



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

Case Reference	: CHI/29UL/LSC/2022/0103
Property	: 70 Holywell Avenue, Folkestone, CT19 6LD
Applicants	: Franklyn Second Residents Association Limited
Representative	: Michael Mullin, counsel
Respondent	: Andrew Dean Jordan
Representative	: In person
Type of Application	: Transferred proceedings from the County Court in relation to service charges
Tribunal Members	: Judge N P Jutton, Mr Kevin Ridgeway, Ms T Wong
Date and Venue of Hearing	: 18 January 2023 Court Room 4, Havant Justice Centre, Elmleigh Road, Havant, Portsmouth
Date of Decision	: 23 January 2023

DECISION

1 **Background**

2 70 Holywell Avenue, Folkestone, CT19 6LD is a leasehold residential flat owned by the Respondent. The Respondent holds it under the terms of a lease dated 13 February 1984 made between Franklyn (Second Co-Ownership) Housing Society Limited (1) and Margaret Doris Shepard (2) (the Lease). The Lease is for a term of 999 years from 25 December 1982. The property is in a block of 6 flats and there are 7 separate similar blocks in total in the development.

3 The Applicant is the proprietor of the freehold interest and is the Respondent's current lessor. The maintenance and repairing obligations of the lessor are set out in the Second Schedule to the Lease. They provide that the lessor is to be responsible for maintaining in good and substantial repair and condition the main structure including the roof and foundations of the buildings. The lessor is responsible for keeping the common parts of the buildings maintained, in repair, cleaned and properly lit. It is responsible for keeping the grounds, paths, drives etc in good order and for the external decoration of the buildings. It is responsible for the insurance of the buildings. As part of its repairing and maintenance obligations, the lessor can employ managing agents and for the purpose of preparing accounts in relation to maintenance, a firm of Accountants.

4 The Lease provides that the lessor can recover the costs that it reasonably incurs in complying with its said obligations from the lessees of the flats as a form of service charge. The lessee is responsible for paying 1/42nd of total costs and expenses that the lessor reasonably incurs. At clause 3(7) of the Lease, the lessee covenants as follows:

“To contribute and pay to the Landlord the annual sum of one hundred and thirty pounds or such greater sum as the Landlord shall estimate as being required to pay in the next ensuing year a one forty-second part of the costs of doing the work and carrying out the things specified in the Second Schedule hereto (hereinafter comprehensively referred to as maintenance) and such sum to be paid half yearly in advance on the 25th day of December and the 24th day of June in each year the first payment being a proportion from the date hereof to be paid on the execution hereof”.

5 Clause 3(8) goes on to provide:

“In case in any year ending on the 25th day of December the sum referred to in sub-clause (7) hereof shall with any balance carried forward from any previous year be insufficient to pay a one forty-second part of the cost

incurred for maintenance in that year then likewise to pay on demand to the Landlord an additional maintenance contribution to bring the amount paid by the Tenant up to a one forty-second part of the actual cost incurred for maintenance in that year”.

- 6 As such the lessee is required to make maintenance payments on account. That in respect of the estimated costs and expenses that the lessor anticipates it will incur in complying with its maintenance obligations in the forthcoming year. If at the end of the year the actual expenditure incurred by the lessor exceeds the amount paid by the lessee(s) as service charges, then there is a balancing payment due from the lessee payable to the lessor on demand.
- 7 At clause 4(1) of the lease, the lessor covenants as follows:

