UPPER TRIBUNAL (LANDS CHAMBER)

[2023] UKUT 231 (LC) **UTLC Case Number: LC-2023-133**
Keble House, Exeter

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

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

LANDLORD AND TENANT – SERVICE CHARGES – effect of failure to comply with provisions in the lease for service charge demands - estoppel by convention - consultation requirements for major works

BETWEEN:

RUSSELL STEWART LACY

Appellant

-and-

HOMESELECT FINANCE (NO.3) LIMITED

Respondent

Re: Flat 8, 2-4 Thurlow Road, Torquay TQ1 3DZ

Upper Tribunal Judge Elizabeth Cooke
13 September 2023

The appellant was not represented
Mr James McHugh for the respondent, instructed by LR Solicitors

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The following case was referred to in this decision:

Cain v Islington LBC [2015] UKUT 542

Introduction

1. This is an appeal from a decision of the First-tier Tribunal about liability to pay service charges and the reasonableness of costs incurred, in its jurisdiction under section 27A of the Landlord and Tenant Act 1985. It brings to a close the third set of proceedings between the parties in relation to service charges demanded by the respondent landlord of 2-4 Thurlow Road.

2. The appellant Mr Lacy presented his own case in the appeal; the respondent freeholder was represented by Mr James McHugh of counsel. I am grateful to them both.

Background

3. The respondent is the freeholder of 2-4 Thurlow Road; it is a Victorian building, originally two semi-detached houses, now containing nine flats. The appellant was granted a long lease of his flat in 2006; he and the respondent are the original parties to the lease. The lease requires the freeholder to maintain the property and the lessee to pay a service charge; the payment mechanism is a little unusual and there will be more to say about it shortly.

4. The payment of service charges is regulated by the provisions of the Landlord and Tenant Act 1985, which state that costs can be recouped as service charges only insofar as they were reasonably incurred (section 19), and confers upon the FTT jurisdiction to decide whether service charges are payable (section 27A).

5. Great difficulties have arisen between the parties about work done to the driveway of the property and the retaining wall which supports it alongside a steep bank.

6. The work on the driveway and retaining wall was on a scale that made it "qualifying works" as defined in section 20 of the Landlord and Tenant Act 1985, so that the respondent was obliged to follow the consultation requirements provided for by that section. In 2013 the respondent applied to the FTT for a dispensation from those requirements; the FTT ordered that it was to follow the procedure but that the time periods for some of the stages should be truncated.

7. In 2016 in a second set of proceedings the FTT had to decide the reasonableness of service charges imposed for the years 2006 to 2015, including those demanded in respect of the work on the drive and the retaining wall. A number of leaseholders including Mr Lacy argued that the level of costs for that work was unreasonable and would have been lower if the respondent had taken action sooner; the FTT gave its decision in March 2016, and that challenge failed.

8. The present proceedings were commenced by Mr Lacy in March 2021; he sought a determination under section 27A of the 1985 Act in respect of service charges for 2006/7 to 2017/18 inclusive, despite the fact that a number of those years had been the subject of the 2016 proceedings. The FTT gave directions limiting the application to two periods; first. the period from March 2015 to March 2018, and second the period from June 2014 ending on 24 March 2015 in respect of matters not included in the 2016 proceedings.

9. At paragraph 28 of the decision now appealed the FTT summarised the issues before it; I reproduce the list here, in the order in which the FTT decided the issues:

   1) Incorrect payment demands for the four years from 2014 to 2018.

   2) A charge of £15,236.50 for work on the driveway and the retaining wall.

   3) An additional charge of £3,015.64 for work on the driveway and retaining wall.

   4) Legal fees charged in the sum of £585.

   5) Cleaning costs

   6) Management fees.

10. The appellant has permission to appeal the decisions made by the FTT on points 1 to 5, and there is a limited permission in respect of point 6. I shall take each in turn, explaining the decision, the grounds of appeal, the arguments and the outcome of the appeal.

