



**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY) and
THE COUNTY COURT AT NOTTINGHAM
(sitting at the Nottingham Justice Centre)**

Case Reference : **BIR/00FY/LIS/2018/0057**
Court Reference : **E2CW648T**
(Nottingham County Court)
Subject Property : **Flat 18**
The Edge
122-124 Lower Parliament Street
Nottingham NG1 1EH
Applicant/Claimant : **The Edge (Nottingham) Management**
Company Limited
Representative : **JB Leitch Solicitors**
Respondents/ : **(1) Daniel Ashley Moore**
Defendants : **(2) Louise Julie Dunn**
Type of Application : **(1) Liability to pay service charges**
(2) Liability to pay administration charges
(3) Liability to pay interest
(4) Liability to pay costs
(All on transfer from the County Court)
Date of Hearing : **5 February 2019**
Tribunal Members : **Deputy Regional Judge Nigel Gravells**
Graham Freckelton FRICS
County Court : **Judge Gravells (sitting as a Judge of the**
County Court (District Judge))
Date of Decision : **4 March 2019**

DECISION

Introduction

- 1 This case concerns a service charge dispute in respect of the property at Flat 18, The Edge, 122-124 Lower Parliament Street, Nottingham NG1 1EH. The freehold interest in the property is owned by the Applicant, The Edge (Nottingham) Management Company Limited; the leasehold interest in the property is owned by the Respondents, Daniel Ashley Moore and Louise Julie Dunn.
- 2 The Applicant alleges that service charges in respect of the subject property have been demanded but remain unpaid. The dispute also includes claims for administration charges, interest and costs.
- 3 The case commenced in the County Court in February 2018 and the Respondents disputed all claims. The case was subsequently transferred to the First-tier Tribunal for determination by a First-tier Tribunal Judge sitting as a Judge of the County Court exercising the jurisdiction of a District Judge (under section 5(2)(t) and (u) of the County Court Act 1984, as amended by Schedule 9 to the Crime and Courts Act 2013) and, where appropriate, a Valuer Member of the Tribunal, in accordance with the Civil Justice Council flexible deployment pilot scheme.
- 4 The Tribunal proceeded to deal with all the issues in dispute between the parties, following the guidance of the Upper Tribunal (Lands Chamber) set out in *Avon Ground Rents Limited v Child* [2018] UKUT 0204 (LC). Issues relating to service charges and administration charges were determined by the First-tier Tribunal (Deputy Regional Judge Nigel Gravells and Graham Freckelton FRICS ('the Tribunal')). Issues relating to contractual costs and interest were determined by Judge Gravells, sitting as a Judge of the County Court ('the Court').
- 5 Since the case is now before the First-tier Tribunal, for the purposes of this Decision the Claimant in the County Court action is referred to as 'the Applicant' and the Defendants are referred to as 'the Respondents'.
- 6 The second Respondent did not actively participate in the initial proceedings in the County Court action or the subsequent proceedings before the Tribunal/Court. Moreover, the first Respondent did not explicitly refer to the second Respondent in his documentation. However, the County Court appears to have treated the first Respondent as representing both Respondents; and the Tribunal/Court does likewise. It follows that this decision applies equally to both Respondents.

Background

- 7 The subject property is a flat apartment on the third (top) floor of a converted lace factory in the centre of Nottingham. The building is divided vertically into two sections, each with its own ground floor entrances and lift. The section containing the subject property comprises eight apartments; the other section of the building comprises eleven apartments.
- 8 The Applicant is the freeholder of the building. Its title is registered at the Land Registry under title number NT386330.
- 9 The Respondents are the leaseholders of the subject property, holding under a lease dated 19 December 2001 for a 125-year term from 1 January 2001. Their title is registered at the Land Registry under title number NT367718.

