent : **Mr Anthony Joseph Manning**

Representative : **Mr A J Manning In Person**

Type of Application : **Court referral – determination of
sums payable**

Tribunal Member : **Judge John Hewitt
Mr Stephen Moll FRICS
Mr Owen Miller BSc**

**Date and venue of
Hearing** : **27 July 2017
Colchester Magistrates Court**

Date of Decision : **31 July 2017**

DECISION

Decision of the tribunal

1. The tribunal determines and reports to the court in respect of Claim No. C7CW8G9Y, that of the sums claimed by the applicant/claimant:

1.1 The claims for ground rent of £100, statutory interest, court fee and solicitor's costs are all referred back to the court because this tribunal does not have jurisdiction to determine them; and

1.2 None of the other sums claimed are payable by the respondent/defendant to the applicant/claimant.

For ease of reference attached as Appendix 1 is a breakdown of the £2,064.05 claimed in the proceedings annotated with our determination in respect of each item.

2. The reasons for our decision are set out below.

NB Later reference in this Decision to a number in square brackets ([]) is a reference to the page number of the hearing file provided to us for use at the hearing.

Procedural background

3. The subject Property is one of a pair of flats in a building originally constructed as a house but subsequently adapted to create two self-contained flats. The respondent is the freeholder. Both flats have been sold off on long leases and evidently the applicant is registered at Land Registry as proprietor of both of them.

4. On 19 September 2016, the applicant commenced court proceedings against the respondent claiming:

£1,963.63 being sums payable under the lease of the subject property in respect of ground rent, insurance, administration charges, interest, fees and legal costs; and

£100.42 by way of statutory interest pursuant to s69 County Courts Act 1984, continuing at £0.27 per day.

Unhelpfully there was not attached to the Claim Form a statement of account or breakdown showing how the claim to £1,963.63 had been arrived at.

At the hearing, it was clarified that the sums claimed are as set out in Appendix 1 to this decision.

5. The respondent filed and served a defence to the claim [53 and 65].

6. By an order made 6 February and drawn on 1 March 2017 [46] District Judge Mitchell sitting at the County Court at Colchester ordered that: *"The case be sent to the First-tier Tribunal for a [de]termination of what charges, if any are due."*

7. The tribunal received the court file on 5 April 2017 and directions were issued on 10 April 2017 [50].
8. The referral came on for hearing before us on 27 July 2017.

The applicant was represented by Ms Eleanor Wheeler of counsel having been instructed by Mr David Bland of Pier Legal Services which is evidently part of Pier Management, the applicant's managing agents. No representative of the applicant or its managing agents attended the hearing or had provided a written witness statement in support of any the sums claimed.

The respondent was unrepresented but attended the hearing and presented his case in person.

The lease

9. The lease of the subject Property is dated 22 July 1988. A copy is at [17]. The lease grants a term of 99 years from 22 July 1988 at a ground rent of £50 pa payable in advance on 1 January in each year and on the other terms and conditions therein set out. The lease defines the demised premises which are referred to as the 'upper flat'.
10. On 18 August 2000, the respondent was registered at Land Registry as the proprietor of the lease [13].
11. The following covenants on the part of the tenant are material to these proceedings:

Clause 3 (a) *"To pay the reserved rent on the days and in the manner aforesaid"* [The only rent reserved is the ground rent.]

Clause 3 (j) *"To pay all expenses (including solicitor's and surveyor's fees) incurred by the landlord incidental to the preparation and service of a notice under Section 146 of the Law of Property Act 1925 notwithstanding forfeiture is avoided otherwise than by relief granted by the Court."*

Clause 4 (v) *"To keep comprehensively insured the building comprised in the upper flat during the term hereby granted against inter-alia loss or damage by fire storm tempest and aircraft and other such risks if any as the Lessor thinks fit in an insurance office of repute to the full value thereof including Architects and Surveyors' fees and to make all payments necessary for the above purposes within seven days after the same shall respectively become payable and to produce to the Landlord on demand the policy or policies or a copy thereof of such insurance and the receipt for every such premium paid and will in the event of the demised premises being damaged or destroyed as soon as practicable cause all monies received or payable by virtue of such insurance to be laid out in repairing rebuilding or reinstating the demised premises"*

