



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY) &
IN THE COUNTY COURT at
Guildford, sitting at Havant Justice
Centre, Elmleigh Road, Havant PO9
2AL**

Tribunal reference : CHI/29UD/LIS/2020/0043

Court claim number : F37YY605

Property : 33 Portland Place, Greenhithe DA9 9FE

Applicant/Claimant : (1) PROXIMA GR PROPERTIES
LIMITED
(2) FIRSTPORT PROPERTY SERVICES
LIMITED

Representative : J B Leitch & Co

Respondent/Defendant : Ms CATHERINE ANNE GIBB

Type of Application : Transferred Proceedings from County
Court in relation to service charges

Tribunal members : Judge Tildesley OBE

**Date and Venue of
Hearing** : 27 July 2020 Havant Justice Centre by
telephone
Decision given at end of hearing

Date of decision : 17 August 2020

DECISION

Summary of the decisions made by the FTT

1. The following sums are payable by Ms Catherine Anne Gibb to Proxima G R Properties Limited by 21 September 2020:
 - (i) Service charges: £821.20
 - (ii) Administration charges: £120

Summary of the decisions made by the County Court

- (iii) Legal costs of £2,513.20 under Paragraph 4 of Part One of the Eighth Schedule of the lease
- (iv) Interest of £43.52 and daily rate of 10 pence at 4 per cent in accordance with Paragraph 3 of Part One of the Eighth Schedule of the lease

Background

1. The original proceedings were issued in the County Court under claim no. F37YY605 and were transferred to the Tribunal by District Judge McCulloch dated 10 March 2020 and received by the Tribunal on 16 April 2020.
2. The Tribunal takes the view that this is a suitable case for the Judge sitting first as a Tribunal Judge and then as a County Court Judge to determine all issues which formed part of the claim no. F37YY605.
3. On 9 January 2020 the Defendant filed a defence stating that she had paid the amounts due as service charges. On 23 January 2020 the Claimant filed a reply to defence asking for the defence to be struck out under CPR 3.4(2)(a).
4. On 10 June 2020 Judge Tildesley in his capacity as County Court Judge directed the Defendant to file a response electronically with Havant Justice Centre to the Claimant's Reply to Defence dated 23 January 2020, in particular paragraph 13. The Defendant was required to respond individually to items a, b, c and d and indicate whether she agreed/disagreed with the amount, and if she disagreed why.
5. The Defendant filed a response which did not appear to have been served on the Claimant.
6. Judge Tildesley was not convinced that the Defendant had addressed the issues correctly. The Defendant asserted that the service charge for the period 1 May 2019 to 31 October 2019 had been paid. The Defendant relied on the payments on 12 February 2019, 20 March 2019 and 8 April 2019 to support her assertion. These payments, however, were allocated to the outstanding arrears owed on 1 November 2018.

Judge Tildesley formed the view that the issue which the Defendant had not grasped was that the service charges from previous years were due under the terms of the lease on 1 November and 1 May in each year. The Defendant had sought to pay the amounts due by instalments which were not authorised under the lease with the result that not all service charge had been paid by the due dates. The Claimant has therefore incurred charges over the years for sending out arrears letters and instructing solicitors. It is those costs that the Defendant have not paid which resulted in the arrears of service charge of £821.20 as at 20 May 2020. The Defendant should consider the Statement of Account provided by the Claimant rather than the entries in her bank account.

7. Judge Tildesley, however, decided not to strike out the defence as there remained the issue of the reasonableness of the administration charges of £60 on 25 June 2019 and 15 July 2019. The Defendant had also challenged the ground rent administration fee of £75.
8. On the 7 July 2020 Judge Tildesley directed that the Claim would be heard in public on 27 July 2020 at Havant Justice Centre but by means of telephone conference in view of the Coronavirus Pandemic. Judge Tildesley indicated that
 - a. As Tribunal Judge he would determine
 - i. Whether the on account service charge for 1 May 2019 (£973.42) is reasonable and payable ?
 - ii. Whether the administration charges of £60 on 29 June 2019 and 20 July 2019 are reasonable and payable?
 - b. As District Judge he would determine
 - i. Whether an order should be made for payment of arrears of service charges of £821.20 as at 20 May 2019 and for payment of administration charges totalling £120 and ground rent administration charge of £75?
 - ii. Interest on the sum due
 - iii. Contractual Costs and court fees
9. At the hearing Mr Paul Sweeney of Counsel appeared for the Claimant. Mr David Tugwell of FirstPort Property Services was also in attendance. The Respondent appeared in person.
10. This decision will act as both the reasons for the Tribunal decision and the reasoned judgment of the County Court. The numbers in [] refer to the pages of the Claimant's statement of case.

