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Case No: LC-2023-579

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

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

FTT REF: 2021/0281

2 April 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – procedure – admission or agreement, section 27A(4) of the Landlord and Tenant Act 1985 – consultation requirements – decision-making by tenant-owned landlord

BETWEEN:

THIRTY ONE CRESCENT GROVE LIMITED

Appellant

-and-

SVEN ATHERDEN

Respondents

**Flat 4,
31 Crescent Grove
London SW4 7AF**

**Upper Tribunal Judge Elizabeth Cooke
Determination on written representations**

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Introduction

1. This is an appeal from a decision of the First-tier Tribunal (“the FTT”) about liability to pay leasehold service charges, in the jurisdiction conferred by section 27A of the Landlord and Tenant Act 1985. The appellant, Thirty One Crescent Grove Limited, is the freeholder of 31 Crescent Grove, a converted Georgian house containing six residential flats. Its members are the leaseholders of the flats, who each hold a 999-year lease of their flat or flats and hold one share in the company for each flat they own. There are five individual owners, one of whom owns two flats and so has two shares. The respondent, Mr Sven Atherden, owns one flat on the second floor of the building and so holds one share in the freeholder company.
2. In May 2023 the FTT decided that the appellant could recover only £250 by way of service charge in respect of work done to redecorate the stairwell; and it decided that £600 spent by the respondent himself on work to the roof should be shared by all the leaseholders as part of the service charge.
3. From those two decision the landlord appeals, with permission from this Tribunal. Neither party has been legally represented; Mr David Bingham has prepared the appellant’s written representations.

Background: 31 Crescent Grove and its management

4. As I said above the flats are held on 999-year leases; leases were originally granted in 1977 for 125 years but in 2021 the members of the appellant resolved to grant themselves 999 year terms; Mr Atherden’s extended lease was granted on 20 June 2020. It incorporates the terms of the original lease, which I have not seen, but it is not in dispute that it contains covenants by the landlord to maintain the property and service charge provisions which require the tenant to reimburse the landlord’s expenditure.
5. Each lease requires the leaseholder to pay a slightly different proportion of the landlord’s expenditure; the total adds up to 100% and there is no dispute about that apportionment.
6. This is not a big property. The appellant is a limited company owned and managed by its shareholders of whom Mr Atherden is one. Leaseholders who are, together, their own landlord have to find a way to carry out day-to-day management of the building, which is probably not a huge daily chore but obviously involves keeping up with maintenance which at times is onerous. There is of course extensive legislation that provides decision-making procedures for limited companies, but this company like others in similar situations is run on a sensibly informal basis by its shareholders and it appears from the material I have seen that they take decisions by email.
7. Mr David Bingham is referred to in the FTT’s decision as the company secretary; the resolution to grant the extended lease, and the new lease itself, indicate that he or was at that stage a director of the appellant together with another leaseholder, Mr Nicholas Bingham. Mr David Bingham (“Mr Bingham” from now on) has taken on the task of co-ordinating maintenance; unlike the Mr Atherden who has let his flat, Mr Bingham lives at the property and has given a lot of his time and effort in its upkeep.
8. These proceedings have the feel of a dispute between Mr Atherden, who made the application to the FTT, and Mr Bingham; but that is not the case. Mr Bingham is an officer of the landlord company, but is himself no more and no less the landlord than is Mr Atherden

together with the other individual lessees. If the landlord suffers a shortfall in the recovery of service charges that is a problem for Mr Atherden as much as for all the other leaseholders.

The service charges in issue

9. This appeal is about the FTT's decision in relation to service charges in the year 1 April 2021 to 31 March 2022. One of the charges in issue is for work carried out in May 2021 to re-decorate the stairwell of the house at a cost of £3,880. It appears from the bundle that there was correspondence between the leaseholders before the work was commissioned about the need to carry out some decoration. I shall say more later about the significance of that email correspondence. After the work was done and service charges were demanded, Mr Atherden expressed concerns about the evidence provided of the landlord's expenditure.
10. In the summer of the same year there was email correspondence about a leaky gutter, which was causing problems for Mr Atherden in the first floor flat and for Mr Daniel Anderson, another leaseholder. There was some disagreement about what was to be done and, again, I shall say more about the email correspondence later. Mr Atherden commissioned and paid for some work. He then took the view that that cost, £600, should be shared by the leaseholders as part of the service charge; Mr Bingham disagreed on the basis that it was not a charge that the landlord, by its shareholders, had agreed to incur.