11. It is worth pointing out at this stage that the Tribunal was not provided with service charge demands, by either party. Instead, the service charge accounts were produced. They record debits and credits entered by the respondent and in effect indicate what the respondent thinks the appellant owes by way of service charge and what he has paid. Obviously the fact that the respondent has recorded a debit, representing a sum owed to it by the appellant, does not mean that it has been the subject of a service charge demand, let alone that that demand was made in proper form. And it is impossible to discern from the service charge account what were the costs in respect of which the charge was made. The FTT did see service charge demands and made decisions about their content and their compliance with statutory requirements, but none of those decisions was in issue in the appeal.

Ground 1: incorrect payment demands

The FTT's decision

12. This first point is a generic one applying to all the charges in issue in the FTT.

13. The FTT found – and there has been no appeal from this finding – that the lease requires the leaseholders to pay £100 every quarter by way of service charges in advance, and then to pay on demand after the end of a given year the amount by which that contribution of £400 falls short of the total charge.

14. This is unusual, and inconvenient for the landlord because it has to pay up front for services, maintenance etc. What the respondent has done instead is to demand service charges quarterly, on each occasion for a quarter of the appellant's share of the estimated forthcoming service charges, and also to make some ad hoc demands where extra expenditure is anticipated.

15. The appellant was unaware of the provisions in the lease for quarterly payments of only £100 until, he says, 2016. So this point was not in issue in the 2016 proceedings. But in the present proceedings the appellant challenged all the quarterly service charges on the basis that they were not demanded in accordance with the provisions of the lease. The FTT said at its paragraph 31 that of the £8,521.25 service charges demanded across the 4 relevant years all but £1,392.18 was in dispute on this basis. The FTT did not say how those two figures were calculated; I do not think they are correct because they do not include the sum in dispute for work on the driveway and the retaining wall under the second issue (see paragraph 9 above, but that does not matter for present purposes.

16. The respondent's answer to this in its statement of case in the FTT was that it had not been aware that it was contravening the terms of the lease in this way. The appellant had paid the quarterly charges as demanded since the grant of the lease and it would be unfair for him now to take a substantial benefit as a result of his silence on the point for so many years; "the applicant should therefore be estopped from raising this argument in 2022."

17. The FTT asked Mr Lacy at the hearing whether he had paid more than £100 a quarter and if so why, and his answer is recorded in the FTT's refusal of permission to appeal: "Prior to the previous Tribunal case I did pay the amounts that I was requested and I appreciate that that's because when I first bought my flat I didn't fully realise the importance of the lease. Whether deliberately or by accident the management company sent me quarterly payment requests for whichever amounts they specified, so I paid those amounts."

18. Nevertheless the FTT rejected the argument that he was estopped from relying upon this provision in the lease because, it said, in order to rely on estoppel a party must have acted to its detriment in reliance upon something said or done by the other party. Instead, it found something quite different: that the applicant had paid the service charges now in dispute, up to September 2016 and then on one occasion in January 2017 in the sum of £957 and that the applicant had therefore admitted liability for those charges, following *Cain v Islington LBC* [2015] UKUT 542.

19. The FTT did not set out what were the charges in issue for the period covered by that finding. Nor did the FTT state what were the payments that it determined had been made and when they had been made.

20. To explain the FTT's decision about those payments we have to look at section 27A to the 1985 Act and then at the decision in *Cain v Islington.*

21. Section 27A(4) and (5) of the 1985 Act provide as follows:

> "(4) No application [to the FTT under section 27A] may be made in respect of a matter which-
>
> (a) Has been agreed or admitted by the tenant…
>
> (5) But the tenant is not to be taken to have agreed or admitted any mater by reason only of having made the payment."

22. Thus the FTT has no jurisdiction to determine the reasonableness and payability of service charges that have been agreed or admitted by a tenant; but a single payment of a single charge does not mean that the tenant has admitted liability. In *Cain v Islington* the Tribunal (HHJ Gerald) said:

> "18. Looking at the reasoning behind this provision, no doubt the reason why the making of a single payment on its own, or without more, would never suffice is that … it is common enough for tenants to pay (even expressly disputed) service charges so as to avoid the risk of forfeiture and preserve their home and the value of their lease. But the reason why a series of unqualified payments may, depending on the circumstances, suffice is because the natural implication or inference from a series of unqualified payments of demanded service charges is that the tenant agrees or admits that which is being demanded. Putting it another way, it would offend commonsense for a tenant who without qualification or protest has been paying a series of demanded service charges over a period of time to be able to turn around and deny that he has ever agreed or admitted to that which he has previously paid without qualification or protest."

