



FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference : CHI/00HN/LSC/2022/0056

Property : 33b Carbery Avenue, Bournemouth BH6
3LN

Applicant : Henrikka Kemppi

Representative : -

Respondent : Gary Levesconte

Representative : -

Type of Application : Determination of liability to pay and the
reasonableness of service charges

Tribunal Member(s) : Mr W H Gater FRICS
Regional Surveyor
Mr B Bourne MRICS

Date of Hearing : 22 September 2022

Date of Decision : 15 November 2022

DECISION

Summary Decision in the Tribunal

A: The Tribunal has determined that the sums claimed are not payable by the Respondent.

B: The Tribunal reserves its decision on the Applicant's application for costs pending submissions from the parties as directed below.

Background

1. The Applicant seeks a determination of her liability to pay certain service charges claimed for the years 2020 and 2021. Her application sets out the charges disputed.
2. On 18 July 2022 the Tribunal issued directions for the management of the case and directed that there should be a hearing.
3. On 19 July 2022 the Respondent wrote to the Tribunal stating that he was unable to respond to the application due to "a serious case that is being dealt with by specific performance from the Claimant". He stated that as his funds were limited, he cannot seek legal advice.
4. The Respondent was told that he must make a formal application for a Case Management Order.
5. In an application dated 2 August 2022 the Respondent requested an extension of unspecified length as he was signed off with stress and dealing with another case involving the claimant. He wished the application to be postponed until after the other case was dealt with.
6. He went on to request that evidence from the Applicant is debarred as it does not contain the correct information. The application also referred to evidence which relates to the case itself rather than case management issues.
7. The Tribunal directed on 11 August 2022 that it is unable to hold matters in abeyance in the manner described and the matter must be disposed of as soon as possible. It granted an extension to accommodate the Respondent but both parties were directed to issue documents as directed and agree a bundle. Failure to do so may result in striking out or debarring action.
8. The Tribunal received a further case management application from the Respondent dated 22 August 2022.
9. The applications were, in essence, identical to the previous application determined on 11 August 2022. The Respondent produced no new evidence to justify overturning the previous directions and the application was again refused.

Findings of fact /Preliminary matters.

10. References to pages in the bundle are shown thus [*].
11. The Tribunal did not inspect the property. It is described as a two bedroom second floor flat, one of three in the building. The Respondent owns the freehold and the first floor flat. The Ground floor flat is in separate ownership, held on a long lease.
12. The Respondent has not made submissions as directed and the bundle was not agreed by the parties.
13. A separate submission described as a bundle was submitted by the Respondent on 9 September 2022 by email, with a copy to the Applicant. The date for submission of these documents to the Applicant was 25 August 2022.
14. The Tribunal accepted these documents in the interests of justice in order that the matter may be determined as proposed.
15. The Applicant combined these documents into a bundle, albeit not agreed, and submitted these to the Tribunal on 15 September 2022 with a copy to the Respondent.
16. This was accompanied by a statement in response by the Applicant at [571].
17. The Respondent has stated in applications and correspondence that he has not been provided with evidence from the Applicant to enable him to respond. The Tribunal directions state that the Applicant's case is sufficiently described in the application. It forms the basis of the deliberations and findings below.
18. The issues on which the application was based were examined at the hearing and the parties agreed that they capture the points to be determined. The Tribunal finds that the Respondent has had sufficient information from the outset to respond in full to the application and chose not to comply with directions in respect of the bundle. He has suffered no prejudice.
19. During the course of the hearing the Respondent confirmed that in fact no demands for payment had been made, other than to send a list of costs to the Applicant which were intended for the purposes of negotiation. The Tribunal finds that in the absence of any demands, none of the amounts at issue are payable. It will however address the issues in the interests of justice to establish whether there is any ground for claiming recovery under the lease. Some of the issues have in part been determined by a previous tribunal and the parties may be assisted by this further determination.

