Neutral Citation Number: [2024] UKUT 122 (LC)

Case No: LC-2023-819

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)
FTT REF: LON/00BK/LSC/2022/0313

14 May 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – ADMINISTRATION CHARGE – appeal from an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 – First-tier Tribunal's discretion

BETWEEN:

(1) KHALID QAYYUM RANA
(2) RUBANASHAFI RANA

Appellant

-and-

MAITLAND COURT LIMITED

Respondent

Flat 58,
Maitland Court,
Lancaster Terrace,
London, W2 3PE

Upper Tribunal Judge Elizabeth Cooke
Determination on written representations

Ms Diane Dolivoux for the appellants, on a direct access basis
Wagner & Co Solicitors for the respondent

The following cases are referred to in this decision:

Church Commissioners v Mrs Khadia Derdabi [2011] UKUT 380 (LC)
Johnsey Estates (1990) Limited v Secretary of State for the Environment [[2001] EWCA Civ 535
Tenants of Langford Court v Doren Limited [2001] 3 WLUK 935

1. Introduction

1. This is an appeal from an order of the First-tier Tribunal ("the FTT") under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002, made following its decision about whether service charges demanded of the appellants were payable in its jurisdiction under section 27A of the Landlord and Tenant Act 1985.

2. The appeal has been determined under the Tribunal's written representations procedure; representations have been drafted by Ms Diane Dolivoux of counsel for the appellants and by Wagner & Co Solicitors for the respondent.

The relevant law

3. Paragraph 5A of schedule 11 to the 2002 Act provides:

> "(1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs."

4. That provision was enacted in order to give the FTT, which in service charge disputes is a no costs jurisdiction, a discretion to make an order preventing a landlord from recovering litigation costs from its leaseholders where the terms of the lease allowed it to do so by way of administration charges; section 20C of the Landlord and Tenant Act 1985 has the same effect in relation to service charges.

5. That discretion will not always be exercised in the leaseholders' favour, even where they have been successful in challenging service charges. In making orders under paragraph 5A and under section 20C the FTT is overriding one party's contractual entitlement, and so the principles at work are different from those relevant to costs orders in other jurisdictions.

6. In in *Church Commissioners v Mrs Khadia Derdabi* [2011] UKUT 380 (LC) the Tribunal (HHJ Nigel Gerald) explained how applications under section 20C and paragraph 5A should be approached:

> "18. In very broad terms, the usual starting point will be to identify and consider what matter or matters are in issue, whether the tenant has succeeded on all or some only of them, whether the tenant has been successful in whole or in part (i.e. was the amount claimed in respect of each issue reduced by the whole amount sought by the tenant or only part of it), whether the whole or only part of the landlord's costs should be recoverable via the service charge, if only part what the appropriate percentage should be and finally whether there are any other factors or circumstances which should be taken into account.
>
> 19. Where the tenant is successful in whole or in part in respect of all or some of the matters in issue, it will usually follow that an order should be made under s20C preventing the landlord from recovering his costs of dealing with the matters on which the tenant has succeeded because it will follow that the landlord's claim will have been found to have been unreasonable to that extent, and it would be unjust if the tenant had to pay those costs *via* the service charge. By parity of reasoning, the landlord should not be prevented from

> recovering *via* the service charge his costs of dealing with the unsuccessful parts of the tenant's claim as that would usually (but not always) be unjust and an unwarranted infringement of his contractual rights. …
>
> 22. Where the landlord is to be prevented from recovering part only of his costs *via* the service charge, it should be expressed as a percentage of the costs recoverable. The tenant will still of course be able to challenge the reasonableness of the amount of the costs recoverable, but provided the amount is expressed as a percentage it should avoid the need for a detailed assessment or analysis of the costs associated with any particular issue.
>
> 23. In determining the percentage, it is not intended that the tribunal conduct some sort of "mini taxation" exercise. Rather, a robust, broad-brush approach should be adopted based upon the material before the tribunal…"

7. That does not mean that there is an entitlement or an expectation that an order under section 20C or paragraph 5A will be made, nor that such an order will always extinguish liability in proportion to a leaseholder's success in the substantive decision about service charges. The FTT has a discretion, and provided that it takes into account relevant circumstances and does not take into account irrelevant circumstances, and does not make an error of law nor arrive at a decision that no properly directed tribunal could have made, the Upper Tribunal will not interfere. In the Lands Tribunal (HHJ Michael Rich QC) said this about orders under section 20C:

> "28. In my judgement the only principle upon which the discretion should be exercised is to have regard to what is just and equitable in all the circumstances. The circumstances include the conduct and circumstances of all parties as well as the outcome of the proceedings in which they arise.
> 29. I think that it can be derived from the decision of the Court of Appeal in [*Iperion Investments Corporation v. Broadwalk House Residents Ltd* [1995] 2 EGLR 47] that where a Court has power to award costs, and exercises such power, it should also exercise its power under s.20C, in order to ensure that its decision on costs is not subverted by the effect of the service charge.
> 30.Where, as in the case of the LVT, there is no power to award costs, there is no automatic expectation of an Order under s.20C in favour of a successful tenant, although a landlord who has behaved improperly or unreasonably cannot normally expect to recover his costs of defending such conduct."

8. Those observations are equally applicable to orders made under paragraph 5A of Schedule 11 to the 2002 Act.

The proceedings leading to the appeal

9. The appellants are the leaseholders of one of 90 flats at Maitland Court, near Lancaster Gate station. The respondent is the leaseholder-owned management company, entitled to demand service charges under the lease. In October 2022 the respondent made an application to the FTT for a determination about service charges, which the FTT made on 10 April 2023. The amount of service charges in dispute was initially £5,560.24, but that sum was reduced by a direction of the FTT before the hearing to £4497.36 because the FTT had no jurisdiction in respect of the rest of the amount claimed.

10. The sum claimed was further reduced by concessions made by the respondent shortly before the hearing, so that at the hearing the amount in issue was £1,909. The FTT found that £1,063.97 was payable by the appellants, made up of £804.23 and £259.74. It declined to make an order under section 20C of the 1985 Act; its reasons were:

> "(i) that the applicant has been the more successful party as more than half the amount in contention has been found payable, (ii) the property is a self-managed block owned by the residents and (iii) even a successful party can have no expectation of a s.20C order: *Tenants of Langford Court v Doren Limited* [2001] 3 WLUK 935."

11. On 9 May 2023 the appellants applied to the FTT for permission to appeal that decision and also applied for an order under paragraph 5A; the application was drafted by Ms Diane Dolivoux of counsel and explained that the landlord's litigation costs appeared to be recoverable under the lease as administration charges rather than as service charges and that the appellants, being unrepresented, had not appreciated they needed to make an application under paragraph 5A.

12. The application challenged both the decision itself and the refusal to make the section 20C order. As to the decision itself, among the grounds of appeal was the argument that of the amount found to be due to the respondent (for reasons I do not need to go into) £804.23 was not due on the basis of the evidence provided to the FTT, so that only £259.74 was payable. As to the refusal to make a section 20C order the appellants said that (a) as a result of concessions made by the respondent shortly before the hearing it had in fact recovered only 25% of the £4,497.36 originally in issue in the proceedings (b) if the appeal in relation to the £804 was successful the respondent would have recovered only 5% of what it sought.

13. The respondent made written representations in response to that application. The FTT then reviewed its decision and on 31 August 2023 issued an amended decision in which it accepted that the £804.23 was not payable, for the reasons given by the appellants. It amended its decision in relation to section 20C, and made a separate order in relation to paragraph 5A. Its reasoning was identical in both, and it is the paragraph 5A decision that is now in issue (because the appellants take the view that litigation costs are recoverable under the lease by way of administration charge and not of service charge) so I set that out below. There is an amendment in it because the FTT later corrected a typographical error:

> "2. Taking into account the determinations in the decision of 10 April 2023 as amended on 31 August 2023, the Tribunal determines that an order be made that not more than half the applicant's administration charges in respect of litigation costs may be recovered ~~via the service charge~~ from the respondent.
>
> 3. The reasons are (i) neither party has been wholly successful. Although the amount found payable of £259.74 was small compared to the initial claim of £5,560.24 (reduced by Judge Pittaway to £4493.36) the applicant had been entitled to £259.74 since November 2022 and that amount was admitted in the appeal application (ii) there was no evidence of any offer by the respondent to settle this action (iii) the property is a self-managed block owned by the residents and (iv) even a successful party can have no expectation of a s. 20C order *Tenants of Langford Court v Doren Limited* [2001] 3WLUK 935, which by parity of reasoning the Tribunal considers applies equally to this application.