- 10 By clause 7 of the lease, the Applicant covenants to provide the usual range of services to the development (including repairs and maintenance and insurance). The Applicant has appointed Encore Estate Management Limited to provide those services on its behalf.
- 11 By clause 2(2) of, and the Third Schedule to, the lease, the Respondents covenant to pay (i) one-nineteenth (5.2632 per cent) of the costs incurred by the Applicant in providing those services and (ii) a proportion (based on consumption) of gas and water charges. Payment is made, first, by quarterly payments in advance and, second, by a balancing payment (or credit) following the preparation of the accounts for the relevant service charge year.
- 12 The Respondents failed to make any payments from September 2017. Two 'urgent payment reminders' and one 'final payment reminder' were sent to the Respondents in relation to the quarterly payment for 2016/2017 due in September 2017 (£495.30), gas charges due in October 2017 (£26.49) and the balancing charge for 2015/2016 (£111.53), a total of £633.32; but no payment was made. Further gas charges (£17.87) and a quarterly payment for 2017/2018 (£504.00) became due in December 2017.
- 13 In January 2018 the Applicant referred the unpaid charges to a debt collection agency; but the Respondents made no payments.
- 14 On 21 February 2018 the Applicant commenced a County Court action against the Respondents to recover alleged unpaid service charges of £1,110.83, gas charges of £44.36 and interest (to date) of £23.22. The Applicant also claimed court fees of £105.00, fixed solicitor's costs of £80.00 and contractual costs (to date) of £756.00.
- 15 On 19 March 2018 the Respondents indicated that they intended to defend all parts of the claim.
- 16 By Order dated 14 September 2018, pursuant to section 176A of, and paragraph 3 of Schedule 12 to, the 2002 Act, District Judge Lloyd-Jones transferred the County Court claim to the First-tier Tribunal (Property Chamber) for determination.
- 17 Subject to paragraph 4 above, the Tribunal proceeded to deal with all the issues in dispute between the parties.
- 18 With a view to clarifying the matters in dispute the Tribunal issued detailed Directions on 5 November 2018.
- 19 On 14 December 2018 the Applicant's claim for contractual costs was quantified at £13,633.40.

Inspection and hearing

- 20 The Tribunal inspected The Edge development on 5 February 2019. Present at the inspection were Mr A Byrne, Director, The Edge (Nottingham) Management Company Limited, Ms E Dancer and Mr M Williamson, of Encore Estate Management Limited, and Mr P Sweeney, of Counsel, representing the Applicant. The Respondents did not attend and were not represented.
- 21 Immediately following the inspection a hearing was held at Nottingham Justice Centre. The same persons were present at the hearing.

- 22 Although the Tribunal indicated that it would postpone the hearing to enable the Respondents to attend, Mr Moore twice confirmed that he was happy for the hearing to go ahead in his absence.

Service charges

Statutory framework

- 23 Section 27A of the Landlord and Tenant Act 1985 ('the 1985 Act'), so far as material, provides –

(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.

- 24 Sections 18 and 19 of the 1985 Act provide –

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.

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 provision 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.

Service charge demands

25 As noted above, the unpaid service charge demands for the relevant years are as follows –

2016/2017 interim payment: £495.30
2015/2016 balancing payment: £111.53
2017/2018 interim payment: £504.00

26 In addition, the unpaid demands for gas charges total £44.36.

Reasonableness and payability of service charges

27 In making its determinations the Tribunal took into account, so far as relevant, all written representations of the parties, together with the oral evidence and arguments advanced at the hearing.

28 In the absence of the Respondents, the Tribunal invited the Applicant to address the matters raised both in the Respondents' defence to the County Court claim and in the Respondents' Statement of Case submitted in compliance with the Tribunal's Directions.

29 Mr Sweeney, on behalf of the Applicant, submitted that none of the matters raised by the Respondents constituted a valid challenge to the reasonableness and payability of the unpaid service charges and gas charges.

30 The Tribunal agrees with that submission.

Personal and financial circumstances of the Respondents

31 The first Respondent referred to adverse personal and financial circumstances consequent upon the termination of his career in the armed forces.

