Neutral Citation Number: [2024] UKUT 158 (LC)

Case No: LC-2023-821

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)
FTT REF: LON/00AZ/LSC/2023/0082 AND 83

5 June 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – consultation – whether consultation took place – whether work done was within the scope of the consultation – the duty of the First-tier Tribunal to explain its reasoning – absence of jurisdiction to decide whether charges are payable when the tenant has agreed to them

BETWEEN:

AMBERCROWN LIMITED

Appellant

-and-

ALEXANDRA PERRETT (1)
LEA LAMBELL (2)

Respondents

Nutley Court,
127 Honor Oak Road,
Lewisham,
London,
SE23 3SW

Upper Tribunal Judge Elizabeth Cooke
4 June 2024

Introduction

1. This is an appeal against one point in a decision made by the First-tier Tribunal ("the FTT") about service charges demanded by the appellant landlord, Ambercrown Limited, from the respondents as leaseholders of flats at Nutley Court, Honor Oak Road, Lewisham. The FTT decided that the appellant had not carried out a consultation, as required by section 20 of the Landlord and Tenant Act 1985, about works on the roof of the property, and that therefore the appellant could recover only £250 in respect of those works from each respondent. The appellant appeals on the ground that it did consult, and that the FTT did not explain why its consultation was not adequate.

The legal and factual background, and the issue in the appeal

2. Nutley Court is a block of four flats and two maisonettes, all held on long leases. The appellant is the freeholder, and its six shareholders are the six leaseholders, including the respondents. They are the leaseholders of flats 1 and 2, respectively. The respondents were directors of the appellant from October 2016 to October 2022. The block was managed by Parkfords until April 2022 and thereafter by Ambercrown Management Limited ("AML"), a company incorporated in order to take over the management of the property after Parkfords' resignation.

3. The leases of the flats are in unsurprising form and make provision for the payment of service charges by the leaseholder to the landlord.

4. The FTT has jurisdiction under section 27A of the Landlord and Tenant Act 1985 to decide whether service charges are payable by leaseholders. Charges may not be payable because, for example, they are not recoverable under the terms of the lease, or the costs they represent were not reasonably incurred by the landlord and so fall foul of section 19 of the 1985 Act, or because of failure to comply with the consultation requirements imposed by section 20 of the Landlord and Tenant Act 1985.

5. Section 20 of the 1985 Act and the Service Charge (Consultation Requirements) (England) Regulations 2003 together prescribe a consultation procedure that landlords must follow if service charges for particular works are going to cost more than £250 for each tenant. The procedure comprises a number of stages: first, a notice of intention to carry out works must be served; then a notice stating the estimates that have been received; and finally, unless the contract is entered into with a person nominated by a tenant, or with the person who submitted the lowest tender, a notice of reasons for entering into the contract has to be served.

6. Failure to follow that procedure means that the landlord can recover only £250 from each tenant in respect of the works about which it should have consulted.

7. In February 2023 the appellant and the respondents both applied to the FTT for a determination about service charges for the years 2016, 2022 and 2023. In accordance with its usual practice the FTT directed the preparation of a Scott Schedule setting out the charges in dispute; the items in dispute were so numerous that the FTT agreed with the parties' representatives at the hearing on 29 August 2023 that it would hear them and make decisions in respect of selected items only. What was to happen about the items in respect of which the FTT made no decision was not stated. One of the items that was decided was liability for charges of £12,500 in total in respect of work done on the roof.

