UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2017] UKUT 398 (LC)
UTLC Case Number: LRX/125/2016

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – FTT Procedure – applicant ordered to serve proceedings on respondents – proceedings said not to have been received – applicant ordered to serve decision on respondents – whether procedural irregularity – time for application for permission to appeal – FTT refusing to set aside decision – whether in the interests of justice – appeal allowed

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

IRIS HYSLOP

Appellant

and

38/41 CHG RESIDENTS CO LIMITED

Respondents

Re: 39 and 41 Craven Hill Gardens, London W2

Determination on written representations

The following cases are referred to in this decision:

English v Emery Reimbold & Strick Ltd [2002] 1 WLR 2409

Scott v. Scott [1913] AC 417

Introduction

1. This appeal raises important issues concerning the practice of the First-tier Tribunal (Property Chamber) ("FTT") in relation to the service of proceedings on respondents and the distribution of copies of the FTT's own decisions to those affected by them. The appeal is against a decision of the FTT made as long ago as 15 December 2015 on an application brought by the landlord of two adjoining but independent buildings at 39 and 41 Craven Hill Gardens, London W2 each comprising 18 flats.

2. The landlord, 38/41 CHG Residents Co Limited ("CHG"), sought a determination concerning the reasonableness of service charges and administration charges which it had incurred in 2015 and further charges which it intended to incur in 2016 in carrying out major works to the buildings, together with a determination of the liability of the long leaseholders of the 36 flats to pay those charges. It was intended that all of the leaseholders should be respondents to the application so that CHG would have the comfort of a decision binding all interested parties before it embarked on substantial additional expenditure.

3. The application must have been made shortly before 20 October 2015 as, on that date, the FTT gave directions to CHG which included the following:

> "The landlord must by 30 October 2015 serve a copy of the application and these directions on each of the leasehold respondents and shall confirm to the tribunal that it has done so."

4. Mr Matthew Gream, a director of CHG, wrote to the FTT by email on 28 October 2015, and again by letter on 7 December, confirming that the application and the directions had been served on all of the respondents.

5. No response to the application was received by the FTT from any of the leaseholders and the application was subsequently determined on paper without the need for a hearing. On 15 December 2015 the FTT issued its decision which was that for 2015 CHG was entitled to recover service charges totalling £180,420 (including £130,000 to be paid into reserve funds) and that for 2016 it could collect estimated service charges totalling £97,599 (including a further contribution of £40,000 towards reserves). The FTT explained its decision by saying that "in the absence of any written objections or responses from the leaseholders we can see no reason to determine other than these charges are reasonable".

6. On the same day, 15 December 2015, the FTT sent its decision to CHG under cover of a letter in which it requested CHG to "provide a copy to the respondents". The letter also included information about how to appeal against the decision and enclosed a note which CHG was advised to read if it was considering appealing. CHG was not requested to send a copy of the covering letter or the note providing guidance on appeals to the respondents.

7. Ms Iris Hyslop, the appellant, is the leaseholder of Flat 5, 41 Craven Hill Gardens and was one of the intended respondents to the application before the FTT. It is her case that she did not receive a copy of the application, and so was unable to participate in the proceedings;

nor did she receive a copy of the FTT's decision, so did not seek permission to appeal until long after it had been made with the result that her application was eventually refused by the FTT as being out of time.

8. Before considering the facts and procedural history in a little more detail it will be helpful to identify the relevant procedural rules.

Procedural rules

9. The relevant procedural rules are the Tribunal Procedure (First-tier Tribunal) Property Chamber) Rules 2013 ("the Rules"). The overriding objective of the Rules is to enable the Tribunal to deal with cases fairly and justly (rule 3(1)).

10. The Rules begin with a series of definitions in rule 1(3). It is necessary to refer to the relevant parts of three of these.

11. An "applicant" is a person who commences Tribunal proceedings, including by making an application.

12. A "respondent" is a person against whom an applicant brings proceedings. Thus a person becomes a respondent to an application simply by being named in the application as the person against whom the application is brought. There is no need for a person named in that way to do anything in order to become a respondent; in particular, there is no need for them to contact the FTT or file any document.

13. A "party" is a person who is an applicant or respondent (or, if the proceedings have been concluded, who was at the time when the FTT finally disposed of all issues in the proceedings).

14. By rule 6 the FTT is given extensive case management powers allowing it to regulate its own procedures. In particular Rule 6(3)(d) provides that the FTT may:

> "permit or require a party or another person to provide or produce documents, information or submissions to any or all of the following –
>
> (i) the Tribunal;
>
> (ii) a party;
>
> (iii) in land registration cases, the registrar."