The lease

20. The lease before the Tribunal is a lease dated 9 June 1987 between Frederick Eldon Standen, Estelle Maude Standen, and David Alexander MacColl and Carol Anne Cameron.
21. Clause 1 (v) of the Lease requires the Applicant to pay “unto the Lessors by way of additional or further rent a sum or sums of money equal to one third of the amount which the Lessors shall expend in complying with the covenants by the Lessors contained in Clause 3 (ii) hereof such last mentioned rent to be paid on demand following the expenditure by the Lessors “.
22. Clause 3. THE Lessors hereby jointly and severally covenant with the Lessee as follows:-
23. ... (ii) the Lessors will (subject to contribution and payment by the Lessee as herein provided) maintain repair renew:-
 - (a) the boundary fence and wall indicated by the 'T' marks on the said plan together with the 'walls footings foundations exterior walls and general structure roof (including the roof timbers) chimney stacks gutters and rainwater pipes of the building
 - (b) the gas water pipes tanks drains and electric wires and cables in under or upon the building or the garden and curtilage thereof and enjoyed or used by the Lessee in common with the Lessors and any occupiers of the Lower Premises
 - (c) any other part or parts of the building or premises whatsoever used in common by' the Lessee and the Lessors and any lessee or owner for the time being of the Lower premises or any part thereof
 - (d) so often as reasonably required paint (in the same colours as at present or such other colour as may be agreed with the Lessee) with two coats of good quality paint in a proper and workmanlike manner all the exterior wood stone and ironwork of the building.
 - (e) Clause 2(b) of the Lease requires the Applicant “To contribute and pay one third of the costs expenses and outgoings and matters mentioned in the second Schedule hereto”.
24. “The Second Schedule hereinbefore referred to Costs expenses and outgoings and matters in respect of which the Lessee is to contribute a One Third Share.
 - (1) The expense of maintaining repairing and renewing
 - (a) the boundary fence and wall indicated by 'T' marks on the said plan walls footings foundations exterior walls and general structure roof (including roof timbers) chimney stacks and rainwater pipes of the building
 - (b) the gas and water pipes tanks drains and electric cables and wires in under or upon the building or the gardens and curtilage thereof and enjoyed or used by the Lessee in common with the Lessors

and any occupiers of the Lower Premises

(c) any other part or parts of the building or premises whatsoever used in common with the Lessee the Lessors or any Lessee or owner for the time being of the Lower Premises

(2) The cost of painting the exterior wood stone and ironwork of the building”.

25. Clause 2 (q) requires the Applicant tenant to insure her flat in the joint names of herself and the Respondent. Clause 3 (iii) requires the Respondent to insure the Lower Premises in the joint names of himself, the Applicant and the Lessee of part of the Lower Premises.
26. By a deed of variation dated 18 April 2001 between Charles Albert Keit, Rosemary Keit and Catherine Jane Boyes, the original clause 3(iii) of the lease is deleted and replaced so that the Lessor (Respondent) is responsible for the insurance of Flat 3b. There is a corresponding reimbursement clause in respect of the Applicant Lessee at 2(q) whereby they pay a fair and reasonable portion of the costs of insurance.
27. The Respondent submitted a lease of the First Floor Flat at 33 Carberry Avenue, dated 2 August 2019 but this has no bearing on this case. The Tribunal concurs with the earlier finding by the Tribunal which also received this lease, in CHI/OOHN/LSC/2020/0050 7 October 2020 which stated that “a later contract /lease between a lessor and the different lessee, to which the Applicant is not a party, cannot, of itself, alter the terms of the lease.”

The hearing

28. As a preliminary matter, the Respondent made a further application to adjourn.
29. The Tribunal was informed the evening before the hearing that Mr Levesconte would not attend but that Ms Diane Hurdle, his partner, would represent him. In the event Mr Levesconte did attend and presented his case online, with Ms Hurdle in attendance.
30. Mr Levesconte said that he assumed the hearing would not proceed but he now wished to be present and whilst he felt unwell he was best placed to present his case. The Tribunal ascertained that he was well enough to continue, and stated that time would be given for breaks.
31. The Applicant attended online and stated that she wished to proceed with the hearing as matters had developed where the Respondent had contacted her mortgage lender and costs were being charged incorrectly to her bank account.
32. The Tribunal adjourned and determined that it would proceed with the hearing. The overriding objective requires the Tribunal to dispose of the case in a timely manner. This application was made in May 2022. There

have been many opportunities to contribute to the proceedings and submit documents, but these have been declined by the Respondent.

