General Form of Judgment or Order

In the County Court at **Clerkenwell & Shoreditch** sitting at 10 Alfred Place, London WC1E 7LR	
Claim Number	E4CW8V8X
Date	29th of July 2019

Smartbourne Property Management Ltd	**1st Claimant Ref**
	2nd Claimant Ref
Mr Peter Cain	**1st Defendant Ref**
	2nd Defendant Ref

BEFORE Tribunal Judge Brilliant, sitting as a Judge of the County Court (District Judge)

UPON the claim having been transferred to the First-tier Tribunal for administration on 8 March 2019 by order of District Judge Sterlini sitting at the County Court at Clerkenwell & Shoreditch

AND UPON hearing Mr Blakeney of counsel for the Claimant and the Defendant not attending

AND UPON this order putting into effect the decisions of the First-tier Tribunal made at the same time

IT IS ORDERED THAT:

1. The Defendant shall pay to the Claimant by 4.00 PM 28 August 2019 the sum of £698.20 being the sum found due and payable in respect of service charges and interest to the date of judgment;

2. The Defendant shall pay to the Claimant by 4.00 PM 28 August 2019 the sum of £185.00 including VAT in respect of the Claimant's summarily assessed costs;

3. The reasons for the making of this Order are set out in the combined decision of the court and the First-tier Tribunal (Property Chamber) dated 29 July 2019 under case reference LON/00AU/LSC/2019/0101.

Dated: 29 July 2019

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY) &

IN THE COUNTY COURT at Willesden, sitting at 10 Alfred Place, London WC1E 7LR

Tribunal reference	**:**	**LON/00AU/LSC/2019/0101**
Court claim number	**:**	**E4CW8V8X**
Property	**:**	**11 Dovey Lodge, Bewdley Street, London N1 1HG**
Applicant/Claimant	**:**	**Smartbourne Property Management Ltd**
Representative	**:**	**Mr E Blakeney of counsel**
Respondent/ Defendant	**:**	**Mr P Cain**
Representative	**:**	**Did not appear**
Tribunal members	**:**	**Judge Simon Brilliant & Mr Kevin Ridgeway FRICS**
In the county court	**:**	**Judge Simon Brilliant (sitting alone as a District Judge of the County Court)**
Date of decision	**:**	**29 July 2019**

DECISION

Those parts of this decision that relate to County Court matters will take effect from the 'Hand Down Date' which will be:

(a) If an application is made for permission to appeal within the 28-day time limit set out below – 2 days after the decision on that application is sent to the parties, or;

(b) If no application is made for permission to appeal, 30 days from the date that this decision was sent to the parties

Summary of the decisions made

(1) The following sums are payable by the respondent/defendant ("the tenant") to the applicant/claimant ("the landlord") by 4.00 PM 28 August 2019:

(i) Service charges: £660.00.

(ii) Legal costs under s.51 Senior Courts Act 1980: £185.00 including VAT.

(iii) Interest on the arrears of £660.00 at 4.25% per annum under s.69 County Courts Act 1984 calculated to the date of judgment: £38.20.

The application

1. The landlord freeholder seeks a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") and schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") as to the amount of service charges and an administration charge payable by the tenant, both in respect of 11 Dovey Lodge, Bewdley Street, London N1 1HG ("the flat").

2. Proceedings were originally issued against the tenant on 19 September 2018 in the County Court Business Centre under claim number E4CW8V8X. The tenant filed a Defence dated 23 September 2018. The proceedings were then transferred to the County Court at Clerkenwell & Shoreditch and then to this tribunal by the order of District Judge Sterlini dated 8 March 2019.