23. In that case the Tribunal found that the where the tenant had paid service charges without protest or reservation over a six-year period he could not now challenge the reasonableness of those charges.

24. In the present case the FTT said:

> "56 The Tribunal finds that the Applicant paid the on-account service charges at one-quarter of the budget sum until September 2016. No evidence was provided to the Tribunal on which the Tribunal could properly find that the Applicant did so having alerted the Respondent to the fact that the Applicant did not thereby accept or admit the sums to be payable…
>
> 67 The Tribunal has no jurisdiction in respect of matters which have been agreed or admitted ,as provided for in section 27A(4)(a) of the 1985 Act and hence the Applicant is prevented from pursuing this application fr the period prior to September 2016.

> 68. However, necessarily no such inference could be drawn in relation to the later period in which the Applicant had not made payment and did take the point, except insofar as a payment was made of £957 in January 2017."

25. It will be obvious that the argument that the respondent was making, and the conclusion that the FTT reached, had radically different consequences for the appellant. What the respondent was saying was that having paid substantive charges quarterly since the start of the lease the tenant should now be estopped from saying that he was only liable for £100 per quarter; but that would not have prevented him from arguing that the charges were based on costs that had not been reasonably incurred. By contrast, the FTT's finding led it to the conclusion that the charges now in dispute had all been thereby paid or admitted until September 2016, and that the FTT had no jurisdiction in respect of those payments, nor in respect of the charges represented by the £957 paid in January 2017.

26. As to the period from September 2016 onwards the FTT found that the service charges had not been demanded as the lease required so far as the sum demanded every quarter was concerned. Moreover the demands from 25 December 2016 did not contain a summary of the tenant's rights and obligations as required by section 21B of the 1985 Act, nor the information about the landlord required by section 48 of the Landlord and Tenant Act 1987. There is no appeal from those findings, and I was told at the hearing of the appeal that the services charges from September 2016 onwards, other than the sum of £957 paid in January 2017, have been cancelled from the appellant's account insofar as they exceeded what the lease allowed.

The appeal and the parties' arguments

27. The appellant has permission to appeal the FTT's finding that he has paid the service charges in issue in the present proceedings, up to September 2016 in the sum of £957 in January 2017, and has thereby admitted liability. He makes two points: first, that this was an argument that the respondent had not made and that therefore the FTT should not have made it for the respondent, and second that in any event he has not made those payments.

28. As to the first point, it is clear from the respondent's statement of case in the FTT that its argument was that the appellant was estopped from raising the quarterly payments point on the basis of the provisions in the lease; there is no argument in that statement of case that the FTT had no jurisdiction because the payments in issue had been made without protest. Mr McHugh told me, on instructions, that his client's case in the FTT was that the service charges in issue had been paid, but he did not represent the respondent in the FTT and he could not point to anything in the bundle, nor in the FTT's decision, that indicated that that had been the respondent's case in the FTT. He did not suggest, and there is nothing in the FTT's decision to indicate, that the respondent changed its position during the hearing and adopted the *Cain v Islington* argument. I take the view that the respondent's instructions to Mr McHugh are incorrect on this point. The FTT rejected the respondent's own argument but found in its favour on a very different argument that the respondent did not make.

29. The appellant says that that was unfair since the respondent was represented; the FTT should not have constructed a case for it. In the present circumstances I agree. I have the

impression from the decision that perhaps the FTT took the view that it was simply reformulating the respondent's counsel's presentation of the facts and achieving the same result; it may be that the FTT did not appreciate the difference between the consequences of the respondent's argument and the consequences of the finding it made.