“That (subject to contribution and payment as hereinbefore provided) the Landlord shall carry out the work and do the things specified in the Second Schedule hereto and keep proper accounts of the maintenance contributions received by the Landlord and of the expenditure on maintenance and shall as soon as practicable after the 25th day of December 1983 and every 25th day of December thereafter render to the Tenant an account of the receipts and expenditure and showing any balance remaining which balance (unless otherwise agreed between the Landlord and all the Tenants of flats in the Building holding under Leases similar to this Lease) shall be carried forward to the next annual account and shall not be refunded to any tenant”.
- 8 Accordingly in the event that the estimated service charge paid by the lessee to the lessor on account of anticipated expenditure exceeds the actual expenditure incurred by the lessor, then excess sum is not strictly under the terms of the Lease refunded to the Tenant but is carried forward to the next service charge account.
- 9 In this case the Applicant seeks to recover from the Respondent alleged arrears of service charge payments demanded on account, that is estimated service charge payments, for the years 2013, 2014, 2015, 2016, 2017, 2019, 2020 and 2021. Details of those alleged arrears are more particularly set out in Annex C to the Particulars of Claim. The total sum claimed is £5989.95. That includes the sum of £39.95 which is described as a service charge ‘excess’ for the year 2013.
- 10 In addition, the Applicant seeks to recover administration charges of £250 which it says it has incurred with a debt collection agency in trying to recover the said arrears of service charges from the Respondent. The Applicant also seeks to recover legal costs and court fees which it says are payable by the Respondent under the terms of the Lease.

- 11 The Applicant instituted proceedings against the Respondent in February 2022 in the County Court Money Claims Centre under Claim No. PBA0087579. The Respondent filed a Defence on 22 March 2022. The proceedings were transferred to the County Court at Canterbury. By an Order dated 26 September 2022, the proceedings were transferred to this Tribunal. The Order provided that those matters that fell to be determined by the County Court would be determined by a Tribunal Judge sitting as a County Court Judge exercising the jurisdiction of a District Judge. Directions were made by the Tribunal on 27 September 2022. The Directions provided that the matters that fell within the jurisdiction of the Tribunal, namely the determination of service charges under section 27A of the Landlord and Tenant Act 1985 and the claim for administration charges claimed, would be addressed by this Tribunal. That the Applicant's claim for contractual costs and court fees would be dealt with by the Judge sitting as a County Court Judge.
- 12 At the start of the hearing, the Tribunal identified that the issues before it (as opposed to the County Court) were whether the estimated service charges demanded by the Applicant from the Respondent on account were reasonable and if so payable by the Respondent, and whether administration charges claimed by the Applicant from the Respondent in the sum of £250 were payable by the Respondent (and if so reasonable in amount).
- 13 The documents before the Tribunal comprised a Hearing Bundle running to 199 pages. References to page numbers in this Decision are references to page numbers in that Bundle. The Bundle contained the County Court documents including the Claim Form, the Defence and Reply, Directions made by both the Court and the Tribunal, a Witness Statement made by the Applicant's Managing Agent and various Service Charge Accounts.
- 14 **The Law**
- 15 The statutory provisions relevant to service charge applications of this nature are to be found in sections 18, 19 and 27A of the Landlord & Tenant Act 1985 (the 1985 Act). They provide as follows:

The 1985 Act

- 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*
- 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.*

16 The statutory provisions relevant to administration charge applications can be found in Part 1 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 (the 2002 Act). They provide as follows:

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 which is payable, directly or indirectly –*

- (a) *for or in connection with a grant of approvals under his lease, or applications for such approvals:*
- (b) *for or in connection with the 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*

.....

(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 verbal 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 on whether 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.*

17 **The Applicant's Case**

18 At the start of the hearing, Counsel for the Applicant, Mr Mullin submitted that the Respondent should be de-barrred from giving evidence or restricted in his participation at the hearing pursuant to Rule 8 of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013. The Respondent having failed to comply with the directions made by the Tribunal which required him to serve any witness statement upon which he sought to rely together with documents in support by 4 p.m. on 25th November 2022. The Respondent had sent an unsigned form of witness statement and a number of photographs to the Applicant on 11th January 2022. There was, Mr Mullin pointed out, no application before the Tribunal for relief from sanctions. The Respondent's unsigned witness statement had not been filed with the Tribunal. The Tribunal determined that nonetheless the Respondent was entitled to make oral submissions to the Tribunal and if he wished to make those submissions inter alia by reading out his unsigned statement, he was entitled to do so save that his submissions should not stray into addressing evidence of fact. The Respondent had a copy of the unsigned statement with him which he offered to hand up to the Tribunal. Mr Mullin said he'd no objection and copies were handed to the Tribunal.