3. The tribunal issued directions on 15 March 2019 and the matter duly came to hearing on 1 July 2019.

The hearing

4. The landlord was represented by Mr Blakeney of counsel, instructed by Longmores, solicitors. There were present Mr Wagstaffe of Longmores, Ms L Finn and Mr N Oliver, directors of the landlord, and Mr Josh, the estate manager. The tenant failed to appear. He subsequently wrote to the tribunal with medical evidence from a Consultant Physician in Sleep and Respiratory Medicine dated 11 March 2019. This was to the effect that the tenant suffered from highly fragmented night-time sleep. The tenant did not ask for an adjournment or for the hearing to be set aside. There is nothing in the medical evidence which would have supported any such applications.

The background

5. The flat is situated in a purpose-built block of flats.

6. Neither party requested an inspection of the flat; nor did the tribunal consider that one was necessary, or that one would have been proportionate to the issues in dispute.

7. The tenant holds a long lease of the flat, which requires the landlord to provide services and for the tenant to contribute towards their costs by way a variable service charge. The specific provisions of the lease will be referred to below, where appropriate.

The issues

8. The claim against the tenant in the County Court comprised of the following:

   (i) Interim service charges amounting to £660.00.

   (ii) A demand for an administration charge, in the sum of £258.00.

   (iii) Interest on arrears of service charges and the administration charge.

   (iv) Costs of the action.

County court issues

9. The order transferring issues to the tribunal was in very wide terms: "It is ordered that this claim be transferred to First–tier Tribunal (Property Chamber)".

10. Following amendments to the County Courts Act 1984, made by schedule 9 of the Crime and Courts Act 2013, all First-tier Tribunal ("FTT") judges are now judges of the county court. Accordingly, where FTT judges sit in the capacity as judges of the county court, they have jurisdiction to determine issues relating to ground rent, interest or costs, that would normally not be dealt with by the tribunal.

11. Accordingly, the Tribunal wrote to the parties inviting their agreement to the tribunal dealing with all issues raised by the county court proceedings at the forthcoming tribunal hearing, that is to say, where appropriate, the tribunal judge appointed to hear the case would exercise the power to sit as a county court judge. In the view of the tribunal, the interests of justice were best served by one body hearing all the evidence and making all the relevant decisions in the case; and there would be an advantage to the parties as well, by saving both time and expense.

12. Both parties accepted the tribunal's invitation to sit as a county court in order to deal with any issues not normally dealt with by the tribunal.

Accordingly, Judge Brilliant presided over both parts of the hearing, which has resolved all matters before both the tribunal and the court. The tribunal wing member, Mr Ridgeway, sat on the tribunal matters only. These reasons will act as both the reasons for the tribunal decision and the reasoned judgment of the county court, where a separate order has been made.

The issues & decisions (the tribunal)

Service charges

13. The landlord's claim is for interim service charges falling due on 25 December 2017 and 25 March 2018.

14. It might be thought that it would not be necessary to consider the underlying issues relating to the service charges as the question for the tribunal to decide was whether the interim service charges themselves were payable and of a reasonable amount.

15. However, the tribunal was persuaded that it was necessary to consider the issues relating to the payability and reasonableness of the actual service charges. This was because without a decision as to the payability and reasonableness of the actual service charges, the tribunal could not form a view as to what was a reasonable interim payment.

16. The tenant raised the following matters:

(1) Whether the landlord was permitted under the terms of the lease to recover the costs of painting the external window frames or, if it was, whether the amount was excessive.

(2) Whether the landlord was permitted under the terms of the lease to accumulate a reserve fund or, if it was, whether the amount was excessive.

(3) Whether the contract with the landlord's managing agents was a qualifying long term agreement ("QLTA") within the meaning of ss 20 and 20ZA Landlord and Tenant Act 1985 ("the 1985 Act").

(4) Whether the fees charged by the landlord's managing agents were reasonable.

(5) Whether the fees charged by the landlord's auditors were reasonable.

(6) Whether the landlord was entitled to recover administration charges under the lease as sought or, if it is, whether the amount is excessive.

Painting exterior windows

17. It was common ground that the tenant was demised the window glass and window frames of the flat under paragraph (i) of the Second Schedule to the lease.