The legal background

11. The FTT has jurisdiction under section 27A of the Landlord and Tenant Act 1985 to decide whether service charges are payable and, if so, to whom, by whom, in what amount, when and how.
12. One reason why they might not be payable is failure to comply with the requirements of section 18 of the 1985 Act, that costs be reasonably incurred and works of a reasonable standard. Another reason might be failure to comply with section 20, which requires the landlord to pursue a formal consultation process before undertaking work that costs each tenant more than £250; if the landlord fails to do so then the service charge for those works is limited to £250 per tenant.
13. Section 27A(4) provides:

“(4) No application under subsection (1) or (3) may be made in respect of a matter which—
(a) has been agreed or admitted by the tenant...”
14. Section 27A(4) refers to the tenant's agreement of “a matter”; thus a tenant who agrees, for example, that he is liable to pay a service charge might still seek challenge the amount charged on the basis that the expenditure was not reasonably incurred or that consultation was not carried out.
15. Section 22 of the 1985 Act says this:

“(1) This section applies where a tenant, or the secretary of a recognised tenants' association, has obtained such a summary as is referred to in section

21(1) (summary of relevant costs), whether in pursuance of that section or otherwise.

(2) The tenant, or the secretary with the consent of the tenant, may within six months of obtaining the summary require the landlord in writing to afford him reasonable facilities—

(a) for inspecting the accounts, receipts and other documents supporting the summary, and

(b) for taking copies or extracts from them.”

16. Section 25 provides that failure to comply with section 22 is a criminal offence, punishable by a fine. Despite that, failure to comply with section 22 has no effect on whether service charges are payable.

The proceedings in the FTT

17. The application to the FTT was made in November 2022. Mr Atherden’s application said this:

“1. The paperwork supporting the stairwell redecoration expense of £3,880 has not been provided by the landlord. Despite numerous requests over a period of 18 months, a pre-arranged meeting and a formal Section 22 notice, the landlord has been unable to provide an invoice, payment receipt or clearly identifiable company bank statement entry to support this expense and this by the formal deadline of 31st October 2022.

2. The £600 roof repair expense is not listed in the service charge summary. This is a fully documented building expense which I was forced to instigate to protect my property and the building itself from continuous water infiltration. The landlord has unilaterally decided to exclude this expense from the service charge and refused to share it amongst leaseholders despite the repairs protecting five properties which reside beneath.

3. The service charge summary is not certified by a qualified accountant or a statutory auditor. The landlord also dispensed with the services of the accountant in 2021 and this without the consent of other leaseholders.

18. In the next box on the form Mr Atherden continued:

1. The paperwork relating to the stairwell redecoration expense provided by the landlord on the 6th November 2022 (a week after the notice period expired) is I believe not legally viable. The invoice is missing the company name and address, and the company logo is different from the one appearing on the original quotation. The description is lacking detail with no indication of the materials used despite a £180 premium added to the original quotation for the use of a higher quality paint which cannot be verified. The landlord previously admitted to me he had no paperwork to support the expense as he had paid in cash.

2. I arranged for the roofer to proceed with the repairs and I paid the £600 roof expense however I expected to have it reimbursed through the service charge. All leaseholders and the landlord were consulted before the roofer was instructed to proceed. On completion, the paperwork supporting the expense was provided to the landlord.

3. No further comments on issue 3.

19. There does not appear to have been any further statement of case in front of the FTT.
20. The FTT gave directions, without a hearing, on 15 December 2022 and stated the issues in the proceedings included:
- “The reasonableness and payability of service charges demanded 1st April 2021 – 31st March 2022 in particular
 - o The payability of £3,880 for stairwell redecoration expenses
 - o The omission of £600 roof repair expenses
 - o The failure to provide certification of service charge summary
 - o The dispensing with the services of an accountant
 - whether the landlord has complied with the consultation requirement under section 20 of the 1985 Act
 - whether the works are within the landlord’s obligations under the lease/ whether the cost of works are payable by the leaseholder under the lease
 - whether the costs are payable by reason of section 20B of the 1985
 - whether an order under section 20C of the 1985 Act and/or paragraph 5A of Schedule 11 to the 2002 Act should be made
21. That is curious because there was no mention of reasonableness of the charges in Mr Atherden’s application, and his application stated that he did not seek an order under section 20C of the 1985 Act. Importantly there was no mention of the consultation requirements under section 20C of the 1985 Act in the context of the work done on the stairwell (although Mr Atherden claimed to have consulted the other leaseholders before commissioning work on the roof himself).
22. The FTT gave the usual direction to the applicant to complete a Scott Schedule setting out which charge he disputed and why. The Schedule was completed and is very brief; as to the stairwell work Mr Atherden said that it was payable, was not reasonable in amount, was not correctly demanded, that he was not prepared to pay anything, and that the reason was that “re-decoration expense not payable”. There is no suggestion there that the work was not to a reasonable standard nor that the price was too high. As to the roof, it was said that the charge was payable, was reasonable in amount, and that the tenant was prepared to pay his proportion of it under the lease. Two further boxes said “Service charge summary certification not provided” and “Dispensed with the services of an accountant without the consent of the tenants”.
23. The FTT made its decision on the papers and without a hearing, on 15 May 2023.
24. As to the stairwell, the FTT said:
- “14. The amount claimed is £3,880. This equates to a sum in excess of £250 per flat which requires compliance with consultation in accordance with s.20 Landlord & Tenant Act 1985 ... The Directions raised s.20 as an issue, but no documentation in this regard was provided. The tribunal assumes therefore that no s.20 consultation was carried out. There is no evidence that an application for dispensation was made to remedy this defect.