The gist of the applicant's case

12. The gist of the applicant's case is that it believes the respondent has not complied with his obligation to insure the Property and thus from about 2011 it has effected insurance on both flats. In the subject court proceedings, the applicant seeks to recover the premiums paid in respect of the years 2015/16 and 2016/17, but in respect of 196b Maldon Road only.
13. In its reply [7] the applicant implies that these sums are service charges or fall to be treated as if they were service charges payable under the lease, and that in the event of non-payment it was entitled to pursue a strategy which might lead to the forfeiture of the lease.
14. The applicant asserts that it has incurred fees and expenses in trying to recover the premiums which amount to variable administration charges within the meaning of the Schedule 11 to the Commonhold and Leasehold Reform Act 2002 and that it is entitled to recover them pursuant to the covenant in clause 3(j) of the lease on the footing that they were incurred incidental to an effort to forfeit the lease.
15. At the hearing Ms Wheeler withdrew the three claims of £95.94 each in respect of Annual Management Fees on the footing that the lease does not impose a service charge regime and does not impose an obligation on the tenant to pay such fees.
16. Ms Wheeler also clarified that the applicant does not now regard the insurance premiums as service charges but as sums paid out in consequence of the alleged failure of the tenant to insure the property and those sums were payable pursuant to the terms of the lease. Unfortunately, Ms Wheeler was not able to point to any provision in the lease to support that proposition.

The gist of the respondent's case

17. The respondent asserted that he has paid the two sums of ground rent claimed and he asserted that he could prove it but had he not (yet) disclosed the relevant documents.
18. The respondent also asserted that the property had been insured at all times but accepted that he had not produced documents to the applicant to confirm that position.
19. The respondent asserted that the sums claimed in respect of insurance premiums and administration charges were not payable under the terms of the lease. It was evident that the respondent considers that the applicant has simply failed to understand the provisions of the lease and for years, and since at least 2011 the applicant and its managing agents have been making improper and bullying demands on him for payment of sums to which they were not entitled.

Consideration and discussion

20. We have some sympathy with the broad thrust of respondent's submissions. The imperfect paperwork provided in the hearing bundle prepared on behalf of the applicant was woefully inadequate, but what it did show was that quite a few inappropriate demands were made on the respondent, not only by Pier Management but also by its solicitors, J B Leitch Limited.
21. As regards the covenant to insure, it comprises three main elements:
- a) to effect insurance;
 - b) to pay for that insurance within 7 days of it becoming due and payable; and
 - (c) to produce to the landlord on demand the policy and the receipt for the payment of the premium.
22. The applicant appears to have concluded that in breach of that covenant the respondent has (for a number of years) failed to insure the Property. No evidence to support that has been provided. Evidently the reason for the applicant's conclusion is that the applicant has demanded copies of the policies and receipts for payment of the premium and the respondent has failed to provide them. To support that there is a letter at [42] dated 26 July 2016 sent by J B Leitch to the respondent stating that they had been instructed "... *for the recovery of Ground Rent and Insurance Rent ...*" The letter included a 'formal request' for the insurance documents "... *for the years 2015 to 2016 and 2016 to 2017*". No evidence was provided to show that similar demands were made (and ignored) in prior years.
23. We find that failure to produce the documents is not of itself evidence of failure to insure, but that failure to produce the documents is a breach of the covenant to produce them on demand. That breach may well give rise to a money claim for damages for breach. Such a claim would have to be made in the County Court for that court to assess the amount (if any) of damages payable. It may well be that a court might hold that it was not unreasonable for a landlord to insure the Property and it might be that the appropriate measure of damages will be the reasonable cost of insurance effected by the landlord plus any associated costs reasonably and properly incurred in doing so; but we cannot speculate. The applicant has not pursued a claim for damages for breach of covenant.
24. What is quite clear to us is that even if a breach of covenant to produce evidence of insurance has occurred, the lease does not entitle the landlord to effect insurance, to demand the cost incurred and to treat non-payment of the demand as if it were itself a breach of covenant which it could pursue to forfeiture of the lease and to treat the costs incurred in doing so as being payable pursuant to clause 3(j) of the lease.

Of course, if the lease had provided that in the event of default of producing evidence of insurance, the landlord shall be entitled to insure the Property and to recover the cost from the tenant as a debt, or

perhaps as if it were rent in arrear, the position would, or may, be different, but that is not the case here.

25. It was suggested that the several Administration Charges incurred since 11 April 2014 were all referable to, or part of, a strategy incidental to the giving of a notice pursuant to s146 Law of Property Act 1925, and thus fell to be payable under clause 3(j) of the lease.