33. The Respondent was given an opportunity to present oral evidence at the hearing.
34. With regard to the Respondent's health the Tribunal made clear that breaks would be provided as required and asked the Respondent to point out when one was required.
35. The Applicant pointed out that she too suffered from the stress of the ongoing dispute. Certain service charges have been added to her mortgage. She is not living in the building due to structural issues.
36. In the event the Tribunal carried out breaks during proceedings and checked on the wellbeing of the participants during the hearing.

The Law

37. Tribunal procedures: The Tribunal has regard in how it has dealt with this case to its overriding objective in The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

Rule 3(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes:

- dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;
- avoiding unnecessary formality and seeking flexibility in the proceedings;
- ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
- using any special expertise of the Tribunal effectively; and
- avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it:

- exercises any power under these Rules; or
- interprets any rule or practice direction.

(4) Parties must:

- help the Tribunal to further the overriding objective; and
- co-operate with the Tribunal generally.

38. The relevant law in relation to this application is set out in sections 18, 19, 20C and 27A of Landlord and Tenant Act 1985 as amended by Housing Act 1996 and Commonhold and Leasehold Reform Act 2002 and Schedule 11 Paragraph 5A Commonhold and Leasehold Reform Act 2002.

39. The Tribunal has the power to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. Service charges are sums of money that are payable – or would be payable - by a tenant to a landlord for the costs of services, repairs, maintenance or insurance or the landlord's costs of management, under the terms of the lease (s18 Landlord and Tenant Act 1985 "the 1985 Act"). The Tribunal can decide by whom, to whom, how much and when service charge is payable. A service charge is only payable insofar as it is reasonably incurred, or the works to which it related are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the charges.
40. Under Section 20C and Schedule 11 Paragraph 5A Commonhold and Leasehold Reform Act 2002, a tenant may apply for an order that all or any of the costs incurred in connection with the proceedings before a Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge or administrative charge payable by the tenant specified in the application.
41. In reaching its Decision, the Tribunal also takes into account the Third Edition of the RICS Service Charge Residential Management Code ("the Code") approved by the Secretary for State under section 87 of the Leasehold Reform Housing and Urban Development Act 1993. The Code contains a number of provisions relating to variable service charges and their collection. It gives advice and directions to all landlords and their managing agents of residential leasehold property as to their duties. In accordance with the Approval of Code of Management Practice (Residential Management) (Service Charges) (England) Order 2009, "Failure to comply with any provision of an approved code does not of itself render any person liable to any proceedings, but in any proceedings, the codes of practice shall be admissible as evidence and any provision that appears to be relevant to any question arising in the proceedings is taken into account".

The issues

42. The Tribunal noted that the Respondent's submissions and correspondence were mixed with reference to a pending County Court case. An application to adjourn these proceedings pending the outcome of that case had already been refused.
43. The Tribunal made clear that the pending County Court proceedings had no bearing on this case and that the matter would be determined with reference to the issues set out in the application.
44. The Tribunal obtained agreement from the parties on the list of issues to be determined. These were dealt with in turn and each party was given an opportunity to make submissions.
45. The Applicant pointed out that some of the issues had been determined or referred to in the previous decision.

46. The evidence, deliberations and findings for each issue are as follows:-

The demands

47. At the hearing the Respondent stated that the list, [200] emailed on 14 September 2021 was a request not a demand and that he anticipated a period of negotiation.

48. There are certain requirements with regard to demands for payment of service charges. Section 21B of the Landlord and Tenant Act 1985 as amended by Housing Act 1996 and Commonhold and Leasehold Reform Act 2002 provides:-

Section 21B: Notice to accompany demands for service charges

(1) A demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges.

(2) The Secretary of State may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations.

(3) A tenant may withhold payment of a service charge which has been demanded from him if subsection (1) is not complied with in relation to the demand.

(4) Where a tenant withholds a service charge under this section, any provisions of the lease relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it.

(5) Regulations under subsection (2) may make different provision for different purposes.

(6) Regulations under subsection (2) shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

49. The Tribunal finds that the demand by email [200] did not comply with the requirements of the Act and that none of the amounts claimed are payable.

50. Given the history of disputes at the property, it will assist if the Tribunal sets out findings on each heading to help the parties achieve better understanding of the matter.