15. It is not in dispute that works were carried out albeit the applicant complains about the quality of the finish but it is difficult to ascertain from the limited evidence whether the charges were reasonable. In any event, in the absence of any s.20 Consultation, the relevant contribution by the applicant is limited to £250.

25. As to the roof works the FTT said:

“22. There is ample correspondence in the bundle to suggest that the roof works had been discussed and there was support for such works to be commissioned by the applicant from one other leaseholder.

It is difficult to see how the charge of £600 was not reasonably required if the tenants in the applicant’s flat were experiencing water ingress, ... The Tribunal therefore finds that the charge of £600 is reasonable and payable and should have been included in the service charge account to be apportioned between the leaseholders.”

26. The appellant appeals those two determinations. There is no cross appeal from the FTT’s finding that the lease did not require the service charge accounts to be certified by an accountant.

The appeal: the works to the stairwell

27. The first ground of appeal relied upon section 27A(4), that Mr Atherden had agreed to pay his share of the £3,880 for the stairwell, by an email from Mr Bingham to the leaseholders on 10 May 2021 which said:

“DCP Decorating will start work on the staircase tomorrow morning, using my first-floor flat as a base.

The cost, assuming no extras and the discovery of nothing unexpected, will be £3,980 (no VAT applicable). At Sven’s request, Trade Diamond Paint will be used on the walls.”

to which Mr Atherden replied on the same day:

“Thank you David, I am really pleased to hear that the decorating is starting tomorrow.

In relation to the paint, you clarified Trade Diamond will be used on the walls, (resulting in an increased cost of £280) I presume you meant all surfaces including the woodwork as per my request?”

28. Both those emails were, as I understand it, in the bundle before the FTT. I am confident that that is the case because Mr Atherden was unhappy about the inclusion of some of the pages in the bundles on the basis that they were not before the FTT; I have therefore ignored those pages (42 – 44); he has not challenged the inclusion of this email chain on page 27-28 of the appeal bundle, repeated at 138-9.

29. So Mr Atherden was very pleased for the work to be done, and at his request the price was a little higher than it might have been because of the quality of the paint used.

30. Mr Atherden's email of the 10 May 2021 did not in terms state that he was content with the overall price. But two things are perfectly clear: one is that he was content for the work to go ahead. The other is that when he made an application to the FTT he did not raise a challenge on the basis of consultation under section 20 of the 1985 Act. And I take it from his enthusiasm for the work to go ahead that the absence of formal consultation did not trouble him. There had already been considerable email discussion as to what work was needed and indeed Mr Atherden himself had originally proposed a more extensive programme costing £4,800 (his email of 14 January 2021).
31. Why the FTT introduced section 20 as an issue I do not know. Obviously when the FTT hears litigants in person it has to assist them, and such litigants will not often know the formal statutory basis of their case. Moreover, the FTT has to determine a great volume of service charge disputes; pragmatic decisions have to be made and for example it is sensible to give directions without a hearing. It is one thing to suggest to the parties in standard directions that consultation might be an issue; but without any indication from Mr Atherden following the directions that consultation actually was an issue for him, it is difficult to see any justification for deciding the application on the papers on a basis that Mr Atherden had not raised.
32. He had not raised it because, to put it informally, the absence of formal consultation as prescribed by section 20 and the regulations thereunder was not a problem for him; to put it formally it was "a matter" that he had agreed to for the purposes of section 27A(4). The decision that only £250 was payable because of the absence of consultation was therefore made without jurisdiction and is set aside.
33. I have to consider whether to substitute the Tribunal's own decision on Mr Atherden's application for a determination as to whether the service charge was payable.
34. As the FTT rightly found, the formal shortcomings in the information provided by the landlord did not make any difference to whether the service charge was payable. And there was no challenge to reasonableness. Mr Atherden stated simply on the Scott Schedule that it was not reasonable, but he said nothing else and that is not sufficient to put reasonableness in issue.
35. I therefore substitute the Tribunal's decision that the service charge for Mr Atherden's share of the £3,880 spent on the stairwell was payable.