15. Rule 8 deals with the consequences of a failure to comply with the Rules, or a practice direction or other FTT direction. An irregularity resulting from such a failure does not itself render void the proceedings or any step taken in them (rule 8(1)). Where a party has failed to comply, rule 8(2) allows the FTT to take such action as it considers just, which may include

waiving the requirement, requiring the failure to be remedied or imposing a sanction such as restricting a parties' participation or striking out their case.

16. Rule 26 is headed "starting proceedings". An applicant must start proceedings before the FTT by sending or delivering to it a "notice of application" (rule 26(1)). The notice of application is required by rule 26(2) to contain certain information including the names and addresses of each respondent to the application. The application must also include all further information or documents required by the FTT's 2013 Practice Directions, but in the case of applications concerning service charges the only additional information required to be provided is the name and address of any recognised tenants' association and a copy of the lease. There are certain cases to which rule 26 does not apply, but these do not include applications concerning service charges.

17. The effect of rule 26(1) is that an application is validly commenced when the document containing the required information is sent or delivered to the FTT.

18. Rule 29 is headed "notice to respondents, interested persons and others". So far as is material to this appeal rule 29 imposes the following requirements on the FTT itself:

> "(1) When the Tribunal receive a notice of application in accordance with rule 26(1) or a statement of case in accordance with rule 28(4), the Tribunal must provide a copy of the application and any accompanying documents to the respondent.
>
> (2) The Tribunal must also provide to the respondent a written notice informing the respondent of the requirements of rule 30.
>
> (3) ...
>
> (4) On receipt of an application relating to service charges, administration charges or estate charges the Tribunal must provide notice of the application to—
>
> (a) the secretary of any recognised tenants' association … ; and
>
> (b) any person whose name and address is known to the Tribunal whom the Tribunal considers is likely to be significantly affected by the application.
>
> (5) …
>
> (6) The Tribunal may give notice of the application to any other person it considers appropriate.
>
> (7) Any notice given under paragraph (4) or (6)—
>
> (a) must state that a person may apply to the Tribunal to be joined as a party to the proceedings; and
>
> (b) may be given by publication of the notice in two newspapers (at least one of which should be a freely distributed newspaper) circulating in the locality in which the premises to which the application relates are situated."

19. Rule 29(1) therefore makes it the responsibility of the FTT to "provide a copy of the application and any accompanying documents to the respondent". This requirement must be read together with rule 16(2), part of a rule headed "provision of documents", which provides that:

> "The Tribunal may provide any document (including any notice or summons or other information) under these Rules by—
>
> (a) itself sending or delivering the document; or
>
> (b) requiring a party to do so."

20. Rule 36 is concerned with decisions. The FTT may give a decision orally at a hearing but by rule 36(2) (omitting immaterial exceptions):

> "… the Tribunal must provide to each party as soon as reasonably practicable after making a decision … which finally disposes of all issues in the proceedings or of a preliminary issue … —
>
> (a) a decision notice stating the Tribunal's decision;
>
> (b) written reasons for the decision …; and
>
> (c) notification of any right of appeal against the decision and the time within which, and manner in which, such right of appeal may be exercised."

21. Part 6 of the Rules is concerned with correcting, setting aside, reviewing and appealing FTT decisions. Rule 51 provides for a decision to be set aside and re-made in certain limited circumstances, as follows:

> "51. Setting aside a decision which disposes of proceedings.
>
> (1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision or the relevant part of it, if –
>
> (a) the Tribunal considers that it is in the interests of justice to do so; and
>
> (b) one or more of the conditions in paragraph (2) are satisfied.
>
> (2) The conditions are –
>
> (a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;
>
> (b) a document relating to the proceedings was not sent to or was not received by the Tribunal at an appropriate time;
>
> (c) a party, or a party's representative, was not present at a hearing related to the proceedings; or
>
> (d) there has been some other procedural irregularity in the proceedings."

22. Once a decision has been made, any party wishing to seek permission to appeal to the Upper Tribunal must make a written application to the FTT under rule 52(1). A time limit for making such an application is provided by rule 52(2):

"(2) An application under paragraph (1) must be sent or delivered to the Tribunal so that it is received within 28 days after the latest of the dates that the Tribunal sends to the person making the application written reasons for the decision to the person making the application–

(a) written reasons for the decision;

(b) notification of amended reasons for, or correction of, the decision following a review; or

(c) notification that an application for the decision to be set aside has been unsuccessful.