IPM initial survey and the day to day running of the property. Greenwards Assoc fees for preparation report and schedule of works for schedule of works under section 20 notice. £1,665/£1,365

51. Initiative Property Management Ltd (IPM) are the managing agents appointed by Mr Levesconte.
52. The applicant stated that the 2020 Tribunal decision found that management fees are not payable.
53. The Respondent's claim that the previous Tribunal reduced the figure is not correct. There is no evidence of any expense having been incurred
54. The Respondent stated that there is nothing in the lease which says he cannot appoint a manager. Given disputes with the tenant, an allegation of breach of lease and the size of the management he has had difficulty finding a manager.
55. Questioned by the Tribunal the Respondent stated that the previous Tribunal disallowed £300 of management fees but the remaining sums related to other works. The Respondent said that he had not managed to send in receipts and agreed that documentation was required in order to substantiate a claim. However, he does not run the management company.
56. Consideration. The Respondent is not prevented from appointing a manager, but the issue here is whether he is able to recover such costs from the Applicant. There is nothing in the lease which permits this and the Tribunal finds that costs of employing a management agent are not recoverable. This was made clear in the earlier Tribunal decision.
57. If there are other charges within the figure these have not been specified or supported by evidence.
58. Further, even if the lease did provide for such charges, they are not payable due to the absence of a competent demand supported by receipts.
59. For the avoidance of doubt the Tribunal finds that neither the entire sum of £1,665 or the alleged reduced sum of £1,365 are payable.

Asbestos survey £214.80

60. The Applicant stated that the previous decision held that health and safety costs are not payable as service charges. She states that no evidence has been provided to support the Respondent's claim that she had caused a problem by leaving storage items in place. The Applicant believes that the survey was for the purposes of the freehold sale and is not payable under the service charge.

61. The Respondent agrees that the survey was related to conveyancing. The report was issued by Meyer Surveys Ltd. [517].
62. The Respondent asserts that the original survey in 2019 could not be completed due to excessive storage under the stairs by the Applicant causing obstruction and a further report was necessary. The invoice [516] for £214.80 is claimed in full from the Applicant on the grounds that the report was necessary due to storage.
63. Consideration: The report appears to be a complete resurvey rather than a completion of a survey as a result of any obstruction.
64. On examination of the lease the Tribunal finds that there is no provision which permits the Respondent to claim the costs of Health and Safety issues and the charges proposed are not payable.
65. Further, even if the lease did provide for such charges, they are not payable due to the absence of a competent demand supported by receipts.

Rear fence £242

66. The Applicant states that under her lease she must only contribute to the repair of fences which were marked with a T on the lease plan. The rear fence is not so marked and lies solely in the Respondent's garden.
67. At the hearing the Respondent confirmed that he had renewed the rear fence but had not taken the payment from the sinking fund and no demand had been made. He considered that this was an informal arrangement, and that the Applicant should have said that she disagreed.
68. Consideration: The Tribunal finds that the lease states clearly which fences fall under the Applicant's responsibility, and these are marked with a T. The rear fence is not part of her covenant, and the proposed charges are not payable.
69. Further, even if the lease did provide for such charges, they are not payable due to the absence of a competent demand supported by receipts.

Ground floor fence £62.66

70. The Applicant states that the fence in question is not a boundary fence and as such it is not her responsibility.
71. At the hearing both parties agreed that the panels in question are not on the boundary and in fact enclose the garden of the Ground Floor flat.
72. Consideration. In the light of the agreed facts the Tribunal finds that this fence is not a boundary fence and not one which the Applicant must pay a share of the cost of repairs.

Jet washing and repointing the drive. £193.

Further drive repairs due to risk assessment observation: Labour and materials £100

73. The Applicant states that there is no evidence of when these works were done and no proof of expenditure. She did not agree to the works being carried out.
74. The Respondent said that the works were done through IPM with the agreement of the Applicant. He pointed to bank statements [438 et seq.] as evidence of expenditure.
75. The further works were carried out by him in response to the risk assessment.
76. Consideration: Under clause 1(d) of the lease the Applicant has the right to use the driveway for vehicular access. Clause 3 requires the Respondent to repair and maintain parts used in common. Paragraph 1(c) of the Second Schedule requires the Applicant to pay one third of the cost of such works.
77. The Tribunal finds therefore that ordinarily a share of these costs would fall to the Applicant. However, there is no evidence of the expenditure nor whether the works were necessary or reasonably incurred. The provision of a bank statement such as that provided is insufficient evidence. Furthermore, no demand in compliance with statute has been made.
78. Accordingly, the Tribunal finds that the proposed charges are not payable.