The Tribunal Determination

11. The First Claimant is the freehold proprietor of, inter alia, the estate known as and situate at 14-43 (inclusive) Portland Place, Greenhithe ("the Estate").
12. The Defendant is the leasehold owner of the property known as and situate at 33 Portland Place, Greenhithe, DA9 9FE ("the Property"). The Property forms part of the Estate.
13. The Defendant's ownership of the Property is derived from and subject to the terms of a lease dated 26 April 2006, made between (1) Crest Nicholson (South East) Limited, (2) Ingress Park (Greenhithe) Management Limited, (3) Peverel OM Limited and (4) Catherine Anne Gibb and granted for a term of 999 years from 1 May 2000 ("the Lease").
14. The Second Claimant is "the Manager" in respect of the Estate (and thus including the Property), as named in the Lease, responsible for, inter alia, the provision of servicing and the demanding and collection of service charges pertaining thereto.
15. The relevant provisions of the lease in respect of the service charges are
 - a) By Clause 1, "the Lessee's Proportion" means the proportion of the Maintenance Expenses payable by the Lessee in accordance with the provisions of the Seventh Schedule.
 - b) By Clause 1, "the Maintenance Expenses" means the moneys actually expended or reserved for periodical expenditure by or on behalf of the Manager/the Lessor at all times during the term of the Lease, in carrying out the obligations specified in the Sixth Schedule.
 - c) By Paragraph 1 of the Seventh Schedule, "the Lessee's Proportion" is comprised of the various Part Proportions referred to therein.
 - d) By Paragraph 3 of the Seventh Schedule, certified accounts are binding save in the case of manifest error.
 - e) By Paragraph 7.1 of the Seventh Schedule, the Lessee covenants to pay the Lessee's Proportion half-yearly in advance on 1 May and 1 November every year.
 - f) By Paragraph 7.2 of the Seventh Schedule, the Lessee covenants to pay any balancing charge demanded by the Manager (if any).
 - g) The Sixth Schedule of the Lease sets out the services/matters in respect of which the Lessee's Proportion (essentially a service charge) is payable, the contents of which is referred to in its entirety (which includes, inter alia, management fees,

accountancy fees and the costs of enforcing the Lease (accordingly including legal costs).

16. The dispute related to the interim service charge of £973.42 for the period 1 May 2019 to 31 October 2019. In this regard the Claimant exhibited in Annex G to its statement of case the “Budget for the year ending 30 April 2020”[110-111]; the Statement of Anticipated Expenditure to 30 April 2020 which showed the annual amount of £1,946.85 due from the Defendant [112]. At Annex I the Claimant exhibited a copy of the service charge demand in the sum of £1,044.62 comprising £973.42 for the half year service charge and £71.20 for balance brought forward [188]. The demand included the name and address of the landlord and was accompanied by a Summary of Tenant’s Rights and Obligations.
17. The Defendant made no challenge to the Claimant’s authority to recover the service charges under the lease, and to the lawfulness of the demands. The Defendant acknowledged at the hearing that the service charges were reasonable.
18. The Defendant’s defence was that the service charge that is claimed to be outstanding for the period 1st May to 31st October 2019 of £821.2 and would be part of the invoice sent out in May 2019 for £973.42 was paid in full as follows £250 paid on 12-2-19, £250 paid on 20-3-19, £250 paid on 8-4-19, £223.42 paid on 18-5-19 as full and final payment. The Defendant pointed out that payments are made in advance over several weeks for cashflow purposes rather than being hit with a large one off payment every six months. The Defendant produced an extract of her bank statement to evidence the payments made.
19. The Claimant argued that the Defendant’s defence was not credible. The Claimant submitted that the Defendant appeared to be operating under the mistaken belief that she may legitimately pay small amounts periodically towards her service charge liability which was contrary to the terms of the Lease. This required payment of the service charges half-yearly in advance, each such half-yearly amount being payable in full as a matter of contract.
20. The Tribunal finds that the effect of the Defendant’s action of paying the service charge in instalments was that over the course of years the Defendant had incurred administration charges for late payments. This meant that payments made between 12 February 2019 to 18 May 2019 did not discharge the service charge payable on 1 May 2019 but were allocated to the arrears in her account existing at the time the payments were made.
21. The Claimant produced a Statement of Account marked J which showed arrears owing of £761.20 at the time of the payment of £250 on 12-2-19; arrears owing of £511.20 at the time of the payment of £250 on 20-3-19; arrears owing of £261.20 at the time of the payment of £250