The appeal: the works to the roof

36. It will be apparent from what I have said so far that Mr Atherden paid £600 for some work to the roof and wants to be reimbursed through the service charge. The FTT agreed with him that that amount is payable as a service charge by all the leaseholders subject to his paying his share.
37. Permission to appeal has been granted on the ground:

"That the FTT made an error of law in requiring the cost of the roof works, incurred by Mr Atherden, to be treated as a service charge and apportioned between the leaseholders, because it was not a "cost incurred by or on behalf of the landlord" as required by section 18(2) of the Landlord and Tenant Act 1985."

38. I have not seen the service charge in the lease but I assume that it requires the leaseholder to reimburse the landlord's expenditure, rather than the expenditure of another leaseholder. The decision that one leaseholder's expenditure is to be reimbursed, in effect by the others is therefore surprising without further explanation.
39. On reviewing the email correspondence which was before the FTT and is now in the appeal bundle I find that in the summer of 2021 there was some discussion between the five leaseholders about what needed to be done to deal with a leaky gutter. Mr Atherden and Mr Anderson wanted the parapet gutter to be re-surfaced with Ultraflex, and Mr Atherden shared a quotation for £600 on 9 August 2021. On 31 August 2021 Mr Bingham emailed the leaseholders to say that he was not convinced that would be effective. He had been up on the roof and did not think there was water ingress from the parapet gutter. He thought that the culprit was a join in the gutter and suggested painting it over with Ultraflex or a similar polyurethane-based filler. He said:
- “If there is a majority view that we should go ahead with the £600 option, fine – it won't do any damage, but I think it is major overkill.”
40. It is worth pausing for a moment to consider who is talking to whom. The responsibility for repairs to the structure and exterior rests with the landlord. This is – to put it in formal terms – a discussion between the members of the landlord about how to fulfil its responsibility for repair and maintenance. No-one has a controlling shareholding. So any disagreement has to be resolved by majority, whether that is at a meeting convened formally under the Companies Acts, or an email conversation, or a chat in the garden.
41. Obviously, the landlord can decide to authorise one of the leaseholders to get work done, for which the landlord then takes responsibility. And it was open to the landlord – by a decision of its shareholders whether unanimous or not – to authorise Mr Atherden to commission and pay for the £600 job. Equally obviously, a unilateral decision to get work done without the company's agreement is not a decision of the landlord and does not fall to be reimbursed as part of the service charge.
42. What happened next was that Mr Bingham went up on the roof and “painted a coat of Evercyl (One Coat, Instant Waterproof Roof Covering) along the bottom surface of the whole of the parapet gutter”, as he reported to the other leaseholders in an email of 6 September. That cost £23.17. On 22 September Mr Bingham emailed the other leaseholders to say had been surprised to find a contractor on the roof applying Ultraflex to the area he had sealed with Evercyl. Mr Atherden, with the agreement of Mr Anderson, had engaged contractors to do the £600 job and paid for it.
43. There was then a dispute as to whether that £600 had been authorised. Mr Atherden claimed, in the email correspondence that followed, that since he and Mr Anderson supported his plan, Mr Bingham opposed it, and no-one else expressed support of either plan, he had a 2:1 majority. Mr Bingham's response was that he held two shares and therefore had two votes making it 2:2.
44. A limited company may take decisions by simple majority of individuals on a show of hands, or it may count votes on the basis of shareholdings. There is no need in the present case to go into the companies legislation to decide what was the right way to count the votes in this case because the crucial point is that the silence of the other two individual shareholders – Mr Nicholas Bingham and Ms Emma Bowman – did not give Mr Atherden

a majority. Two out of five individual shareholders, or two out six shares, supported the plan. Whether the others agreed, disagreed, or had no view, or deliberately decided not to express a view is not known. Email silence does not equate to a formal abstention.

45. This was not a formal meeting of the company, where a vote was called for and abstentions recorded. This was an email discussion; if Mr Atherden seeks to rely on such a discussion to demonstrate majority support for his plan he has to show that the two who did not express a view were actually abstaining. In the absence of enquiry to check their position, their silence does not convey any information and in the circumstances of the email conversation as I have described it was more likely to indicate absence of support for Mr Atherden's more expensive plan.
46. There was therefore no decision of the landlord in favour of spending the £600. The FTT said that there had been discussion, which is correct, and that there "was support" for Mr Atherden's plan – and there was, but only by one other shareholder. It was therefore not expenditure of the landlord and was not chargeable as a service charge. The FTT's decision was irrational and is set aside, and the Tribunal substitutes its own decision that the £600 cannot be reimbursed as part of the service charge.

Conclusion

47. The appeal succeeds. The respondent's proportion of the service charge for the stairwell redecoration is payable, and the £600 that he decided to incur for the roof works is not recoverable as part of the service charge.

Upper Tribunal Judge Elizabeth Cooke

2 April 2024

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.

