Neutral Citation Number: [2022] EWCA Civ 1375

Case No: CA-2022-000853

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)
Upper Tribunal Judge Elizabeth Cooke
[2022] UKUT 68 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 October 2022

Before :

LORD JUSTICE BEAN
LORD JUSTICE PHILLIPS
and
LORD JUSTICE NUGEE

- -

Between :

PHILIPP STAMPFER	**Applicant/ Respondent to Appeal**
- and –	
AVON GROUND RENTS LTD	**Respondent /Appellant**

- -
- -

Justin Bates (instructed by **Scott Cohen Solicitors Ltd**) for the **Appellant**
Rebecca Cattermole (instructed on a **direct access basis** (pro bono)) for the **Respondent**

Hearing date : 18 October 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on 24 October 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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Lord Justice Nugee:

Introduction

1. This second appeal is concerned with the question whether a landlord which is entitled to payment of a ground rent of £250 per year under a long lease of a residential flat can in addition charge the lessee £30 + VAT (£36) twice a year by way of "Ground Rent Collection Fee". On the terms of the lease in question that turns on whether the landlord, in serving a notice under s. 166 of the Commonhold and Leasehold Reform Act 2002 (**"the 2002 Act"**), which is a prerequisite to the ground rent becoming payable, is "attend[ing] to … the collection of rents"; or, more simply, whether the service of the s. 166 notice is part of the process of collecting the rent.

2. The First-tier Tribunal (**"the FTT"**) answered this question Yes. On appeal the Upper Tribunal (**"the UT"**) answered it No. The landlord, Avon Ground Rents Ltd, (**"Avon"**) now appeals to this Court, with permission granted by the UT itself.

3. Despite the well-argued submissions of Mr Justin Bates, who appeared for Avon, we notified the parties at the conclusion of his submissions that we did not need to hear from Ms Rebecca Cattermole, who appeared pro bono for Mr Stampfer, and that the appeal would be dismissed for reasons to be given later. I now give my reasons for agreeing to the dismissal.

Facts

4. The facts can be shortly stated.

5. By a lease dated 16 November 2010 (**"the Lease"**) Braye Ltd demised a three-bedroom residential flat at Flat 12, 6 Trinity Mews, London E1 (**"the Flat"**) to Philipp Stampfer and Alexander Stampfer for a term of 125 years from 1 January 2010 to 31 December 2134 inclusive. As is common in long residential leases, the Lease was granted at a substantial premium and reserved a comparatively small rent. Such rents are usually called "ground rents" although this is not in fact a term found in the Lease. The initial rent, payable for the first 25 years, was £250 per year, payable by equal half yearly payments in advance on 1 January and 1 July in every year. Thereafter the Lease provided for the rent to double every 25 years. The Lease also contained in the usual way provisions for the payment of a service charge. I will have to look at these in more detail below.

6. The Flat is one of a number in a block of flats referred to in the Lease as "the Building" but known as Flats 1 to 14, Trinity Mews, London E1. There is another block in front of it, referred to in the Lease as "the Front Block" but known as 7 to 19 Redmans Road, London E1.

7. Avon acquired the freehold to both blocks in January 2017. Initially its invoices for ground rent simply claimed from the leaseholder of each flat £125 every 6 months. From 1 July 2019 however it added a charge of £30 + VAT (ie £36) to its half-yearly invoices, by way of "Ground Rent Collection Fee". I will call it the **"ground rent fee"** to avoid prejudging the issue. The result was that each leaseholder was charged £161 every 6 months instead of £125. It may be noted that although small in monetary terms this represents a significant extra charge as a proportion of the rent, £36 being a 28.8% uplift on the ground rent.

8. Some of the leaseholders refused to pay the ground rent fee; some paid under protest. Mr Stampfer was one of those who declined to pay. He queried the legal basis for the charge. The response was given on 1 July 2019 in an e-mail from Avon Estates (London) Ltd (**"Avon Estates"**) (which acted as Avon's agent). This was that the £30 + VAT "surcharge" was a Ground Rent collection fee that they had introduced

that year. Among other things Avon Estates said:

> "There is work involved in collection of Ground rents.
>
> The legal demand must be in a prescribed form and if error is made it can be fatal to collecting and cause the Freeholder damages. Each demand and notice must be checked and the administrative work is reflected in the charge that is charged to the landlord and passed on to the leaseholders in accordance with lease terms."

The reference to the legal demand having to be in a prescribed form is to the provisions of s. 166 of the 2002 Act which I set out below. The statement that Avon was passing on to the leaseholders a charge that it had itself been charged appears to have been incorrect: it is not now suggested that Avon engaged any independent agent to send the s. 166 notices or was in fact charged anything.

9. Mr Stampfer continued to dispute liability. The dispute remained unresolved and on 10 July 2020 Mr Stampfer and ten other leaseholders in the two blocks applied to the FTT (Property Chamber) for determination of liability to pay the first two examples of the ground rent fee, namely the £36 charged on 1 July 2019 and a second £36 charged on 1 January 2020.

The service charge provisions in the Lease

10. The relevant service charge provisions in the Lease are as follows:

(1) By clause 2.2 there was reserved as further rent the Service Charge payable in accordance with Schedule 7.

(2) By Schedule 7 paragraph 2.5 the Tenant is obliged to pay the Service Charge Percentage of the Landlord's Expenses.

