

12069



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case reference : LON/00AE/LSC/2016/0249

Property : Cairnfield Court, Cairnfeld Avenue,
London NW2 7PP ('the building')

Applicants : Soraya Safavi – Flat 4
Hazel Rankin – Flat 6
Susan Rankin – Flat 6
Sammanheh Safavi – Flat 7
Tahereh Haddad – Flat 8
Renta Garwolinska – Flat 9

Representative : Mr J Patel, Legal Comfort Solicitors

Respondent : Strandview Limited

Representative : Mr M Patel, Stenfield Solicitors

Type of application : Liability to pay service charges.
Preliminary hearing on jurisdiction

Tribunal member(s) : Miss A Seifert FCI Arb
Mr D Jagger MRICS

Date and venue of hearing : 5th October 2016 at 10 Alfred Place,
London WC1E 7LR

Date of decision : 24th November 2016

DECISION

Decision of the tribunal

The tribunal does not have jurisdiction to determine this application for the reasons stated below.

Background

1. The applicants applied for a determination of liability to pay and reasonableness of service charges under section 27A of the Landlord and Tenant Act 1985 ('the Act').
2. In the application form dated 22nd June 2016, it was stated that the service charge year in question was 2011. The service charges in issue were stated as: *'The Landlord failed to comply with the LVT decision - Refund of Service charges and Major Works - Landlord failed to Consult the Leaseholders under Section 20 for the specific contractor'*. Further details were in a document attached to the application form which referred amongst other matters to a decision of the tribunal under section 27A of the Act in case reference LON/00AR/LSC/0042.
3. Following a Case Management Conference ('CMC'), the tribunal issued directions on 14th July 2016. In the directions it was stated:

(1) The applicants seek a determination under section 27A of the Landlord and Tenant Act 1985 (the Act) as to whether service charges are payable in respect of the costs incurred for major works carried out in 2011.

(2) The respondent asserts that this tribunal does not have jurisdiction to consider the application as the service charges in dispute have been subject of a determination by the decision of HHJ Bailey sitting at the County Court at Central London under claim number 2CL20028 on 18 June 2015.

(3) An oral case management hearing took place on 14 July attended by Mr Steynor on behalf of the applicants and Mr Patel on behalf of the respondents and these directions (including hearing date) have been drawn up in consultation with those attending.

(4) Mr Patel explained that the applicants issued a claim in the County Court claiming damages alleging the respondent caused structural damage to the building as a result of the addition of 4 flats to the building. The respondent then counterclaimed for recovery of unpaid annual service charges including the applicants' contribution towards the cost of major works.

(5) Mr Patel stated that HHJ Bailey dismissed the applicant's claim. In respect of the major works, the respondent's claim was for £4,443 per flat. It was determined that each applicant was liable to pay £3,684.76. He submitted that in the circumstances, pursuant to section 27A(4) of the Act, this tribunal did not have jurisdiction to consider the application as the matter had been determined by the County Court.

(6) In the light of the above, the tribunal decided that the matter should be set out for a preliminary hearing in order to determine whether the tribunal has jurisdiction to consider the application. If the tribunal decides that it does have jurisdiction, then directions for the future conduct of the case will be issued at the conclusion of the preliminary hearing.

(7) The parties are referred to the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 for guidance on how the application will be dealt with.

4. Directions were then given leading to the hearing of the preliminary issue on jurisdiction including for the serving and filing of the respondent's statement of case, the applicant's statement of case, documents for the hearing, and for the hearing arrangements.
5. Section 27A of the Act contains provisions as to 'Liability to pay service charges: jurisdiction'. Section 27A(4) provides:

No application under subsection (1) or (3) may be made in respect of a matter which (c) has been the subject of determination by a court.