18. However, the tenant asserted that this meant the landlord was not entitled to carry out works to the window frames and therefore could not recover the costs of doing so from the tenants. The landlord disagreed with this interpretation, and considered that notwithstanding the terms of the demise, it was still entitled to carry out the works and recover the cost through the service charge.

19. The tribunal preferred the landlord's construction of the lease.

20. Paragraph 3 of the Sixth Schedule to the lease is a covenant on behalf of the landlord:

> "To redecorate the entrance halls passages landings and staircases in a proper and workmanlike manner at least once in every seven years and to paint the exterior wood and iron and cement work of the Building and all additions thereto … at least once in every four years of the Term such redecoration and painting to be in such manner as shall be agreed by a majority of the owners or lessees of the flats comprised in the Building or failing agreement in the manner of the previous decoration or painting or as near thereto as circumstances permit."

21. The term "the Building" is defined in the preamble and at clause 1(ii) of the lease as "Dovey Lodge aforesaid". The term "the Maintenance Contribution", which the tenant has a liability to pay pursuant to paragraph 1(b) of the Fifth Schedule, is defined as one eighteenth of "the cost to [the landlord] in each Maintenance year of complying with the obligations on its part contained in paragraph 1 to 17 inclusive of the Sixth Schedule".

22. Under paragraph (viii) of the Second Schedule, the lease expressly excludes from the demise of the flat "the lintels and cills to the windows of the Flat".

23. Furthermore, the tenant's own decorating obligations are set out at paragraph 5 of the Fifth Schedule as being:

> "To paint … all the wood iron and other parts of the <u>interior</u> of the Flat

usually painted once in every seventh year of the Term and in the last year of the Term as well" [emphasis added].

24. The tribunal concluded that the tenant was under no obligation to paint the exterior of the windows of the flat. He had an obligation to keep the flat in repair, but the obligation to paint only extended to the interior of the flat. It fell upon the landlord, as part of its obligation to paint the entirety of the exterior of the building, to paint the window frames of each flat.

25. Moreover, it was apparent from the witness statement of Ms Finn that the landlord had carried out these works since at least 1984 and the cost thereof had been recovered from the tenants through the service charge without complaint. The tenant was estopped by convention from denying a liability to pay.

26. The tenant also disputed the reasonableness of any charges for these works on the basis of his own calculations. He inserted that the windows could be painted in two days at £200.00 per day, and therefore the cost should be limited to £100.00 per to this year. Good decorators, he added, have easily been found for less.

27. However, there was no evidence to support the tenant's assertions and they should therefore be given little, if any, weight. In any event, the landlord was only just beginning the process of carrying out such works and the associated costs were not yet certain – these costs are being collected as part of the larger external repair and decoration programme that is due to be carried out later this year.

28. It was therefore not possible for the tribunal to determine whether the sums for window decoration were reasonable in amount or not, only whether they were recoverable in principle.

Reserve fund

29. The tenant asserted that the lease did not permit a sinking fund because the words *fund, reserve, sinking,* etc were not to be found in the lease. He added that there was no sinking fund because there was no need for one, and were there to be a sinking fund the lease would clearly identify what was to happen in the event of a tenant selling their flat.

30. The landlord on the other hand stated that paragraph 15 of the Sixth Schedule to the lease permitted the establishment of such a fund:

"To set aside such sums of money as the Landlord shall reasonably require to meet such future costs as the Landlord shall reasonably expect to incur in repairing or replacing maintaining and renewing those items which the Landlord has covenanted to repair replace maintain or renew"

31. Moreover, paragraph 4 of the Seventh Schedule stated that:

> "The expression "the expenses and outgoings incurred by the Landlord" as hereinbefore used shall be deemed to include not only those expenses outgoings and other expenditure which have been actually disbursed incurred or made by [the landlord during the year in question in performing its obligations hereunder but also such reasonable part of all such expenses outgoings and other expenditure hereinbefore described which are of a periodically recurring nature (whether recurring by regular or irregular periods) whenever disbursed incurred or made otherwise including a sum or sums of money by way of reasonable provision for anticipated expenditure in respect thereof as [the landlord] or its accountants or managing agents (as the case may be) may in their discretion allocate to the year in question as being fair and reasonable in the circumstances and relates pro rata to the flat".