on 08-4-19, and arrears owing of £1,044.62 at the time of the payment of £223.42 on 20-5-19. The Tribunal finds that as at 20 May 2019 the Defendant owed £821.20 in respect of the interim charge demanded on 1 May 2020 [206].

22. The Tribunal finds that the interim service charge of £973.42 for the period 1 May 2019 to 31 October 2019 is authorised under the terms of lease and has been lawfully demanded. The Tribunal is satisfied on the evidence of the budget presented and the absence of challenge from the Defendant that the amount of £973.42 is no greater amount than is reasonable in accordance with section 19(2) of the Landlord and Tenant Act 1985. The Tribunal holds that the Defendant has paid £152.22 towards the sum demanded leaving a balance of £821.20.
23. **The Tribunal determines that the Defendant is liable to pay £821.20 in respect of the service charge for the period 1 May 2019 to 31 October 2019.**
24. The Claimant on 29 June 2019 issued an administration charge of £60 [192] and on 20 July 2019 a separate administration charge of £60 entitled “legal review fee” [196]. A summary of Tenant’s Rights and Obligations accompanied the demands.
25. The Claimant sent a letter of 25 June 2019 preceding the administration charge of 29 June 2019 [213] stating

“Further to our previous reminder, we note that the arrears of £881.20, now inclusive of £60 administration fee, have not been settled. We have enclosed a statement of account showing a breakdown of the outstanding balance.

If you have paid in the last few days, thank you. There is no need to contact us, you can ignore this letter and please accept our apologies.

Any outstanding balance will need to be settled today to prevent your account being referred to our debt recovery agents for legal proceedings. This may result in additional costs and interest being applied to your outstanding balance, at the rate prescribed in your lease or transfer document. We will not send any further reminder letters”.

26. The Claimant sent a letter of 15 July 2019 preceding the administration charge of 20 July 2019 [217]

“Despite our previous reminders, your account is still outstanding. We have no alternative but to take legal action to recover the outstanding money you owe. As stated in our previous letter, a further fee of £60 has now been added to your account. An invoice for this charge will follow separately.

We are referring your account to our appointed solicitors. They will contact you shortly with a formal claim letter giving a final opportunity to pay the debt. Legal fees will be incurred as a result of this and our solicitor will inform you of these”.

27. The Claimant relied on Paragraph 4 of Part One of the Eighth Schedule to recover the administration charges from the Defendant. Paragraph 4 stated insofar as is relevant that,

“The Lessee covenants to pay all costs, charges and expenses (including legal costs and fees payable to a Surveyor) incurred by the Lessor in or in contemplation of any proceedings or service of any notice under Sections 146 and 14 7 of the Law of Property Act 1925”.

28. The Claimant contended that the charges represented the credit control teams' pre-legal costs of (i) reviewing the respective rent and service charge accounts, (ii) determining whether the accounts are in arrears, (iii) sending pre-legal correspondence to demand payment of arrears, (iv) conducting a further review to determine whether the account(s) can/should be referred to external solicitors. (v) placing the account "in breach" (an electronic flagging system to ensure that any payments are flagged to be notified to the external solicitors and to ensure that correspondence received directly is passed to the external solicitors for processing), and (vi) thereafter instructing and liaising with the external solicitors as necessary, including providing explanations and supporting documentation to ensure that solicitors can properly pursue the arrears and ultimately issue County Court proceedings if necessary. The Claimant submitted that the above explanation was demonstrative of the substantial amount of pre-legal work that had to be undertaken.

29. The Defendant argued that she was not liable to pay the administration charges because she was up to date with her payments on the service charges. The Defendant had not challenged the administration charges when they were sent to her. The Defendant admitted that she had not bothered looking at the letters.

30. The Tribunal is satisfied that the Defendant was in arrears when the administration charges were demanded. The Tribunal finds having regard to the Claimant's explanation for the charges that the amounts of £60 for each charge are reasonable. The Tribunal holds that the Claimant was entitled to recover the charges by virtue of Paragraph 4 of Part One of the Eighth Schedule to the lease.