19 The Applicant's case is set out in the County Court Statements of Case (pages 5-8), in a Witness Statement of Julian Alexander a Director at the Managing Agents company of Alexander Fleming dated 27 October 2022 (pages 39-42), in a Statement of Case filed in accordance with Directions made by the

Tribunal dated 30 November 2022 (page 141) and in Submissions made by Counsel for the Applicant to the Tribunal at the hearing.

- 20 Mr Mullin, noted that the Defence filed in the County Court proceedings did not take issue with any procedural elements of the demands for service charge payments. That the Defence seemed to raise, as far as it could be understood, a single issue which was that the Respondent was seeking to withhold service charge payments due to an alleged lack of maintenance on the part of the Applicant. The only issue he said before the Tribunal, as regards service charge payments, was whether sums were due from the Respondent and it was not for the Tribunal to address an argument from the Respondent, if that were the case, that he was entitled to withhold payment of service charges due to an alleged lack of maintenance of the property. An allegation, Mr Mullin submitted, of historic neglect was not relevant to an assessment by the Tribunal of service charges pursuant to section 27A of the 1985 Act absent a properly pleaded and evidenced set off and counterclaim. That the Respondent was not entitled to seek to raise before the Tribunal a Defence in the form of an equitable set off because that had not been properly pleaded by the Respondent, if at all.
- 21 Further, Mr Mullin submitted that there had been a failure on the part of the Respondent to comply with Directions, in particular paragraph 15 of the Directions made by the Tribunal dated 27 September 2022 which required the Respondent to send to the Applicant by 4.00 pm on 25 November 2022 copies of any documents which he relied upon plus any Witness Statements. The Respondent had sent to the Applicant an unsigned Witness Statement and photographs on 11 January 2023, but that was outside of the time limit provided for in the said Directions. That there was no formal Application for relief from sanctions before the Tribunal. That the Respondent should be afforded no special status as a litigant in person.
- 22 The Respondent, Mr Mullin suggested, was in reality contending that he had no issue with the service charge demands themselves, but that he was withholding payment as a form of leverage by reason of an alleged breach of covenant on the Applicant's part to maintain the building. That such an argument could be run in cases of this nature, but it would need to be properly pleaded and supported by expert evidence. That was not the case here and therefore that was not a Defence open to the Respondent in respect of these proceedings. As such, the Applicant was entitled to a determination from the Tribunal that the service charges claimed by it were payable by the Respondent.
- 23 In addition, the Applicant sought to recover from the Respondent administration charges of £250 which it says it incurred in instructing debt

collecting agents to seek to recover the arrears of service charges from the Respondent. The Applicant relies to that end on the terms of the Lease and in particular, clause 2(12) whereby the lessee covenants:

“To pay all expenses (including Solicitors’ costs and Surveyors’ 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 be relief granted by the Court”.

- 24 Mr Mullin submitted that the Applicant was unable to serve a Notice pursuant to section 146 without first obtaining a determination from a Court or Tribunal that the service charges claimed were payable. That as such, administration charges incurred by the Applicant in seeking to recover payment of service charges were a necessary precursor to the service of a section 146 Notice and as such, were costs that were incidental to the service of such a Notice.
- 25 The Tribunal referred Mr Mullin to the Court of Appeal Decision in **The Mayor and Burgesses of the London Borough of Tower Hamlets v Ali Jivaraj Kahn** (2022) EWCA Civ 831. In that case the Court addressed the question as to whether or not costs incurred in respect of proceedings prior to the preparation and service of a section 146 Notice could be said to be ‘incidental’ thereto. Whether costs could be said to be incidental when in the event no preparation or service of a section 146 Notice had taken place. The Court concluded that the costs incurred in such litigation were too remote from the preparation and service of a section 146 Notice to be considered ‘incidental’ to such preparation and service.
- 26 The Tribunal asked Mr Mullin if he would like for time to consider that case. He declined and accepted that the Tribunal was bound by the Decision in Tower Hamlets v Kahn.
- 27 **The Respondent’s Case**
- 28 The Respondent’s case is set out in the form of Defence filed in the County Court proceedings and in Submissions made by the Respondent at the hearing before the Tribunal. The Respondent said that there had been, what he described, as a total lack of adequate long time maintenance to the property going back over many years. He said that maintenance was never taken seriously by the Applicant. That damp was a common complaint at the rear of the property. Windows had not been maintained and not sealed. That his complaints had been ignored, that he had taken steps himself to dig a form of French drain around the back of the bedrooms to his property to try to resolve the damp issue. There was a history he said of Managing Agents blaming problems on previous Managing Agents. That matters had not improved and

his property was 'damp ridden'. That he needs to constantly use a dehumidifier.