32. The tribunal was satisfied that the lease did provide for the provision of a reserve fund. It was noted that the Court of Appeal took a similar view on the near identical wording in St Mary's Mansions Ltd v Limegate Investment Co Ltd [2002] EWCA Civ 1491. The tribunal was also satisfied on the basis of Ms Finn's witness statement that the amounts demanded for the purpose of the reserve fund were reasonable.

33. Moreover, the tenant had paid these charges without challenge over several years. This had the effect that they cannot now be challenged pursuant to s.27A(4) of the 1985 Act – see Cain v Islington LBC [2015] UKUT 542 (LC). The tribunal would lack jurisdiction to hear the tenant's challenge therefore, or in the alternative should be slow to conclude that the sums only now challenged are unreasonable in amount.

Managing agents

34. The tribunal found that that the agreement with Capital Property Management Ltd ("Capital") was not a QLTA. It was entered into before the consultation requirements came into effect on 31 October 2003. When Encore Estate Ltd ("Encore") acquired Capital in 2016 it simply took over the existing agreement. Alternatively, there was no certainty that the minimum length of the agreement would be for longer than one year: Corvan (Properties) Ltd v Abdel-Mahmoud [2018] EWCA Civ 1120.

35. The tribunal found that the fees charged by Encore were reasonable. The quotations obtained by the tenant did not represent realistic alternatives as they had been provided on extremely limited information. It was unclear as to what would be provided, the level of service, or if the quotes reflected introductory rates and would increase thereafter. Moreover, the landlord was not obliged to choose the cheapest service provider – the test is whether or not the fees charged fell within the range of reasonable prices.

36. Based on their knowledge and experience, the tribunal found that the fees charged were reasonable.

Auditors

37. The tenant also sought to establish that the fees for the auditors were unreasonable in amount on the basis that he had obtained cheaper quotes for certifying the accounts.

38. However, the tribunal found that this was not a comparison of like with like – the sums incurred by the landlord for auditing were comprised of the cost of both preparing the initial accounts and auditing and certifying them. Neither of the quotes provided by the two companies approached by the tenant had indicated what their fees for the preparation of accounts would be, and one of the companies had stated that this would not form part of their management fee.

39. Based on their knowledge and experience, the tribunal considered the fees charged were reasonable.

Conclusion

40. Given that none of the tenant's objections to the underlying service charges were made out, the tribunal concluded that the interim service charge demands were reasonable and payable.

The issues & decisions (County Court)

Administration charge

41. The landlord's claim was for interim service charges falling due on 25 December 2017 and 25 March 2018. On 24 May 2018, the landlord referred the arrears to a debt collecting agency. The charge for doing this was £250.00 together with VAT, totalling £258.00.

42. The landlord submitted that it was entitled to recover those costs pursuant to paragraph 17 of the Fifth Schedule, which is a covenant by the tenant:

> "To pay to the Landlord all costs charges and expenses which may be incurred by the Landlord incidental to the preparation and service of a notice under Section 146 of the Law of Property Act 1925 or incurred in or in contemplation of proceedings under section 146 and 147 of that Act.

43. However, paragraph 7 of the Seventh Schedule provided as follows:

> "It is hereby agreed and declared that the Landlord shall not be entitled

to re-enter under the provision in that behalf hereinbefore contained by reason only of non-payment by the Tenant of any such interim payment as aforesaid prior to the signature of the certificate but nothing in this clause or these presents contained shall disable the Landlord from maintaining an action against the Tenant in respect of non-payment of any such interim payment as aforesaid notwithstanding that the certificate had not been signed at the time of the proceedings…".