14. The sole ground of appeal, as to which the FTT itself gave permission to appeal, is that the FTT was wrong to make that order, and that either none, or only 5% of the respondents' costs of the FTT litigation should be recoverable from the appellants by way of administration charge.

The appeal decision

15. It is most unusual for a decision of this kind to be challenged on appeal, because of its discretionary nature. The respondent in its written representations urges me not to interfere with it for that reason. It cites *Johnsey Estates (1990) Limited v Secretary of State for the Environment* [[2001] EWCA Civ 535 where Chadwick LJ said this about appeals from an exercise of discretion:

> "21. … an appellate court should not interfere with the judge's exercise of discretion merely because it takes the view that it would have exercised that discretion differently.
> 22.. [That principle] requires an appellate court to exercise a degree of self restraint. It must recognise the advantage which the trial judge enjoys as a result of his 'feel' for the case which he has tried. Indeed, as it seems to me, it is not for an appellate court even to consider whether it would have exercised the discretion differently unless it has first reached the conclusion that the judge's exercise of his discretion is flawed. That is to say, that he has erred in principle, taken into account matters which should have been left out account, left out of account matters which should have been taken into account; or reached a conclusion which is so plainly wrong that it can be described as perverse."

16. That decision was made in a different context but those words are entirely relevant to this appeal.

17. Some of the arguments in the appellants' statement of case in the appeal are not relevant, for example that the respondent has failed over a long period to tell him whether his account is in credit or not. That does not appear to be part of the appellants' argument before the FTT. Moreover the appellants say that they had in fact overpaid their service charges in 2020; again this is not a fact that the FTT found, and it cannot be the basis for an appeal.

18. However, the FTT's decision is on its face a little unexpected. It initially refused a section 20C order even though the respondent had succeeded only in respect of half of what was in issue by the time of the hearing - ignoring the fact that by that time more than half of the original claim had been ruled inadmissible or had been conceded. In its decision of 31 August it made a paragraph 5A order in respect of half the respondent's costs, even though what the respondent had recovered had now been reduced by nearly 75% and was now a very small fraction of the original claim.

19. That does call for explanation. And on the face of it the reasons the FTT gave are all relevant ones. Looking both at the decision of 10 April 20 and the paragraph 5A order of 31 August 2023, what strikes me is that the most significant of those reasons in the mind of the panel seems to have been the first, essentially that the appellants knew that money was due and did not pay it. And I agree that if that was straightforwardly the case then the order made by the FTT would be unassailable; the conduct of parties is entirely relevant to

the decision even if on those facts and on those figures I might have made a different decision.

20. But the difficulty with the FTT's reasoning is that it ignored what happened just before the hearing, when substantial concessions were made by the respondent – reducing the amount in issue by half – on the basis of payments made by the appellants in the sum of £1,294.80 (paragraph 6.1 of the skeleton argument of counsel for the respondent in the FTT) and as a result of an error (paragraph 6.2 of the skeleton argument admitted that the sum of £1,338.09 in the application should have read £43.29).

21. So even if the appellants knew, or could have worked out, before the hearing that £259.74 was payable, their withholding of payment was understandable in light of the fact that sums were being demanded in the proceedings that they had already paid, and other sums were being demanded that were not in fact due. As they put it in their application for permission to appeal in the FTT, had they paid all that was being demanded at any time until those concessions were made they would have overpaid a considerable sum. And there is no finding that the appellants did know before the hearing that the £259.74 was payable, only that they did not contest that sum when applying for permission to appeal. Indeed, one of their complaints was that the respondent had not kept proper accounts and could not tell them whether their service charge account was in credit or debit; the concessions made before the hearing by the respondent are consistent with there having been some confusion on the respondent's part, which again makes it difficult to criticise the appellants for not paying the £259.74 in addition to what they had already paid.

22. So the FTT's refusal to order that the respondent should be prevented from recovering all, or 95 %, of its costs as an administration charge turns out to be flawed because it failed to take into account a relevant consideration, and a consideration that weighed heavily against the FTT's main reason for that refusal.

23. For that reason I set the decision aside.

24. I substitute the Tribunal's own decision, making an order that the appellants' liability to pay the respondent's litigation costs in the FTT by way of an administration charge be extinguished. I do so because that seems to me to be just and equitable in light of the fact that the appellants were by far the more successful party in the proceedings before the FTT.

Upper Tribunal Judge Elizabeth Cooke

14 May 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.