- 29 Put simply, his case was that maintenance had not been carried out. The Tribunal put to the Respondent that the service charges being claimed in the County Court proceedings, which were the subject of the proceedings before the Tribunal, were claims for payments of estimated service charges on account. That the Tribunal was not being asked to determine whether actual relevant costs incurred by the Applicant which constituted the service charge accounts, were reasonable in amount and if so payable. That the issue for the Tribunal was whether or not the service charges claimed on account amounted to a reasonable estimate of the costs and expenses that the Applicant anticipated that it would incur in the forthcoming service charge year. The Respondent confirmed that he understood the difference. His complaint, put simply, was that he should not have to pay service charges when repairs and maintenance to the property had not been carried out which in turn had adverse consequences for the residents.
- 30 As to the claim for administration charges, Mr Jordan said that the issue of the service charges could have been sorted out with the Applicant had it addressed his concerns. Had it done so, then the administration charges would not have been incurred.

31 **The Tribunal's Decision**

32 **Service Charges**

- 33 The service charges claimed by the Applicant and which are more particularly set out at Annex C to the Particulars of Claim are, save for a balancing payment of £39.95 in respect of the year 2013, demands for payments on account of the estimated costs and expenses which the Applicant says that it anticipates it will incur for the forthcoming service charge year. As such, the question for the Tribunal is whether or not such demands are a reasonable estimate of such anticipated costs and expenses and are payable. Upon the basis of the evidence before it the Tribunal is satisfied that they are reasonable pre-estimates not least having regard to the actual service charge accounts subsequently produced.
- 34 In addressing the issue of whether or not a service charge demanded is payable, the Tribunal does have the jurisdiction to determine a claim by a lessee for damages for breach of covenant to repair provided that the claim is properly pleaded as an equitable set off. In this case, the Tribunal agrees with the Applicant that the Respondent has not raised a properly pleaded case of equitable set off, nor has he made a counter claim. To his credit, when given

the opportunity to do so, the Respondent did not contend that the sums claimed were unreasonable estimates of anticipated future expenditure.

- 35 In all the circumstances and upon the basis of the evidence before it the Tribunal determines that the service charge payments sought in advance by the Applicant from the Respondent (together with the excess payment of £39.95 for the year 2013) for the years 2013, 2014, 2015, 2016, 2017, 2019, 2020 and 2021 as are more particularly set out in Annex C to the Particulars of Claim in the total sum of £5989.95 are reasonable and are payable by the Respondent to the Applicant.
- 36 The Tribunal determines that the Applicant is not entitled to recover from the Defendant an administration charge of £250. In the view of the Tribunal, the Lease does not allow for such recovery. That clause 2(12) of the Lease allows the lessor to recover from the Lessee costs that it reasonably incurs which are incidental to the preparation and service of a Notice under section 146 of the Law of Property Act 1925. In this case, no such Notice has been prepared or served. In the view of the Tribunal, the debt collection charge incurred by the Applicant of £250 is too remote from the preparation and service of a section 146 Notice to be considered incidental to such preparation and service.
- 37 **Summary of Tribunal's Decision**
- 38 The Tribunal determines that the service charges claimed by the Applicant from the Respondent as service charges on account of estimated and anticipated expenditure in the sum of £5989.95 are payable by the Respondent.
- 39 The Tribunal determines that the administration charges claimed by the Applicant from the Respondent in the sum of £250 are not payable by the Respondent.

Dated this 23rd day of January 2023

Judge N P Jutton

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by

email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.