44. Judge Brilliant (in his capacity as a judge of the County Court) considered that the effect of this provision was that whilst the landlord could maintain an action in debt in respect of interim payments prior to the signature of the certificate, there was no right to forfeit the lease prior to that signature.

45. The charging provision in paragraph 17 of the Fifth Schedule, set out in paragraph 42 above, only entitles a charge to be made when the landlord is contemplating forfeiture proceedings.

46. At the hearing, the court was shown the relevant certificate, which was not signed until 25 June 2019.

47. It followed that on 25 May 2018, when the administration charges were incurred, the landlord had no right to forfeit the lease. Accordingly, the landlord could not recover the cost of the administration charge from the tenant.

48. Judge Brilliant did not consider that the provisions in paragraphs 16 and 17 of the Sixth Schedule came anywhere near entitling the landlord to recovering the administration charge.

Interest on service charges

49. The landlord has claimed interest under section 69 of the County Courts Act 1984 on these sums at the rate of 8%. Alternatively, it claimed contractual interest at 4% per annum above the base rate of Barclays Bank plc under paragraph 1(c) of the Fifth Schedule to the lease. The court was told that this amounted to 4.5% per annum. Judge Brilliant (in his capacity as a judge of the County Court) indicated that he was minded to award interest at 4.25% per annum. A calculation was helpfully provided immediately after the hearing showing interest at this rate on £660.00 amounted to £36.04 at the date of the hearing, which equates to £38.20 at the date of judgment.

Costs

50. The landlord claimed contractual costs of £10,051.40 including VAT. This was made up of a bill from JB Leitch Ltd in the sum of £2,980.00 and a bill from Longmores in the sum of £7,071 40.

51. Judge Brilliant (in his capacity as a judge of the County Court) noted that the particulars of claim dated 19 September 2018 contained a statement that the proceedings were the first step in contemplation of a forfeiture claim.

52. However, as explained above, he considered that it was premature to attempt to forfeit the lease some nine months before the certificate was signed. Accordingly, the provisions of paragraph 17 of the Fifth Schedule were not engaged, and did not give the landlord a contractual entitlement to its costs in taking proceedings to recover the service charges. Nor did the provisions in paragraphs 16 and 17 of the Sixth Schedule entitle the landlord to recover the costs of the proceedings.

53. The proceedings were properly constituted insofar as they claimed the arrears of interim service charges in debt. However, the lease does not provide for the landlord to be awarded contractual costs in those circumstances only.

54. This case was not allocated to a track under the CPR. However, given the amounts and issues involved, it clearly falls within the scope of the small claims track. Accordingly, the court considers the costs should be assessed as if this case had been allocated to the small claims track and the cost to be paid by the tenant are as follows:

Court fee on issue:	£105.00
Solicitors fixed costs, on issue:	£80.00
Total	£185.00.

55. Given that the tribunal has made a decision regarding the service charges, the landlord is entitled to a judgment in that sum. A separate County Court order, reflecting this decision is attached and will be submitted with these reasons to the County Court sitting at Clerkenwell & Shoreditch, to be entered in the court's records. All payments are to be made by 4.00 PM 28 August 2019.

Name: Judge Simon Brilliant **Date:** 29 July 2019

ANNEX - RIGHTS OF APPEAL

Appealing against the tribunal's decisions

1. A written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional

office within 28 days after the date this decision is sent to the parties.

3. If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

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

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

5. Any application for permission to appeal must arrive at the tribunal offices in writing within 28 days after the date this decision is sent to the parties.

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

7. If an application is made for permission to appeal and that application is refused, or if no application for permission to appeal is made but, in either case, a party wants to pursue an appeal, that party must file an Appellant's Notice at the County Court office (not the tribunal office) within 28 days of the Hand Down date.

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

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