It is also relevant to mention rule 56 which gives the FTT power to treat an application for permission to appeal, or an application to correct or set aside a decision, as if it was an application for any other one of those things.

The procedural history

23. It is Ms Hyslop's case that she first became aware of the proceedings when she was served with a claim for possession of her flat issued in the Central London County Court on 5 August 2016 and received by her more than a week later. The basis of the claim was non-payment of the service charges determined by the FTT in its decision of 15 December 2015. On 16 August 2016 she wrote to the FTT requesting an explanation and informing it that she had not previously been aware of any application by CHG. In response on 17 August she was sent a copy of the application together with a copy of the FTT's original directions. The FTT's case officer also explained how the application was understood to have been sent to her and suggested that Ms Hyslop should contact Mr Gream "to ascertain the reasons why you were not informed of this case."

24. On 5 September 2016 Ms Hyslop applied to the FTT for permission to appeal. Her application included a request for an extension (to that date) of the 28 day period allowed by rule 52(2) for making such applications. Ms Hyslop explained that the reason for her delay was:

"We have only just been made aware of the application and decision of the First-tier Tribunal. The landlord's representative claimed to have notified all leasehold respondents when he had not."

The application itself was made on the grounds that Ms Hyslop had been unaware of the proceedings because no details had been provided to her or the other leaseholders.

25. On 13 September 2016 the FTT refused to grant permission to appeal. The sole ground of refusal was that the application had been made "close to 9 months after the original decision was completed and issued." The decision did not deal separately with the application for an extension of time, or give any reasons for refusing such an extension, but it is clear that the determination amounted to such a refusal. Nor did the FTT treat the application as an application to set aside the decision under rule 51 (as rule 56 would have permitted it to do).

26. On 19 September 2016 Ms Hyslop renewed her application for permission to appeal to this Tribunal, relying on the same grounds as before.

27. On first considering the application I took the view that it was premature and I directed that Ms Hyslop should first apply to the FTT to set aside its decision under rule 51(1); the grounds of the suggested application appeared to be that documents relating to the proceedings had not been sent to, or were not received by her at the appropriate time, and (if that was the case) that it would be in the interests of justice for the decision to be set aside and remade.

28. On 14 November 2016 Ms Hyslop asked the FTT to set aside its decision. In her application she explained the circumstances in which she claimed first to have become aware of the proceedings and said that she had not been notified of the application by Mr Gream and had therefore been deprived of the opportunity of a fair hearing. It was, she suggested, totally unjust for the FTT to determine the application on the basis of the uncorroborated statement by CHG that notice of the proceedings had been given to all of the intended respondents.

29. Ms Hyslop also explained her substantive grounds for challenging CHG's entitlement to the 2015 and 2016 service charges. She objected to the magnitude of the sums claimed as contributions towards the reserve fund and raised issues about the treatment of that fund in the past. It is not necessary for me to say anything about those substantive challenges at this stage, as this appeal is concerned solely with the procedural integrity of the FTT's decision.

30. A response to Ms Hyslop's application was provided by Mr Gream on 17 November 2016. Referring to the suggestion that the application had not been received by Ms Hyslop, he acknowledged that:

> "Given the reliability of the postal service this is always a possibility and it is not feasible for the respondent to send communications to all 36 lessees with proof of delivery in each instance."

Nevertheless Mr Gream offered to provide witness statements from the managing agents and a number of leaseholders who, like Mr Gream himself, had successfully received the application, the directions and the final decision through the post. He suggested that only Ms Hyslop had claimed not to have received the documents and that where 35 leaseholders appeared to have been properly served the omission of one was not a sufficient failure of communication to justify interfering with the original decision. Mr Gream also suggested that the substantive grounds on which Ms Hyslop challenged CHG's original case were disingenuous and simply an attempt to avoid paying service charges due from her, as she had done in the past, and which had led to tribunal determinations in 2012 and 2013.

31. On 23 November 2016 the FTT gave further directions in Ms Hyslop's application requiring both parties to file witness statements.

32. Ms Hyslop complied with the direction by filing a witness statement on 15 December 2016. In it she confirmed that she had received no communication from the FTT until its letter of 17 August 2016 which had been prompted by her own enquiry following service of the

forfeiture proceedings. Nor up to that time had she received anything from CHG. She suggested that, apparently for historical reasons, "the landlord's managing agent has been instructed not to communicate with [her], and followed their client's instructions." The witness statement included material which is not relevant to this appeal and to which I do not need to refer. It concluded with a statement of truth signed by Ms Hyslop.