6. At the hearing on 5th October 2016 of the preliminary issue as to whether the tribunal has jurisdiction, the applicants were represented by Mr J Patel of Legal Comfort Solicitors.
7. At the CMC the applicants had been represented by Mr A Steynor, of Counsel. Mr Steynor provided written submissions dated 10th July 2016 on behalf of the applicants for the CMC. In the directions the applicants were required to provide a statement of case. At the hearing Mr J Patel told the tribunal that the applicants had not provided a statement of case, but relied on the written submissions for the CMC.
8. The respondent provided written submissions for the CMC, and also provided a statement of case dated 26th July 2016.
9. The bundle of documents for the hearing on 5th October 2016 contained documents listed in the index. Mr J Patel provided further documents at the hearing.

The tribunal's reasons for the decision

10. In the applicants' written submissions dated 10th July 2016 (adopted by Mr J Patel as the applicants' statement of case), it was stated that the application by the named applicant leaseholders for a determination of liability to pay and reasonableness of service charges in respect of major works carried out at Cairnfield Court in 2011 under section 27A of the Act.
11. It was stated that the issue in the application is whether Strandview Limited, the landlord and freehold owner of Cairnfield Court, had sufficiently complied with the requirements of section 20 of the Act in order to be entitled to recover the cost of major works under the service charge provisions of the leases of the flats.
12. The question of the major works had already been considered by the LVT in an application under section 27A of the Act (LON/00AE/LSC/2008/0042) in 2008. The decision in that case was set out as follows in that determination.
 1. *The decision of the Tribunal is that:*
 - 1.1 *The specification for Repair Works, a sample of which is at pp10-30 of the trial bundle is a reasonable specification and the scope of works required to be undertaken to Cairnfield Court.*
 - 1.2 *If the works are carried to an acceptable standard and broadly in line with the tender submitted by Tatham & Gallagher Limited at a cost of £78,400 plus VAT a reasonable cost of the project will be as follows..... £105,938.*
 - 1.3 *The persons by whom the service charges would be payable are the persons in whom the respective leases are vested at the time when a lawful demand for payment is made.*
 - 1.4 *The person to whom the service charges would be payable is the party in whom the freehold reversion (or other superior derivative interest) is vested at the time when the works are completed.*
 - 1.5 *The amount payable by each lessee would be the rateable or due proportion of the cost of works payable by virtue of the provisions of clause 2(6) of the respective leases of the lessees.*

- 1.6 *The amounts due from each lessee to the freeholder would be payable promptly following completion of the works and upon the service of a demand by the landlord delivered to each lessee compliant with s47 Landlord and Tenant Act 1987 and the Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007 and supported by evidence of the payment to the contractor of cost of the works and the payment of the professional fees, a copy of the certificate issued by the Contract Administrator to the effect that the works have been completed satisfactorily and to a reasonable standard and at a final cost in conformity with the contract, such certificate to show the total amount due to the contractor.*
- 1.7 *The manner in which the sums due would be payable is by cheque or such other appropriate manner of payment convenient to the parties.*

Permission to appeal the above decision was refused on 15th July 2008.

13. It was stated in the applicants' written submissions that the major works were carried out, by Garpoint Limited (not by Tatham and Gallagher Limited), and that the leaseholders were not informed of the change of contractor. It was stated that Mr James Feeney is the director and shareholder of Garpoint Limited and was also a director and shareholder of the landlord.
14. Various questions were raised in paragraph 4 of the applicant's written submissions in respect of whether the costs of the major works carried out were recoverable.
15. It was noted in the applicant's written submissions that a preliminary issue had been raised by the landlord in a letter from its solicitors dated 8th July 2016. This was that the Central London County Court (HH Judge Bailey in the TCC) had already given judgment in favour of the landlord against each of the applicants in respect of service charges which include costs of the section 20 works, and that therefore the matter is *res judicata* and that the current application before the tribunal is an abuse of process.
16. The applicants do not dispute that judgment has been given against each of them in respect of the costs of the major works in the County Court proceedings. However it was submitted that jurisdiction over the reasonableness and recovery of service charges is exclusive to the Property Chamber and therefore any decision or judgment on the issue made in the County Court was made without jurisdiction. The respondent submitted that this was incorrect.