The decision in the FTT

8. What the FTT said about the roof works was this:

> "16. There were works carried out to the roof in 2022. The charges were separated into categories based on individual invoices: Chris Aly Roofing- £5350; replace skylight- £1500; Replace rotten fascia - £1500; replace rotten tiles- £1500; replace ridging tiles - £1500; replace cladding -£1500. No consultation was carried out before these works were carried out. In *Phillips and another v Francis and another* (Secretary of State for Communities and Local Government intervening) Lord Dyson MR set out the following:
>
> > *It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree.*
>
> 17. The Respondents sought to argue that the roof works eventually carried out were wholly different from that planned. This seems unlikely. None of the works are unusual in the context of addressing roof defects. All the works related to the roof. There was one quote, the final one on 27 April 2022, that included all of the works. All the works were done at the same time, namely between 25 April 2022 to 6 May 2022 and the works were connected to each other as they all related to the state of the roof. There should have been a consultation and there was not therefore the service charge recoverable for these works is limited to £250 per flat."

9. That was everything the FTT said about the roof works. There were no other findings of fact, and no background was set out.

10. The appellant has permission to appeal on the ground that that the FTT did not properly explain its decision that the applicant could recover only £250 from each tenant in respect of the roof works. It says that its case in the FTT was that a consultation was carried out, and it says in the appeal that the FTT should have addressed its evidence and explained why the consultation was not adequate.

The arguments in the appeal

11. At the appeal hearing there was no legal representation; Mr James Green, the leaseholder of flat 4 and company secretary of the appellant, represented the appellant, and the two respondents appeared in person. I am grateful to them all for their explanations of what happened, which was largely undisputed, and of their respective positions. The following

account of the facts reflects what the parties told me, and as far as possible I have indicated where they disagreed; I make no findings of fact.

12. It is not in dispute that the property has suffered from water ingress for many years, although the cause of the problem is not agreed. Mr Green explained that an initial notice under section 20 was sent by Packfords to all the leaseholders in September 2019, as the first step in the consultation process in respect of work designed to solve the problem by carrying out some work on the balconies to the upper flats. A notice of estimates was sent in January 2020, setting out three estimates obtained and explaining that the appellant proposed to engage the contractor who gave the lowest estimate, SJS Maintenance Limited. On 18 June 2021 Packfords wrote to the leaseholders to say that work was going to start.

13. It was obviously some time since the first consultation notice had been sent out. Whatever the reasons for the delay, in the meantime Packfords made provision for the cost of the works in the service charge budget; the 2020 budget included £6,668 for "works to eliminate water ingress", the subject of the consultation notices; the 2021 budget provided for £7,000 to cover work to the skylight which needed replacement (and which Mr Green said was covered by an earlier consultation procedure); the 2022 budget included £500 for a roof inspection. Mr Green and the respondents agreed that those sums - £14,668 in total - were paid by all the leaseholders including the respondents.

14. However, the appellant took legal advice and was advised that the balconies were demised to the individual leaseholders and therefore the appellant could not carry out that work.

15. Instead a plan was made, on the basis of a report prepared by LBB surveyors in February 2022, to redirect the guttering on the roof, so as to connect with a downpipe at the side of the building instead of one at the front of the building. LBB recommended that the work to the balconies should also go ahead. All the leaseholders agreed that the redirection of the downpipe should be done; an email from Ms Perrett to Packfords dated 11 February 2022 made it clear that what she (and I infer also Ms Lambell) wanted was for the whole package of work recommended by LBB to be completed, balconies as well as gutters – but at any rate, along with the rest of the leaseholders they agreed that the work to redirect the gutter should be done. They were directors of the appellant at the time. Packfords obtained a number of quotes.

16. In April 2022 Packfords resigned because of legal proceedings brought by the two respondents to this appeal. The appellant was not able to engage alternative managing agents and therefore AML was incorporated in order to take on the task of management, and subsequently received the service charge balance from Packfords.

17. Meanwhile Mr Green, along with Mr Stamp in flat 6, took the lead in getting the guttering work done. Of the quotes obtained by Packfords, CK Roofing offered the best deal and were asked to do the work on the gutter, and also to replace a skylight (which Mr Green said was the subject of a separate section 20 consultation) and to inspect the roof to see if anything else needed doing. Mr Green wrote to the leaseholders on 25 April 2022 explaining that on inspection CK Roofing had found ridge tiles needed replacement as well as wooden cladding and fascia, none of which had had any attention since the building was constructed in the 1970s, and setting out the cost. He explained that CK Roofing were prepared to do the work while their scaffolding was already up; if it had to be delayed then a fresh set of scaffolding would cost £3,000.