33. On 16 December 2016 Mr Gream responded to the FTT's direction in a letter accompanied by a number of exhibits. As Ms Hyslop has subsequently pointed out this was not in the conventional form of a witness statement nor was it supported by a statement of truth, but the FTT had not directed that it should be so nothing turns on that supposed omission.

34. Mr Gream confirmed that CHG's managing agents, FW Gapp, had been instructed to distribute the notice of application and the FTT's directions to all leaseholders. Copies of emails passing between Mr Gream and the agents in October 2015 confirmed those instructions and demonstrated that there was a concern at that stage that Ms Hyslop might claim not to have received the application. Despite this concern Mr Gream directed that it was not necessary for Ms Hyslop to be treated differently from other leaseholders or for documents to be delivered to her by hand. An email of 27 October 2015 from Ms Gordon of FW Gapp stated that a covering letter, the application itself and the FTT's directions had been posted out on that day to all leaseholders. On 19 November 2015 Ms Gordon confirmed by email that no responses had been received from leaseholders other than a single email from one (not Ms Hyslop) and a telephone call which Mr Gream himself had received from another.

35. Mr Gream provided a copy of the letter dated 24 October 2015 which FW Gapp informed him had been sent by post to all leaseholders. It referred to the enclosed application and drew attention to the FTT's direction to leaseholders to respond by 13 November 2015. Mr Gream explained that the documents had been sent by FW Gapp to the correspondence addresses specified by leaseholders to which their service charge demands and other correspondence was sent. The address provided by Ms Hyslop was given as Flat 5, 41 Craven Hill Gardens. Evidence of receipt of the application by five of the 36 leaseholders was provided, in that Mr Gream confirmed that he had received the copy of the application addressed to him, and provided emails from two leaseholders confirming that they too had received them at their flats in October 2015. Two others had received the same documents by email (their preferred method of communication).

36. Mr Gream also confirmed that he had sent the final decision of the FTT to all leaseholders using "a third party postal service" and provided details of the addresses to which letters had been sent. He confirmed that a copy had been delivered to him and that two other leaseholders had confirmed to him that copies had been received by them.

37. In a supplementary witness statement dated 22 December 2016 responded to Mr Gream's observations with the following further comments:

> "If this postage was delivered to No.41 Craven Hill Gardens it would have been delivered to the common hallway and not to my address at Flat 5. It is usually taken care of by Mr Thomas (Flat 15/41, acting in the capacity as an officer of the landlord company, and one

of the individuals lending support to Mr Gream). Residents have considerable problems with mail being mis-directed, and often returned to the sender. Mail is routinely interfered with. It is difficult to know if mail has been delivered, and it is a matter of luck if it reaches the addressee. If mail is expected you have to check that it has been sent, and if needed, ask for a copy. It is best, if possible, to retrieve your mail before it disappears."

The FTT's refusal to set aside

38. On 10 January 2017 the FTT refused Ms Hyslop's application to set aside its original decision. After referring to the evidence it had received (described above) it gave the following reasons for its refusal:

> "14. The applicant, amongst many other allegations about the conduct of the Respondent company and its officers, stated that it received no communication from the First-tier Tribunal. Furthermore the applicant stated that she had not received anything from the Respondent company. Essentially the applicant says she only became aware of the proceedings when she was served with a claim for possession dated 5 August 2016 and hence her application on 5 September 2016 mentioned above.
>
> 16. On reviewing the evidence set out above, the Tribunal, on the balance of probabilities, prefers the evidence supplied by the Respondent company which it finds persuasive and detailed. As a result it will not make an order to set aside the original decision as the Tribunal considers that it is not in the interests of justice to do so and as the Tribunal considers that there is no procedural irregularity that falls within the conditions in Rule 51(2)."

39. The basis on which the FTT refused to accede to the application to set aside is not explained in its decision of 10 January 2017. It made no findings of fact and undertook no assessment of the evidence, nor did it provide any reason for preferring the evidence of CHG to that of Ms Hyslop.

40. The first matter to which the FTT drew attention was Ms Hyslop's insistence that she had received no communication from the FTT itself. The Tribunal referred to this as an "allegation". In fact it appears to have been uncontroversial that the first document received by Ms Hyslop from the FTT was its letter of 17 August 2016 responding to her request for information about the decision she claimed not to have received. The FTT did not send any document of its own to Ms Hyslop but relied on CHG to do so on its behalf. To describe Ms Hyslop's reference to that procedure as an allegation was, in the circumstances, unfortunate.