Fascia and Gutters cleaned £73.33

79. The Applicant points out that the Respondent is required to renew, maintain and repair the gutters but no corresponding covenant exists for her as Lessee. A payment of £200 was made to Jose Rodriquez on 12 September 2020 for this but no demand has been made. The charges are therefore out of time with regards to Section 20b of the Act.
80. The Respondent points to paragraph 1(a) of the Second Schedule which refers to a responsibility to contribute to the cost of maintaining the "rainwater pipes of the building". The costs were taken from the sinking fund and there had been no objection from the Applicant. The documentation has not been included in the bundle.
81. Consideration. When considering the wording of the lease, the Tribunal adopts the guidance given to it by the Supreme Court in:

Arnold v Britton and others [2015] UKSC 36 Lord Neuberger:

"15. When interpreting a written contract, the court is concerned to

identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", (Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14.)... That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

82. Paragraph 1(a) of the Second Schedule is a wide ranging clause intended to capture the main external areas of the building together with certain boundary fences and walls, in a short sentence.
83. Whilst, as a counsel of perfection it would be simpler to have gutters expressly stated, the natural meaning of the words "rainwater pipes" may reasonably include gutters, the shape of which is sometimes referred to as a half pipe. In the same way that the phrase chimney stack does not mention chimney pot or flashing, the overall purpose of the clause is clear. It is to encompass the main elements of the exterior of the building. Applying the commercial common sense test it is inconceivable that the parties intended to separate the elements of the rainwater disposal system. The practicalities and costs of running two maintenance models for rain water disposal would offend common sense.
84. The Tribunal finds that gutters are covered by the covenant in paragraph 1(a). Nevertheless the costs referred to are not payable due to the absence of a competent demand supported by receipts.

Communal stairs cleaning. £100

85. The Applicant pointed out that no receipts or demands have been produced for this item. She accepts that she is liable for a share of the cost of communal maintenance under the lease.
86. The Respondent confirmed that the work was carried out by Ms Hurdle acting as housekeeper. He indicated that he would review this charge and reduce it to a 14 month period but that no charge has been made to date.
87. The Tribunal finds that communal cleaning is covered by the covenant in paragraph 1(c). Nevertheless the costs referred to are not payable due to the absence of a competent demand supported by receipts.

Buildings Insurance from 3 August 2019 £114.48

88. The Applicant accepts that she is liable for a proportion of the costs of insuring under the lease but is concerned to be told that the property is not insured.
89. The Respondent confirmed to the Tribunal that the whole building is insured but that the fact parts are unoccupied is a concern. He confirmed that he has yet to make demands for insurance premium payments.
90. The Tribunal finds that the costs of insurance are recoverable under the service charge provisions under the lease as varied but that these costs are currently not payable due to the absence of a competent demand supported by receipts.

Costs

91. The Applicant gave notice that she wished to apply for costs and submitted evidence of her costs on a time basis totalling £1189.70.[381].
92. She states that she does not consider it just that she should have to incur cost and a huge amount of time
93. Consideration of costs has regard to the findings in the decision. Before issuing its determination the Tribunal directs that the parties make submissions on costs within 28 days of this decision. These submissions may include Section 20C of the Landlord and Tenant Act 1985 and Paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 .
94. The Applicant also indicates that she seeks recovery of her costs on a time basis. The Tribunal has limited powers to award costs and the parties are directed to Rule 13 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and the findings in Willow Court Management (1985) Ltd v Alexander [2016] 0290 UKUT (LC), when making submissions.
95. The Tribunal will issue its decision on costs as soon as convenient thereafter.

Appeal Provisions

If either party is dissatisfied with this decision they may apply to this Tribunal for permission to appeal to the Upper tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have

been sent to the parties (rule 52 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013).

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.

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.