32 Like the Applicant, the Tribunal sympathises with the first Respondent's circumstances; but those circumstances do not constitute a valid defence to the Applicant's claim.

Lift maintenance

33 Although the lift in the section of the building containing the subject property has been out of action for significant periods, the only costs included in the service charge accounts relate to essential safety maintenance.

34 The Tribunal determines that those costs are reasonable and are payable by the Respondents.

Cleaning

35 The Respondents allege that the common parts of the building are only cleaned once a month. However, the Tribunal determines that the invoices included in the hearing bundle would seem to refute that allegation.

36 The Respondents provided no evidence that the cleaning was of an unsatisfactory standard. Indeed, at the time of the Tribunal's inspection it was noted that the standard of cleaning appeared to be of a satisfactory standard.

37 The Tribunal determines that the costs for cleaning included in the service charge accounts are reasonable and are payable by the Respondents.

Electric vehicle gate

38 The Respondents challenge the payability of costs incurred in respect of the electric vehicle gate that provides access to the four car parking spaces to the rear of the building. They argue that the leaseholders have limited, if any, access to, or use of, the car park.

39 While the Tribunal understands the perceived unfairness of being required to pay for facilities that are not generally available to the Respondents, the obligation to contribute to costs incurred in respect of the common parts and their facilities is clearly stated in the lease.

40 The Tribunal determines that the costs in respect of the electric vehicle gate included in the service charge accounts are reasonable and are payable by the Respondents.

Management

41 The Respondents comment on difficulties in communicating with Encore Estate Management, who are engaged by the Applicant to carry out the management of the building. In particular, the Respondents allege that this has delayed the completion of the insurance claim for damage to the subject property following a roof leak.

42 However, the Tribunal finds that the Respondents' frequent absence from the subject property has contributed to the difficulty in scheduling the inspection of the property.

43 The Tribunal is not persuaded that the specific allegations of mismanagement, even if substantiated, would justify any reduction in the management fee, which the Tribunal determines to be reasonable.

44 The Tribunal therefore determines that the management fee included in the service charge accounts is reasonable and is payable by the Respondents.

Service charges: summary

45 The Tribunal therefore determines that the Respondents are liable to pay the unpaid service charges and gas charges set out in paragraphs 25 and 26 above – totalling £1,155.19.

Administration charges

Statutory framework

46 Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ('the 2002 Act'), so far as material, provides –

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—

...

(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.

...

(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.

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

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.

Reasonableness and payability of administration charges

- 47 Prior to commencing legal action, the Applicant sent to the Respondents two 'urgent payment reminders' (on 25 October 2017 and 6 December 2017) and one 'final payment reminder' (on 20 December 2017); but the Respondents failed to pay the alleged unpaid services charges and gas charges. In January 2018 the recovery of those charges was referred to a debt collection agency.
- 48 Pursuant to clause 2(16)(a) of the lease, the Applicant claims by way of administration charges the fees that the Applicant was charged by the debt collection agency (£246.00).
- 49 Although the Respondents highlight in general terms the substantial costs and charges claimed by the Applicant compared with the amount of the unpaid service charges, they do not explicitly challenge the reasonableness or payability of the administration charges.
- 50 The Tribunal determines that the administration charges of £246.00 demanded by the Applicant are reasonable and are payable by the Respondents.

Interest on unpaid service charges

- 51 Pursuant to section 69 of the County Courts Act 1984 the Applicant claimed interest at 8 per cent on unpaid service charges and gas charges (to 21 February 2018). However, in accordance with clause 3(4) of the lease, the Applicant is entitled to interest on unpaid service charges and other amounts payable under the lease at 4 per cent above the base rate.
- 52 Interest is therefore payable on the following unpaid sums –
 - 2017 interim payment: £495.30 from 29 September 2017
 - 2016 balancing charge: £111.53 from 11 October 2017
 - 2017 gas charges: £26.49 from 1 December 2017
 - 2017 gas charges: £17.87 from 19 December 2017*
 - 2017 interim payment: £504.00 from 25 December 2017

* The Applicant's Statement of Case states the due date as 19 December 2018; but that appears to be an error.