41. The suggestion that the FTT doubted Ms Hyslop's evidence that she had received nothing from it is strengthened by the next sentence of paragraph 14: "furthermore the applicant stated that she had not received anything from the Respondent". The impression given is that the FTT doubted Ms Hyslop's statement because it was a further allegation that she had not received documents from a different source. In fact there was only one source from which the applicant claimed not to have received documents, that being CHG.

42. The FTT gave no reason for preferring the evidence of CHG to that of Ms Hyslop other than that it was "persuasive and detailed". It did not say what facts it found that evidence to have established, nor whether those facts were consistent or inconsistent with Ms Hyslop's complaint that she had not received notice of the application. Had it considered those questions the FTT would have been entitled readily to accept that the original application and directions had been posted by FW Gapp to all leaseholders in October 2015 and had been received by a number of them. It would also readily have concluded that Mr Gream had instructed a "third party postal service", which he did not identify, to send copies of the final decision to all leaseholders at the addresses he supplied. But neither of those facts was significantly in dispute. Ms Hyslop's case was not that documents had not been sent to her, but that they had not been received by her. The FTT made no finding that any of the documents had been received by Ms Hyslop, nor did it give any reason for disbelieving her evidence made in a sworn statement that they had not been.

43. Ms Hyslop's evidence included general evidence about post going missing within the building; the effect of her supplemental statement was that this was a frequent occurrence. There had been no specific response to that suggestion by Mr Gream. The FTT had not given directions for a sequential exchange of evidence and it made its decision on the credibility of the evidence without a hearing, so CHG had had no opportunity to respond. Nevertheless, in his letter of 17 November 2016 Mr Gream had commented on the suggestion that communications had not been received by Ms Hyslop by acknowledging that "given the reliability of the postal service, this is always a possibility". There was also evidence in the emails exchanged between Mr Gream and FW Gapp that CHG had considered it prudent in the past to arrange for personal service of documents on Ms Hyslop, including by pushing them under her door rather than entrusting them to the post. The FTT did not consider why that course of action might have been thought appropriate or whether it suggested that it was more likely or less likely that Ms Hyslop was telling the truth about the uncertainty of postal deliveries at her building.

44. In its recital of the relevant evidence the FTT had begun by noting that there was a long and troubled history of disputes between these parties going back many years. It did not consider whether it was likely that Ms Hyslop, receiving notice of an application to the FTT in relation to service charges or a final decision concerning her liability, would simply have ignored those documents and made no attempt to participate in the proceedings or reverse the decision until further steps were taken to compel her to pay the disputed sum by forfeiture.

The appeal

45. The proceedings before the Tribunal comprise Ms Hyslop's appeal against the decision of 15 December 2015. Following the dismissal of her application to the FTT to set aside that decision permission to appeal the decision was granted by this Tribunal on 12 April 2017. Ms Hyslop also challenges the FTT's refusal to set aside the decision.

46. The appeal raises two related questions of general importance, namely whether the FTT is entitled to rely on an applicant to send (a) the application, and (b) its subsequent decision, to each of the respondents.

47. CGH has chosen not to respond to the appeal, understandably taking the view that it had been entitled to rely on the FTT properly to apply its own Rules and did not wish to become involved in a *post mortem*. Ms Hyslop has not advanced any submissions on the effect of the Rules in support of her appeal; her case is simply that it would be unfair for her to be bound by a decision of the FTT in proceedings of which she had never been given notice. It is difficult to disagree with that general submission.

Issue 1: Was the FTT entitled to rely on CHG to provide notice of the proceedings to the leaseholders?

48. Rules 6(3)(d) provides an express power enabling the FTT to require a party to provide documents, information or submissions to the FTT itself or to another party. That power obviously enables the FTT to require that documents relevant to a service charge application, such as copies of notices, invoices or accounts, should be provided by one party to another. It does not appear to be directly relevant to the obligations of the FTT itself to provide documents.

49. Rule 7 deals with the procedure for applying for and giving directions. Rule 7(4) places the onus of notifying other parties of the application for directions on the person making it. It requires that a party who wishes to apply for directions must first "provide a copy of the proposed application to every other party before it is made" (rule 7(4)(a)); the party must also confirm to the FTT that the other parties have been notified that they may object to the application by giving written notice to the FTT (rule 7(4)(b)).