30. More seriously, it appears that there was no evidential basis for that finding. This is Mr Lacy's second point. He took me to the statement of his service charge account in the bundle, from which it is clear that he has made no payments himself since July 2013. Two substantial charges were debited in October 2013 and March 2014 by his mortgagee, (which he says, and Mr McHugh did not dispute) were for charges for the work to the drive and retaining wall; those charges were then cancelled by the respondent because the work did not at that point proceed (although the money was not returned). After the mortgagee made a payment on 3 March 2014 the account was over £7,000 in credit. Numerous charges were added including one for £15,440.32 in May 2014 which he says, and again Mr McHugh did not dispute, were in respect of the drive and retaining wall works. The only payments recorded in the account before September 2016 were three payments made, Mr Lacy said, by his mother in the sum of £1,025.46 altogether. Whatever the reasons why Mr Lacy's mother made the payments, it is perfectly obvious from the service charge account that the majority of the sums demands during that period were not paid, whether by Mr Lacy or by anyone else.

31. Mr McHugh asserted that the sum of -£19,947 in the credit column of Mr Lacy's service charge account on 24 March 2015 was a payment; but it is a negative sum in a column where payments made are positive numbers, and it is simply the carried-forward sum due from the previous page – the previous page having been produced by the previous managing agents and the new page being the account kept by the present managing agents. Mr McHugh also asserted that entries made on a different copy of the service charge account represented a payment of £19,947.83 on 24 May 2015, but that page appears to be an amalgamation of the two pages just considered. All that is recorded on 24 May 2015 is a credit for £19,947.83 in one column, labelled "B/fwd balance" and debit in the other for the same sum with no overall effect on the sum due, probably again due to the change in managing agents or due to the reproduction on a single page of the two pages produced by the successive managing agents.

32. The FTT's finding that Mr Lacy had admitted the sums in issue up to September 2016 has no basis in the evidence and is set aside. I can see no reason why the payment of £957 in January 2017 in isolation should be taken as an admission contrary to the provisions of section 27A(5), and so the FTT's finding that that payments should be treated as an admission of the service charges it represents is also set aside.

33. Should I substitute the Tribunal's own decision in respect of the estoppel argument, on the basis of Mr Lacy's regular payments of the quarterly charges (not the ones in issue on these proceedings) from the grant of the lease up to the end of 2013? Mr Lacy argued that I should not do so. Estoppel requires clean hands, and the respondent did not have clean hands having tricked him into paying too much; moreover estoppel requires a detriment, and the respondent has benefited from its error by charging him far too much every quarter over the years.

34. I reject the “clean hands” argument; there is no evidence that the respondent deliberately deceived Mr Lacy, who as an original party to the lease was in as good a position as the respondent to know what it said. And the detriment point does not work in these circumstances. What is argued is an estoppel by convention, where the two parties to a deed have proceeded on a conventional, but untrue, reading of its provisions. No detriment is required for that type of estoppel, although in any event there is an obvious detriment: the respondent in relying upon the appellant’s acceptance of the payment mechanism that it operated has exposed itself to the risk of a decision that the sum was not payable after all.

35. Accordingly I substitute the Tribunal’s decision that Mr Lacy was estopped from protesting that the charges were not made in accordance with the provisions of the lease insofar as they exceeded £100 per quarter.

36. That of course does not prevent him from challenging the reasonableness of those charges, and so I turn to the rest of the grounds of appeal.

Ground 2: The work on the driveway and the retaining wall

37. The FTT having found against the appellant in respect of charges made before 2016 nevertheless made findings about those charges in case it was found to have been wrong about the first issue.

38. The first is a sum stated by the FTT to be £15,236.50 and described as having been demanded in 2014 or 2015.

39. What can be seen from the appellant’s service charge account is that he was charged £15,440.32 on 12 May 2014. It was not in dispute in the appeal that this was the sum in issue on this second point decided by the FTT, and that it was a charge made in respect of the work on the driveway and the retaining wall. The charge, if demanded on the date it was debited to the service charge account, falls outside the period said by the FTT to have been in issue in the present proceedings (see paragraph 8 above), but the FTT does not seem to have been aware of that, perhaps because of its uncertainty as to when the charge was demanded, and regarded this sum as being within the scope of the present proceedings because it was based on a point that had not been raised in the 2016 proceedings.