18. Miss Lambert replied on 27 April 2022, asking why money that was collected for the work planned in 2019 was being spent on this different plan. Mr Green responded at length on the same day explaining the necessity for the works, setting out the quotes obtained and explaining that CK Roofing's quote was the cheapest. He asked her to let him know if she wished to "stand in the way" of the appellant's going ahead, since if so the appellant would go to the FTT to seek a dispensation from consultation. No reply was received.

19. The leaseholders of flats 3, 5 and 6 indicated their agreement; I was not shown any response from Ms Perrett. The work then went ahead, and the appellant says it paid CK Roofing the £12,500 set out in the FTT's paragraph 16. The funds for the payment came from the service charges already collected by Packfords, whose budgets from 2020 to 2022 included more than enough to pay.

20. It was the appellant's case in the FTT that the consultation carried out by Packfords in 2019 and 2020 was the consultation for the work done. The consultation was about work to prevent water ingress, and that was the purpose of the redirection of the gutter, the renewal of the skylight and fascia, and everything else done on the roof.

21. The respondents' case, in the FTT and in the appeal, was that that consultation was for a different package of work and that the quotes obtained were not from the contractors who did the work in 2022, so that no consultation was carried out in respect of the work done in 2022.

22. The question raised by the appeal is therefore whether the 2019-2020 consultation can be regarded as a consultation in respect of the works actually carried out in 2022.

23. However in the course of the respondents' submissions during the hearing it became clear that that was not what they were really concerned about. In answer to questions from me the respondents both agreed that as members of the appellant company they had a responsibility to keep the property maintained; they accepted that they had paid the charges and did not seek to argue that the work should not have been done. Specifically they confirmed that they did not want to be reimbursed what they had paid for the roof works. Instead, what they were concerned about was the provision of information.

24. Ms Perrett took me to a bank statement and other documents in the bundle and explained that the respondents were unconvinced that CK Roofing had been paid £12,500, and that they were troubled by discrepancies between what was quoted and what was charged. Mr Green helpfully explained that the reason why the appellant's bank statement did not show all the payments to CK Roofing was that he and Mr Stamp had paid deposits to CK Roofing in April 2022, in order to get the work started before AML was incorporated; those sums were treated as a loan to the company and were repaid after its incorporation. As I said above, I make no findings of fact, but I hope that that information was helpful.

25. I suggested to the respondents that in light of

    a. Their agreement in February that the redirection of the gutter needed to go ahead;

b. Their failure to respond to Mr Green's letter on 27 April 2024 when he said that if they wished to stand in the way of the work he would seek a dispensation from consultation; and

c. Their confirmation that they had paid the charges and did not seek reimbursement

the respondents had agreed the charges in issue, being their share of the £12,500. In response both respondents nodded and Ms Perrett said "yes, absolutely".

26. That being the case there is no need for me to make any decision about consultation. The respondents were not entitled to challenge the charges for the roof works because the FTT did not have jurisdiction to make any decision about them as a result of section 27A(4) of the 1985 Act., which says:

> "(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…"

Conclusion

27. The FTT's decision about the £12,500 incurred in respect of roof works, at paragraphs 16 and 17 of its decision (set out above at paragraph 8) did not address the appellant landlord's case; it did not say why the consultation that the appellant said had taken place was not a consultation in respect of those works. The decision therefore has to be set aside and the appeal is allowed. In the light of the explanations given by both parties and of the respondents' admission at the hearing of the appeal, I substitute the Tribunal's own decision that there was no jurisdiction to decide whether those charges were payable because they were "agreed or admitted by the tenant".

28. The practical result of that is that the payments already made by the respondents do not have to be reimbursed.

Upper Tribunal Judge Elizabeth Cooke

5 June 20

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.