50. The procedure described in rule 7(4) for giving notice of applications for directions is in contrast to rule 29(1) which places a duty on the FTT to provide to the respondent a copy of any notice of application (i.e. any application which initiates proceedings rather than seeking directions within existing proceedings) which it receives in accordance with rule 26(1). The Rules could have required that any party who makes an application to the FTT must give notice of the application to every other person intended to be a respondent, but they do not. Instead they place primary responsibility for informing parties of new proceedings on the FTT.

51. It is significant, however, that the obligation imposed on the FTT by rule 29(1) is expressed as a requirement "to *provide* a copy of the application" to the respondent. The Rules do not refer to "service" of an application, nor in this context do they speak of "sending" an application; the application is to be "provided" to the respondent. This language invites reference to the general provision in rule 16 which is headed "provision of documents".

52. Rule 16(2)(b) specifically authorises the FTT to "provide any document (including any notice or summons or other information) under these Rules by … requiring a party to do so." The reference to "any document" suggest the power is intended to be unrestricted, or at least very broad; any residual doubt over its application to documents required to be served by the FTT under rule 29(1) is removed by the specific reference to "any notice", which must include a "notice of application" by which proceedings are commenced in accordance with rule 26(1).

53. It follows that the Rules specifically contemplate that the FTT may delegate to the applicant its own primary responsibility for providing copies of notices of application to respondents. It might be more accurate to describe the FTT as complying with its own duty to provide copies of notices of application to respondents by requiring the applicant themselves to provide them.

54. It is not difficult to understand why it was though appropriate to deal with the mechanics of "service" (as it would be called in the context of court procedure) by allowing the FTT to discharge its own primary responsibility in this way. In this case there were 36 respondents to the application before the FTT, but other applications, whether in relation to service charges, the appointment of a manager, or the variation of defective leases, can involve hundreds or even thousands of parties. Informing interested parties that proceedings which concern them have been commenced could often be an onerous and expensive task for a tribunal, but it is one which a landlord (the most likely applicant) will often be well equipped to perform since they will usually already have systems in place for communicating with their leaseholders.

55. The Rules also anticipate and seek to ameliorate some of the same practical difficulties surrounding the provision of documents in other ways.

56. In certain circumstances rule 16(11) allows the FTT to waive the requirement to send or deliver a notice, or to require provision of the document by any alternative method the FTT thinks fit (including advertisement in a newspaper); those circumstances include where the intended recipient cannot be found, or is abroad, or where for any other reason the notice or document "cannot readily be sent or delivered to that person". Rule 29(7) also permits the giving of notice of proceedings to any person "likely to be significantly interested in the application" by publication in local newspapers. Whether either of these methods of notification is available in relation to the service of a notice of application on a large number of respondents is not a question which arises directly in this case. Rule 16(11) would appear to be broad enough in principle. A person who is already a party to the proceedings because they have been named as a respondent in the notice of application may not fall within rule 29(7), since rule 29(7)(a) requires that the publication must state that any person may apply to become a party.

57. Provided there are sufficient safeguards against the possibility that something might go wrong where the applicant is required to deliver copies of the originating application, there would seem to be nothing objectionable in principle to requiring that notice of new proceedings be given in that way; such safeguards are provided by the procedure for setting aside a decision under rule 51(1) where a document has not been received by a party or its representative.

58. I am therefore satisfied that the FTT may properly require an applicant to provide to every intended respondent copies of the notice of application by which proceedings were commenced. There was accordingly nothing irregular in the FTT's direction to CHG on 20 October 2015 requiring that it serve copies of the notice of application in this case on each of the leaseholders.

Issue 2: Was the FTT entitled to rely on CHG to provide the reasons for its decision to the leaseholders?

59. I find it much more difficult to accept that it was open to the FTT to delegate to the applicant responsibility for publishing its final decision to the respondents.

60. The proposition that justice requires that the final decision of a court or tribunal must be made available to the parties affected by it is so fundamental that it is difficult to find direct authority for it. It is obvious that the delivery of a decision is an indispensable part of dealing with a case fairly and justly. In *Scott v. Scott* [1913] AC 417, 476 Lord Shaw of Dunfermline described publicity in the administration of justice as "one of the surest guarantees of our liberties", and quoted from Jeremy Bentham: "publicity is the very soul of justice." More recently, in *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409 at para [16] Lord Philips MR said, of the duty to give reasons: "justice will not be done if it is not apparent to the parties why one has won and the other has lost". That justice be public is not only a requirement of the common law. Article 6(1) of the European Convention on Human Rights provides that "judgment shall be pronounced publicly".