40. The appellant’s challenge to this sum was two-fold. The first point he made was that it was a charge for the work on the drive and the retaining wall that was the subject of the 2013 proceedings, and that it had been charged without the consultation process having been followed as required by the statute and by the FTT’s 2013 decision.

41. In order to set out that point properly we have to look in a little more detail at the requirements of the Service Charges (Consultation Requirements) (England) Regulations 1987. The procedure relevant to the works in question is prescribed by Part 2 of Schedule 4; paragraph 1 requires the landlord to give the leaseholders a “notice of intention” explaining what is to be done, with 30 days to respond, and paragraph 4 requires the landlord to give them a notice setting out the estimates obtained for the work, or some of

them, and again for the leaseholders to have 30 days to respond. In each case the landlord is to have regard to any observations made by the leaseholders. Finally paragraph 6 requires the landlord when it enters into a contract for the works to give the leaseholders a notice as follows:

> "“(1) Subject to sub-paragraph (2), where the landlord enters into a contract for the carrying out of qualifying works, he shall, within 21 days of entering into the contract, by notice in writing to each tenant and the recognised tenants' association (if any)–
> (a) state his reasons for awarding the contract or specify the place and hours at which a statement of those reasons may be inspected; and
> (b) there he received observations to which (in accordance with paragraph 5) he was required to have regard, summarise the observations and set out his response to them.
> (2) The requirements of sub-paragraph (1) do not apply where the person with whom the contract is made is a nominated person or submitted the lowest estimate.

42. It will be recalled that the FTT in 2013 did not give an unqualified dispensation. It truncated the time periods for the leaseholders’ responses to the landlord’s notices, allowing a 14 day period instead of 30 days. It said nothing about the final notice required by paragraph 6 of the regulations and there is no suggestion that that notice was not required.

43. The reason why Mr Lacy now says that the consultation process was not complied with is that he found out in September 2016 that the quotation that the respondent had accepted for the work was not one of the ones disclosed to the leaseholders. It was for a higher price than the estimates the leaseholders had seen. No notice was given in accordance with paragraph 6 above and so the leaseholders have had no explanation of the landlord’s choice. Accordingly the consultation requirements were not met and his liability is limited to £250.

44. The FTT does not appear to have Mr Lacys’s argument, and decided instead that the notice of intention given by the respondent was sufficient to cover the work done.

45. Mr Lacy’s second point was about section 21B of the 1985 Act; he argued that the demand had not been made within 18 months of the respondent having incurred the costs of the work. Instead the demand had been made before the costs were incurred. Therefore nothing was payable.

46. Mr Lacy has permission to appeal the FTT’s decision about the charge of £15,440.32 (as the amount now appears to be).

47. I begin by dismissing the appeal insofar as it relates to section 20B of the 1985 Act. The section does not prevent a charge being made before the cost is incurred.

48. As to the argument about consultation, which the FTT does not appear to have taken on board, there was no argument made about it in the respondent's statement of case in the FTT. Mr McHugh was without instructions on this point, despite its having been very clearly argued in Mr Lacy's grounds of appeal and skeleton argument, and was unable to assist the Tribunal. He could not point to anything in the bundle that might assist or that might indicate that the FTT was correct to dismiss this point.

49. Accordingly the appeal succeeds, and instead of the sum of £15,440.32 the appellant is liable to pay only £250 in accordance with section 20 of the 1985 Act and the regulations made thereunder.

Ground 3: the extra cost of work on the driveway and retaining wall arising from delay

50. The sum in issue here was £3,015.64 in relation to some further work on the driveway and retaining wall, charged to Mr Lacy's account on 21 October 2016. I do not need to go into the decision made by the FTT nor into the appeal because Mr McHugh said at the hearing that the respondent concedes that it is not due. The appeal therefore succeeds on this ground.