17. In the County Court proceedings the landlord had counterclaimed for arrears of service charges. An extract from the judgment of HH Judge Bailey was set out in the applicants' written submissions.

'73. This leaves the defendant's counterclaims. These are counterclaims for arrears of service charge. The defendants have divided their claims into four sections (a) from June 2001 to June 2007; (b) from December 2010 to March 2014; (c) March 2014 to June 2014; and (d) the section 20 repairs which were the subject of the demand on 2nd December 2011. Perfectly sensibly, the defendants have abandoned the claims for the first period..... They maintain their claims under (b) and (c) and there being no dispute as to quantum of those beliefs, I award those as pleaded. Finally, for the section 20 repairs, the figures that are claimed need to be reduced in two aspects. First, VAT is claimed by the second defendant, in respect of whose work the claim is made, is not registered for VAT. Secondly, it is claimed that a 15 percent fee by way of supervision fee should not be paid to Martin Surveying Associates in addition to the second defendant's work. It is evident that no supervision fee was paid to Marin Surveying Associates..... the defendants very sensible do not pursue that 15% element.

74. Accordingly, the claim of £4,443 made in respect of each flat..... is reduced to £3,684.76. I will award damages in those sums. I will also award interest.....'

18. A copy of the Judgment of HH Judge Bailey dated 18th June 2015 was provided.
19. In the respondent's statement of case it was stated that in the current application the applicants sought a determination under section 27A of the Act as to whether the service charges demanded from them for major works carried out at Cairnfield Court in 2011 in the sum of £3,684.76 are payable by them and if so whether such charge is reasonable.
20. The respondent's statement of case set out the provisions of section 27A(1), (3) and (4).

27A(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to –

(a) The person by whom it is payable

(b) The person to whom it is payable

(c) The amount which is payable

(d) The date at or by which it is payable, and

(e) The manner in which it would be payable

27A(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it is, as to –

(a) The person by whom it is payable

(b) The person to whom it is payable

(c) The amount which is payable

(d) The date at or by which it is payable, and

(e) The manner in which it would be payable.

27A(4). No application under subsection (1) or (3) may be made in respect of a matter which – has been the subject of determination by a court.

21. It was submitted that the issues that the tribunal is asked to consider in the current application and make a determination on, have already been the subject of a determination by a court in proceedings in the County Court at Central London under claim number 2CL20028 between the applicants as claimants / Part 20 defendants and the respondent and one other as defendants / Part 20 claimant.
22. In the respondent's statement of case, it was noted that at paragraph 73 of his judgment HH Judge Bailey dealt with the issue of service charges and awarded the respondents service charges from December 2010 to March 2014 and March 2014 to June 2014. HH Judge Bailey went on to award the costs of the section 20 repairs and gave judgment for £3,684.76 plus interest.
23. It was submitted that in view of the above matters and by virtue of the provisions of section 27A(4)(c) of the Act the applicants are barred from making the application and the tribunal has no jurisdiction to entertain the application.
24. At the hearing of the preliminary issue Mr M Patel for the respondent submitted that there was concurrent jurisdiction in the County Court and the First-tier Tribunal to determine reasonableness of service charges. Although reasonableness had been referred to in the Reply and

Defence to Counterclaim in the County Court proceedings, there had been no application on behalf of the lessees to transfer the case to the LVT.