61. As one would expect, these principles are reflected in the Rules. Rule 36 permits the FTT to give a decision orally at a hearing (rule 36(1)) and requires it thereafter to "provide to each party as soon as practicable after making a decision … which finally disposes of all issues in the proceedings ... a decision notice stating the Tribunal's decision [and] written reasons for the decision."

62. In this case it has been assumed by the FTT that its obligation to provide a decision notice and written reasons to each party at the conclusion of the proceedings can be satisfied by providing those documents to one party and requesting that it forward them to every other party. I am satisfied that that is not a permissible interpretation of the Rules.

63. I accept that rule 16(2) permits the FTT to "provide any document (including any notice or summons or other information) under these Rules by (a) itself sending or delivering the document; or (b) requiring a party to do so." It does not follow that this procedural rule was intended to have the effect of modifying the FTT's fundamental obligation to make its decisions available to all of the parties.

64. The power to make the Rules was conferred on the Tribunal Procedure Committee by section 22(2), Tribunals, Courts and Enforcement Act 2007. By section 22(4) it was provided that:

> "(4) Power to make Tribunal Procedure Rules is to be exercised with a view to securing—
>
> (a) that, in proceedings before the First-tier Tribunal and Upper Tribunal, justice is done,
>
> (b) that the tribunal system is accessible and fair"

As this instruction makes clear, Parliament did not confer power on the Tribunal Procedure Committee to make rules the effect of which was that justice was not done or the tribunal system became inaccessible or unfair.

65. In any event, had it been intended that the FTT would have power to entrust it to one of the parties to deliver its decisions to other parties, rule 16(2) would have been expressed in a way which made that crystal clear. The language actually used is not at all suited to permitting that procedure to be adopted. The reference to "any document … under these Rules" is not apt to describe the decision notice and reasons required by rule 36. That the Tribunal Procedure Committee thought it necessary to clarify that "any document" includes "any notice or summons" (documents one might otherwise expect to be delivered by the FTT itself), yet did not think it necessary to refer to the decision notice and reasons, simply emphasises that the most significant of all the documents in the proceedings were not intended to be within the scope of rule 16(2).

66. Nor would a procedure which entrusted delivery of the FTT's decision to one party alone be consistent with the express requirement in rule 36(2) to provide it "to each party". The absence of any requirement to confirm to the FTT that delivery had taken place (in contrast to the procedure for seeking directions in rule 7(4)) is a further indication that that was not what the Rules contemplated.

67. Most striking of all, however, is the incompatibility of a procedure which permits the FTT to deliver its decision to one party alone with the provisions relating to applications for permission to appeal. Time begins to run under rule 52(2) for the making of such an application 28 days after "the Tribunal sends to the person making the application … written reasons for the decision". The word used in this rule is "sends" (rather than "provides"). In a context where certainty as to timing is important this requirement must therefore have been intended to be read literally, and to refer to the time when the FTT took the step of sending the document to the person wishing to appeal. If the FTT does not itself send its written reasons to each party, but entrusts that task to another party, time for the first party to seek permission to appeal will never begin to run.

68. Even if rule 52(2) was capable of being read as if the word "provides" had been used instead of "sends" (which would render it consistent with rule 36(2)), thereby opening up the possibility that rule 16(2) might be engaged, it would then be wholly unclear when time would begin to run for an application for permission to appeal. Would the 28 days begin when the written reasons were sent by the FTT to the applicant accompanied by a request that they be distributed to the respondents? If so the apparent time limit of 28 days would be liable to be eroded at the behest of one party to the proceedings. Or would time only start to run if and when the applicant complied with that request? If that was what was intended it is inexplicable that no provision was made to enable the FTT to know when that step had been taken and time had commenced to run.

69. These considerations make it clear that the Rules do not permit the FTT to rely on one of the parties to deliver its decision to any other party, and that rule 36(2) must be interpreted as requiring that the FTT should discharge that obligation itself.

Disposal

70. It is finally necessary to consider how these conclusions affect the FTT's decision under appeal, by which it determined the liability of Ms Hyslop and other leaseholders for the 2015-16 service charge years.

71. The first point to note is that the FTT's original decision was valid. I have concluded that the Rules permit the FTT to rely on one party to send copies of the application notice and the FTT's own directions to every other party. Whether or not the notice of application was received by Ms Hyslop, the decision was therefore one which the FTT was entitled to make.