Ground 4: legal fees

51. Before the FTT the appellant argued that he had been charged £585 for legal fees, that the sum had then been refunded, and that then the sum had been re-applied to his account with the effect that a charge he was not supposed to pay had been made. The respondent argued in the FTT that no charge had been demanded or made. The FTT accepted that argument.

52. It is clear from the statement of Mr Lacy's service charge account that what he says is correct. Mr McHugh offered no argument on the point; he said that the respondent's invoicing is so confused that it is unable to say what it has and has not charged.

53. This ground is an appeal against a finding of fact made by the FTT; it succeeds, but I have no jurisdiction to order a refund or to order that the service charges account be amended. In any event it is not known whether this charge has been the subject of a service charges demand. I simply find as a fact that the appellant's service charge account was debited £585 in respect of legal fees in September 2016 in spite of the fact that the respondent told the FTT that no charge had been made.

Ground 5: cleaning costs.

54. The FTT recorded that the appellant challenged cleaning costs within the service charges, on the basis that the cleaners appeared to be charging for 7.5 hours' work but had done considerably less than that. The FTT considered the respondent's argument that more time was needed to do the cleaning than the appellant contended, and noted that no other lessees had complained about the cost. The FTT found that the charges were reasonable and would be payable if correct demands were issued. The FTT did not say how much had been demanded nor when it had been demanded, but I infer it was looking at charges

made after September 2016 since the FTT did not say that the appellant had admitted liability for these charges.

55. On appeal the appellant explained that he had been charged £229.39 for the 2015-16 service charge year, £229.29 for 2016/17 and £215.20 for 2017/18.

56. No service charge demands were produced and it is not possible to identify these charges in the service charges account; if I have understood correctly, invoices for cleaning have been produced by the respondent and Mr Lacy has worked out from them what he has been charged. He said that the FTT had not engaged with his case nor with the respondent's case. He had argued that it should only take an hour per month to clean the common parts, and that at the company's rates that would be £324 including VAT for the whole of the common parts (to be shared amongst the leaseholders, his share being 13.33%). The respondent had argued that the work would take four hours, which at the cleaners' rates would be £1,008 for the property for the year. In fact the cleaners had charged £1,724.74 in 2015/16, £1,723.99 in 2016/17, and £1,618.08 in 2017/18. Therefore on the respondent's own case the charge made by the cleaners, and passed on to the leaseholders, had not been reasonable.

57. Clearly the FTT did not engage with that argument.

58. Mr McHugh was without instructions on this point and was unable to assist the Tribunal.

59. Accordingly I have to find that the appeal succeeds and I substitute the Tribunal's own decision. I think it very unlikely that any meaningful cleaning of the common parts of a building of this size could be done in one hour a month and so I prefer the respondent's argument. I find that a reasonable charge to have been demanded of Mr Lacy in respect of cleaning for the three years in question was 13.33% of £1,008.

(6) Management fees

60. Before the FTT Mr Lacy argued that the costs of management of the building were not reasonable The FTT disagreed, and he does not have permission to appeal that finding.

61. However, he also said that the respondent had been given a 50% discount in 2015/16 by its managing agents, which had not been passed on to the leaseholders. The FTT agreed, and said that the applicant's service charge for that year should have been reduced by his share of the discount, being 13.33% of £277.58 which is £36.92. However, it had found that the management charges for 2015/16 were among those paid and thereby admitted by the appellant, so that the FTT regarded itself as having no jurisdiction as regards that charge.

62. The FTT's finding about jurisdiction has been set aside. The respondent made no observations about this point. I therefore substitute the decision that FTT would have made on this point had it understood that it had jurisdiction, namely that the amount charged to the appellant in respect of management charges for 2015/16 is to be reduced by £36.92.

Conclusion

63. All the grounds of appeal have succeeded. The appellant asks for orders under section 20C of the 1985 Act, and under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002, so as to prevent the respondent form recovering its costs of the appeal through the service charge or by way of administration charges. The respondent has 14 days from the date of this decision to send to the Tribunal and to the appellant any observations about that application.

Upper Tribunal Judge Elizabeth Cooke
19 September 2023

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.