31. **The Tribunal determines that the Defendant is liable to pay the administration charges of £60 demanded on 29 June 2020 and 20 July 2020 respectively.**

The County Court Decision

32. The Claimant was unable to substantiate the £75 ground rent administration charge. The Court, therefore, decided that the Defendant was not liable to pay the charge of £75.
33. The Claimant claimed interest under Paragraph 3 of Part One of the Eighth Schedule to the Lease which states that “the Lessee covenants to pay interest at the rate of 4% above the Base Rate of Barclays Bank PLC from time to time in respect of service charge in arrears for 21 days, from the due date to the date of payment”.
34. The Claimant agreed a contractual rate of 4 per cent.
35. The Court is obliged to apply the contractual rate of interest of 4 per cent and decided that **the Defendant should pay the Claimant the sum of £43.52 in interest on the principal sum of £941.70 and a daily rate of 10 pence.**
36. The Claimant produced a schedule of costs amounting to £4,542.64 [219].
37. The Claimant relied on Paragraph 4 of Part One of the Eighth Schedule to the lease which, it said entitled it to claim the costs of proceedings because they have been incurred in contemplation of forfeiture. The Claimant asserted that the Claim form and Particulars made express reference to the fact that these proceedings were the first step in contemplation of a forfeiture claim.
38. The Claimant cited the Court of Appeal decision in *Chaplain Limited - v- Kumari* [2015] EWCA Civ 798) which established two principles, first that the costs awarded pursuant to s.51 of the Senior Courts Act 1981 can include the costs of the Tribunal and further that the contractual provision displaces the provisions of CPR 27.14.
39. The Claimant also relied on the Court of Appeal decision in *Church Commissioners for England -v- Ibrahim and Another* [1997] 1 EGLR 13 CA and in delivering Judgment Roch LJ held:

"The successful litigant's contractual rights to recover the costs of any proceedings to enforce his primary contractual rights is a highly relevant factor when it comes to making a costs order. He is not, in my view, to be deprived of his contractual rights to costs where he has claimed them unless there is a good reason to do so... In my opinion, it is not a proper exercise of a judge's discretion to refuse to allow a successful litigant to recover his contractual entitlement to costs because the judge considers that a lessor has an unfairly strong bargaining position”.

40. The Defendant did not contest the Claimant's contractual right to recover the costs of the proceedings. The Defendant, however, considered the amount claimed of £4,542.64 exorbitant, particularly having regard to the amount in dispute.
41. The Court is satisfied that the Claimant is entitled to a costs order by virtue of Paragraph 4 of Part One of the Eighth Schedule to the lease.
42. The Court, however, retains a discretion on the amount of those costs. Under CPR 44.5 it is presumed that costs payable under the terms of a contract have been reasonably incurred, and are reasonable in amount. The Court, however, notes that the presumption is rebuttable. Having regard to the circumstances of the case in particular the relatively small amount in dispute and the straightforward nature of the issues involved, the Court considers that the presumption should not apply.
43. Applying those principles to the costs claimed in this case, the Court decided to reduce the solicitor's costs by 50 per cent, and the Counsel's fee from £700 to £500. This gave a total of £1,991.00 for solicitor's costs and Counsel's fee to which VAT of £398.20 was added. The Court then added other expenses of £124.
44. **The Court assessed the amount of costs payable by the Defendant to the Claimant as £2,513.20.**

Rights of appeal

Appeals in respect of decisions made by the Tribunal

A written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case. The application must be made as an attachment to an email addressed to rpsouthern@justice.gov.uk.

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.

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.

The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the Tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appeals in respect of decisions made by the Tribunal Judge in his/her capacity as a Judge of the County Court

An application for permission to appeal may be made to an appeal judge in the County Court since No application was made to the Judge at the hearing.

Please note: you must in any event lodge your appeal notice within 21 days of the date of the decision against which you wish to appeal.

Further information can be found at the County Court offices (not the tribunal offices) or on-line.

Appeals in respect of decisions made by the Tribunal Judge in his/her capacity as a Judge of the County Court and in respect the decisions made by the FTT

You must follow **both** routes of appeal indicated above raising the FTT issues with the Tribunal Judge and County Court issues by proceeding directly to the County Court.