53 The Court has calculated the interest to the date of judgment (4 March 2019), applying the following rates –

29 September 2017 to 1 November 2017: 4.25 per cent

2 November 2017 to 1 August 2018: 4.50 per cent

2 August 2018 to 4 March 2019: 4.75 per cent.

54 The Court determines that total interest of £69.96 is payable by the Respondents.

Contractual costs

55 The Applicant's County Court claim included a claim for the court fee of £105.00, fixed solicitor's costs of £80.00 and contractual costs (to date) of £756.00.

56 Prior to the hearing the Applicant submitted an updated schedule of costs and disbursements in Form N260. The costs set out there amounted to £13,633.40 (including the County Court fee (£105.00) and the Tribunal hearing fee (£200.00)).

57 In relation to the costs included in Form N260, section 51(1)(c) of the Senior Courts Act 1981 provides that 'the costs of and incidental to all proceedings in ... the county court shall be in the discretion of the court'. The Civil Procedure Rules ('CPR') apply to all proceedings in the civil courts including the County Court. CPR 44 contains the general rules about costs. CPR 44.2(2) sets out the general rule that the unsuccessful party will be ordered to pay the costs of the successful party but the court may make a different order. CPR 44.3 governs the basis of assessment and distinguishes between assessment on the standard and the indemnity bases. In either case the court will not allow costs which have been unreasonably incurred or are unreasonable in amount (CPR 44.3(1)). On a standard basis assessment, by CPR 44.3(2) the court will only allow costs which are proportionate in amount and will resolve any doubt about whether costs were reasonable and proportionately incurred, or were reasonable and proportionate in amount, in favour of the paying party. On an indemnity basis assessment, the 'proportionality' test does not apply, and the court will resolve any doubt as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party (CPR 44.3(3)). CPR 44.4 identifies the factors to be taken into account in deciding the amount of costs, and requires the court in all cases to have regard to all the circumstances. CPR 44.4(3) identifies particular matters to which the court will have regard in assessing costs on the two alternative bases. These include (a) the conduct of all the parties, (b) the amount or value of any money or property involved, (c) the importance of the matter to all the parties, (d) the particular complexity of the matter or the difficulty or novelty of the questions raised, (e) the skill, effort, specialised knowledge and responsibility involved, and (f) the time spent on the case. CPR 44.5 deals with the amount of costs where they are payable under a contract and introduces a rebuttable presumption that they are presumed to have been reasonably incurred and are reasonable in amount, unless the contract expressly provides otherwise.

58 It is clear that the Applicant is the successful party in the present case.

59 The Applicant relies on clause 2(16)(a) of the lease, by which the Respondents covenant –

To pay unto the Lessor all reasonable and proper costs charges expenses (including legal costs ...) which may be incurred by the Lessor incidental to or in contemplation of the preparation and service of a notice under section 146 of the Law of Property Act 1925 ...