72. Secondly, the decision itself was not invalidated by the FTT's choice to rely on CHG to convey its written reasons to each respondent. It is true that time did not start to run against Ms Hyslop for her to make an application for permission to appeal until the FTT itself sent her a copy of its decision (it is not clear whether it has ever done so) and the FTT was therefore wrong to refuse permission to appeal on that ground alone; but, as rule 8(1) makes clear, that irregularity did not render void the proceedings or any step taken in the proceedings.

73. Finally, protection is afforded to respondents who, for whatever reason, do not receive proper notice of proceedings, by the power conferred by rule 51 to set aside a decision which disposes of proceedings where (among other reasons) a document has not been received by a party when it ought to have been, or there has been some other procedural irregularity.

74. The FTT did not deal satisfactorily with Ms Hyslop's application under rule 51(1), which was made at the suggestion of this Tribunal with a view to dealing expeditiously with her proposed appeal. Its decision is within the scope of this appeal, and in my judgment, for the reasons I have already given, it cannot stand and I set it aside. It therefore falls to the Tribunal under section 12(2), Tribunals, Courts and Enforcement Act 2007 either to remit that application to the FTT with directions for its reconsideration or to re-make the decision.

75. I have carefully considered the evidence which is available, and which was put before the FTT by both parties. It is clear from that evidence that CHG is not in a position to prove conclusively that Ms Hyslop received the notice of application and the FTT's directions which, I am satisfied, were sent to her by FW Gapp on 27 October 2015. No statutory presumption is available to convert proof of posting into proof of delivery if the contrary is not established by the intended recipient. Ms Hyslop maintains that she did not receive them, and her case on that issue is bolstered by her own evidence of regular problems with postal deliveries and Mr Gream's acknowledgement that such problems cannot be ruled out. Whether her case that there are difficulties with the post is undermined, or strengthened, by her further claim not to have received the FTT's final decision, sent to her using a different postal service, would also need to be considered, as would the improbability of Ms Hyslop having ignored the application and decision if she had received them. The assessment of Ms Hyslop's own credibility is not something which I consider could fairly be undertaken in this case without hearing oral evidence.

76. In my judgment it would be an unjustified imposition on both parties for the Tribunal to remit the case to the FTT for it to undertake an investigation into the state of the post at the building and the veracity of Ms Hyslop's claim never to have received a copy of the proceedings. A hearing would be necessary which would be likely to occupy a day of tribunal time. The acrimonious relationship between the parties, the reasons for it, and the way in which it has been manifest by conduct, would be directly relevant to the credibility of Ms Hyslop's evidence. The FTT would probably be left to make a difficult decision concerning disputed events which took place more than 2 years ago based on very little direct evidence and substantially dependent on inferences from the parties' behaviour. Yet that relationship and behaviour, and those events, have nothing whatever to do with the quantum of the service charge which it is reasonable for CHG to collect for the years 2015-16.

77. Faced with that unsavoury prospect, I am satisfied that the better course is to set aside the FTT's original decision under rule 51(2)(d) on the grounds that there has been a procedural irregularity and that it is in the interests of justice to do so. The FTT's omission to send a copy of its decision to Ms Hyslop in December 2015 was such an irregularity. Had it done so the issue of the receipt of the application notice sent by CHG could have been investigated and determined shortly after the relevant events occurred rather than more than two years later; because of that omission it has become significantly more difficult to resolve the doubt over Ms Hyslop's knowledge of the proceedings. I am also satisfied that it is in the interests of justice for there to be a hearing at which the focus is on the reasonableness of the service charge and not on the satellite issue of service.

78. I therefore allow the appeal, set aside the decision of 15 December 2015 and remit the proceedings to the FTT for redetermination by a differently constituted tribunal.

79. I am aware that the forfeiture proceedings in the Central London County Court are in abeyance pending the outcome of this appeal. It is therefore important that proceedings are brought to a prompt conclusion. In order to make progress towards that conclusion I direct that CHG must within 21 days of the date of this decision make available to Ms Hyslop a copy of the hearing bundle prepared for the FTT's consideration in December 2015 together with copies of any other report or professional advice on which the service charges in issue in the proceedings were based. This material shall be made available to be collected by Ms Hyslop from the offices of FW Gapp (or an alternative agent in the locality of the building). Ms Hyslop must serve on CHG and file with the FTT a statement of her case in response to the application not later than 14 days after the date on which a copy of the hearing bundle is made available for collection by her; she should focus on the 2015 service charges and the 2016 estimated charges, stating clearly which she disputes and why. The FTT will then no doubt wish to conduct a case management hearing at which directions may be given for the future conduct of the application.

Martin Rodger QC

Deputy Chamber President

23 October 2017