There are several observations we should make about that suggestion:

1. No evidence was produced to show that the applicant had incurred those charges. It is clear from some of the correspondence that these are charges simply imposed by Pier Management. See for example the letter at [89] *"In the absence of immediate payment, Pier Management will levy a further fee of £100 to cover administration costs in preparing your account for referral."* Further, most of the statements/invoices issued by Pier Management bear the legend: *"***** Failure to pay by the above due date, will result in additional charges levied to your account..."*
 2. No information or evidence was provided to show what work was carried out and by whom in respect of each charge levied and no effort was made to show that each charge was reasonable in amount. Given that the first of the applicant's claims was for the non-payment of insurance effected by the applicant on 1 March 2015, it is difficult to see how 'Arrears Charges' of £10 and £25 respectively could be properly incurred on 1 April 2014 and 9 January 2015.
 3. No evidence was produced to show that any of the charges claimed were in relation to or incidental to the service of a notice pursuant to s146 Law of Property Act 1925 (LPA 1925) or to any other proper steps which were required to be taken which might lead to a lawful forfeiture of the lease.
 4. Given our findings as regards the claims to the cost of insurance, the only money claim in the proceedings which the applicant could pursue was for the ground rent. The administration charges claimed, whatever they might have referred to, could not possibly refer to forfeiture for non-payment of the ground rent because:
 1. a s146 notice has never been required for non-payment of rent; and
 2. the amount of the alleged arrears is less than £350 and so the applicant is precluded from forfeiture for non-payment of ground rent by reason of s167 Commonhold and Leasehold Reform Act 2002.
26. In these circumstances, we find that whatever the Administration Charges and associated legal costs might refer to, none of them are

recoverable by the applicant from the respondent pursuant to clause 3(j) of the lease.

Closing observations

27. In conclusion, we want to make a couple of observations. For whatever historic reasons, the relationship between the parties has deteriorated to a very low level. We do not go into the past rights and wrongs but that history appears to be getting in the way of the parties conducting themselves in a constructive way.
28. The court may have to determine the ground rent arrears of £100. The respondent says he has paid that sum and has documents to prove it. The applicant says he has not paid. We urge the applicant identify a senior employee to whom the respondent should send his evidence and we urge the respondent to do so; and that the nominated senior employee considers it and gives a full and reasoned response to it within 7 days of receipt. In this way, we hope that the question of the ground rent can be resolved by agreement.
29. The main thrust of these proceedings concerned the insurance.

The respondent asserted that the Property has been insured at all times. Again, he says he has the evidence to prove it. He even commented that the insurance effected by him was less expensive than that effected by the applicant.

We urge the respondent to disclose that evidence to the applicant, and to do so on each future renewal. In this way, we hope that the question of insurance will not be an issue for either of the parties going forward.

Judge John Hewitt
31 July 2017

Sums claimed		Notes	Outcome
Ground Rent			
01.01.2015	£ 50.00		FTT has no jurisdiction - refer back to court
01.01.2016	£ 50.00		FTT has no jurisdiction - refer back to court
Insurance - Premiums			
01.03.2015	£ 285.23	Period 01.03.15 - 28.02.16	Determined not payable
01.03.2015	£ 19.99	Insurance admin fee	Determined not payable
01.03.2016	£ 309.59	Period 01.03.16 - 28.02.17	Determined not payable
Annual Management Fees			
01.04.2014	£ 95.94		Withdrawn at hearing
01.04.2015	£ 95.94		Withdrawn at hearing
01.04.2016	£ 95.94		Withdrawn at hearing
Administration Charges			
11.04.2014	£ 10.00	Arrears Charge	Determined not payable
09.01.2015	£ 25.00	Arrears Charge	Determined not payable
08.05.2015	£ 50.00	Arrears Charge	Determined not payable
23.07.2015	£ 50.00	Arrears Charge	Determined not payable
20.01.2016	£ 20.00	Reminder Charge	Determined not payable
08.03.2016	£ 20.00	Reminder Charge	Determined not payable
29.03.2016	£ 50.00	LBA Charge	Determined not payable
09.06.2016	£ 100.00	Referral to Solicitors Fee	Determined not payable
Legal costs			
20.06.2016	£ 636.00	J B Leitch Ltd	Determined not payable
Sub-total	£ 1,963.63		
Statutory Interest	£ 100.42	Cont at £0.27 per day	FTT has no jurisdiction - refer back to court
Total	£ 2,064.05		
Court Fee	£ 105.00		FTT has no jurisdiction - refer back to court
Solicitor's Costs	£ 80.00		FTT has no jurisdiction - refer back to court