- 60 It is not disputed that that provision prima facie provides for the recovery of the Applicant's litigation costs in the present case.
- 61 However, in the view of the Court the reference to 'reasonable *and proper* costs' in clause 2(16)(a) qualifies the presumption of reasonableness in CPR 44.5, which in any event is a rebuttable presumption, and also admits the proportionality test.
- 62 Applying those principles to the costs claimed in the present case, the Court makes the following determinations.
- 63 The Court allows the County Court fee (£105.00) and the Tribunal hearing fee (£200.00).
- 64 In relation to the claim for solicitor's fees, given the straightforward nature of the work involved and the absence of any complicating factors in the present case, the Court determines –
- (i) that the time billed for letters and telephone calls is excessive and unreasonable;
 - (ii) that the time billed for work done on documents is excessive and unreasonable;
 - (iii) that charges in excess of £180.00 per hour are unreasonable.
- 65 Subject to the application of the proportionality test (see paragraphs 68 and 69 below), the Court allows £3,000.00 in respect of solicitors' costs (excluding VAT).
- 66 Given the straightforward nature of the work involved and the absence of any complicating factors in the present case, the Court determines that it was unnecessary to instruct Counsel. The presentation of the Applicant's case before the Tribunal/Court was well within the competence of a solicitor. The Court therefore disallows the £1,000.00 claimed in respect of Counsel's costs but allows additional solicitors' costs of £500.00 (excluding VAT).
- 67 In summary, subject to paragraphs 68 and 69 below, the court allows costs of £305.00 in respect of court fees and tribunal hearing fees and £3,500 (excluding VAT) in respect of solicitors' costs – a total of £3,805.00 (excluding VAT).
- 68 That figure is to be compared with the amount of the Applicant's original claim for unpaid service charges and gas charges, which totalled £1155.19. Thus, the legal costs provisionally allowed by the Court (when VAT is included) amount to nearly four times the unpaid charges due under the lease.
- 69 The Court is of the view that, given the Respondents' history of late payment, the Applicant had no option but to commence legal action and that such action involved unavoidable costs. However, the Applicant withdrew from mediation when the Respondents clearly demonstrated a willingness to settle the dispute; and the Applicant continued to incur additional legal costs. Applying the proportionality test, the Court therefore

determines that the solicitors' costs allowed by the Court should be reduced to £3,000.00 (excluding VAT).

Summary on contractual costs

70 The Court allows costs as follows –

- (i) £305.00 in respect of the County Court fee and the Tribunal hearing fee;
- (ii) £3,000.00 (excluding VAT) in respect of litigation costs incurred by the Applicants in connection with proceedings before both the County Court and the Tribunal.

Decision

Decisions of the Tribunal

- 71 The Respondents shall within 28 days pay to the Applicant the sum of £1,155.19 in respect of unpaid service charges and gas charges.
- 72 The Respondents shall within 28 days pay to the Applicant the sum of £246.00 in respect of unpaid administration charges.

Decisions of the County Court

- 73 The Respondents shall within 28 days pay to the Applicant the sum of £69.96 in respect of interest on unpaid service charges and gas charges.
- 74 The Respondents shall within 28 days pay to the Applicant the sum of £3,305 (exclusive of VAT) in respect in respect of court fees, tribunal hearing fees and contractual costs.

Order

- 75 The Order giving effect to this Decision, a copy of which is annexed to this Decision, has been sent to the County Court for sealing.

Appeal

- 76 Different routes of appeal apply to decisions made by the First-tier Tribunal and by the Judge sitting as a County Court Judge.

Appeal against the decisions of the First-tier Tribunal

- 77 If a party wishes to appeal the decision(s) made by the First-tier Tribunal, that appeal is to the Upper Tribunal (Lands Chamber). However, a party wishing to appeal must first make written application for permission to the First-tier Tribunal at the Regional office which has been dealing with the case.
- 78 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.
- 79 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(s) for not complying with the 28-day time limit. The Tribunal will then consider the reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

- 80 The application for permission to appeal must state the grounds of appeal and state the result the party making the application is seeking.

Appeal against the decisions of the Judge sitting as a Judge of the County Court

- 81 If a party wishes to appeal the decision made by the Judge, that appeal must be made to the relevant Appeal Centre of the County Court. The party wishing to appeal must either (i) make a written application for permission to appeal to the Judge at the Regional office of the First-tier Tribunal which has been dealing with the case or (ii) include an application for permission to appeal in any appeal application made directly to the County Court Appeal Centre.
- 82 In any event, regardless of whether an application has for permission to appeal has been made to the Judge at the First-tier Tribunal, any Appeal Notice must be lodged at the County Court Appeal Centre not later than 21 days from the date of the decision being appealed against.

4 March 2019

Professor Nigel P Gravells
Deputy Regional Judge of the First-tier Tribunal