25. It was submitted in the respondent's written submissions that the question of jurisdiction of the tribunal had been considered by HH Judge Nigel Gerald in the matter of Mrs Gertrude *Cowling v Worcester Community Housing Limited [2015] UKUT 0496 (LC)*. A copy of that decision was provided. The headnote of the case read '*Landlord and Tenant – service charge – jurisdiction of the F-tT to hear application challenging the reasonableness of a service charge under sections 18, 19 and 27A (1) of the Landlord and Tenant Act 1985 when that had already been determined by the county court – applicability of section 27A(4)(c) of the Landlord and Tenant Act 1985.*'
26. In the course of that judgment reference was made to the decision of the LVT, as it then was, on 28th October 2014, that it had no jurisdiction to entertain the application to challenge the reasonableness of the service charge up until the date of the District Judge's decision in that case, because that had been determined by the County Court.
27. At paragraph 12 of the Upper Tribunal decision in *Cowling* it was stated that the material parts of the LVT decision were as follows:

'65. This tribunal cannot interfere in any way with decisions of the County Court. Either this Tribunal or a County Court can determine whether a service charge is payable. By giving judgment for the respondent for the sum of £511.51, which was not disturbed on appeal, a court has determined that all of the disputed service charges for the aerial point, up to 7 January 2014, are payable. The tribunal has to agree with the respondent that this is the end of the matter for charges up to 7 January 2014. The determination of the District Judge on 7 January 2014 resolved the payability of the arrears of service charge and subsection (4) of section 27A therefore applies and precludes this tribunal from having jurisdiction in relation to those arrears.'

'66. The District Judge suggested that the Applicant bring these proceedings, and that if this tribunal found the service charge to be unreasonable, the respondent would have to pay service charges paid back to the applicant. This does not seem to the tribunal to be a workable proposition. It would bring the court and the tribunal into conflict, as the respondent might reasonably ask why it has to repay something which a court has found to be payable, and this is surely the whole purpose behind section 28A(4)(c).'

'67. The tribunal cannot accept the neat suggestion of Mr Brown to the effect that contractual liability and reasonableness are separate and distinct issues so that the tribunal could find only the former has been determined in the County Court, and that the tribunal can still

continue the latter. The crucial focus of section 27A of the Act is on 'whether a service charge is payable' (subsection (1)). There is nothing in that section that suggests a divisibility of the word 'payable' into constituent parts. The County Court concluded that the service charge was payable, and whether or not that is a right or wrong decision, it was the decision in relation to the whole service charge in every aspect. The tribunal did not find that any of the LVT decision to which Mr Brown referred persuaded it to take a different view. Those decisions are not (as Mr Brown conceded) binding on the tribunal in any event.'

28. The tribunal in the current case were informed by Mr J Patel that an application had been made to the Court of Appeal for permission to appeal against the decision of HH Judge Bailey on 18th June 2015. He produced at the hearing before the tribunal a copy of an Appellant's Notice stamped received at the Civil Appeal Office on 25th August 2016 and filed on 8th September 2016. The tribunal was told that this application had yet to be determined.
29. As matters stand and at the time the preliminary hearing on jurisdiction was before this tribunal there is an extant judgment by the County Court against that the applicants in this tribunal pay to the respondents money found to be due in respect of the section 20 works in 2011. In respect of the section 20 repairs which were the subject of a demand on 2nd December 2011, HH Judge Bailey determined that the amount sum due in respect of each flat was £3,684.76 (plus interest). That decision stands.
30. As previously stated, section 27A of the Act contains provisions as to 'Liability to pay service charges: jurisdiction'. Section 27A(4) provides:

No application under subsection (1) or (3) may be made in respect of a matter which (c) has been the subject of determination by a court.
31. The tribunal considers that the decision of the county court constitutes a 'determination whether a service charge is payable and, if it is, as to (a) the date at or by which it is payable, (b) the person to whom it is payable, (c) the amount which is payable, (d) the date at or by which it is payable, and (e) the manner in which it is payable' under section 27A(1) from which it follows that the First tier Tribunal has no jurisdiction to entertain the application because it is 'in respect of a matter which (c) has been the subject of determination by a court', section 27A(4)(c).
32. The issue of the service charges payable by the applicants for the major works was determined by HH Judge Bailey in the County Court in claim number 2CL20028 in June 2015. The tribunal has no jurisdiction to consider the application for the reasons stated.

Name: A Seifert

Judge of the First-tier Tribunal (Property Chamber)

Date: 24th November 2016

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

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

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