(3) Capitalised terms are defined in clause 1.1. This includes in clause 1.1.20 a definition of Service Charge Percentage under which the percentage varies depending on whether the relevant expenses are Estate Expenses (that is Landlord's Expenses on providing Services common to both blocks), where the percentage is 4.54%, or Block Expenses (all other Landlord's Expenses), where the percentage is 9.76%.

(4) "Landlord's Expenses" is defined in clause 1.1.10. It includes the following:

> "the costs and expenditure – including all charges, commissions, premiums, fees and interest – paid or incurred, or **deemed in accordance with the provisions of Schedule 7 paragraph 7-2.3 to be paid or incurred**, by the Landlord in respect of or incidental to all or any of the Services or otherwise required to be taken into account for the purpose of calculating the Service Charge…"

(emphasis added).

(5) Schedule 7 paragraph 2.3 is headed "Deemed Landlord's Expenses". Paragraph 7-2.3.1, which allows the Landlord to allocate a fair and reasonable part of recurring costs or anticipated expenditure to a particular year, is not relevant to the present dispute. Paragraph 7-2.3.2 provides as follows:

"If the Landlord or a person connected with the Landlord or employed by the Landlord attends (where permitted by law) to:

7-2.3.2.1 the supervision and management of the provision of services for the Building

7-2.3.2.2 the preparation of statements or certificates of the Landlord's expenses

7-2.3.2.3 the auditing of the Landlord's Expenses

7-2.3.2.4 **the collection of rents from the Building**

then an expense is to be deemed to be paid or a cost incurred by the Landlord, being a reasonable fee not exceeding that which independent agents might properly have charged for the same work."

(emphasis added).

(6) Schedule 7 also contains machinery of a familiar type for calculation and payment of the service charges. This includes provision for the Tenant to make payments on account of the likely amount of service charge (by equal half-yearly instalments in advance), and for the Landlord to provide a final account after the end of the financial year with provisions for adjustment in the case of over- or under-payment.

11. It can be seen from these provisions that what they envisaged is that the Landlord's Expenses, including Deemed Landlord's Expenses, would be divided into Estate Expenses and Block Expenses; each would be totalled; and the lessee would be charged the appropriate percentage of each by way of Service Charge, payable by half-yearly instalments on account, with any necessary adjustments after the end of the financial year. But in fact this machinery was not carried out, and Avon has just charged each lessee a flat fee. Mr Bates accepted that the consequences, if any, of this failure to operate the contractual machinery in the Lease had not been raised as an issue at any stage of the proceedings, and are not before us on this appeal. All that we are concerned with is the question whether in principle Avon can charge a fee for serving a s. 166 notice; as appears from the parts of the provisions I have emphasised above that depends on whether Avon can include in its Landlord's Expenses a deemed amount for "attend[ing] to the collection of rents from the Building".

s. 166 of the Commonhold and Leasehold Reform Act 2002

12. s. 166(1) of the 2002 Act provides as follows:

"(1) A tenant under a long lease of a dwelling is not liable to make a payment of rent under the lease unless the landlord has given him a notice relating to the payment; and the date on which he is liable to make the payment is that specified in the notice."

13. The notice must specify a date for payment (s. 166(2)). This cannot be less than 30 days nor more than 60 days after the date of the notice, and cannot be earlier than the date specified in the lease (s. 166(3)). The notice must also contain prescribed information (s. 166(2)) and be in the prescribed form (s. 166(5)(a)).

14. The relevant regulations are the Landlord and Tenant (Notice of Rent) (England) Regulations 2004, SI 2004/3096, which came into force on 28 February 2005. Reg

2(1) specifies certain information that the notice must contain such as the name of the leaseholder, the period to which the notice relates, and the like; reg 2(2) provides that the notice shall be in the form set out in the schedule to the regulations.

15. The effect of s. 166 was summarised by Lewison LJ in *Gibbs v Lakeside Developments Ltd* [2018] EWCA Civ 2874 at [29] as follows:

> "Although at common law rent becomes payable whether or not the landlord demands it, that is not so in the case of a tenant under a long lease of a dwelling. Section 166 of the Commonhold and Leasehold Reform Act 2002 provides that such a tenant
>
> > "… is not liable to make a payment of rent under the lease unless the landlord has given him a notice relating to the payment; and the date on which he is liable to make the payment is that specified in the notice."
>
> Thus, second, the landlord must give the lessee such a notice; and it must be in the prescribed form."

16. The appeal before us proceeded on the assumption that Avon duly gave s. 166 notices to Mr Stampfer and the other leaseholders. We were shown an example of a later s. 166 notice given to Mr Stampfer which required payment of £125 ground rent on 5 January 2021, but, rather curiously, the particular s. 166 notices in issue (those demanding payment in July 2019 and January 2020) were not before us. But it was not suggested that they had not been given.

The decision of the FTT

17. Mr Stampfer and the other applicants referred two questions to the FTT. The second concerned a fee charged by Avon for the registration of subleases, but the FTT held that it had no jurisdiction in respect of that question and we are not concerned with it. The first concerned the £36 ground rent fees. The basis of the application was that the ground rent fee was an "administration charge" regulated by the 2002 Act: by schedule 11 paragraph 2 of the 2002 Act a variable administration charge is payable only to the extent that it is reasonable, and by paragraph 5 the FTT has a statutory jurisdiction to determine whether an administration charge is payable, and, if it is, the amount payable. It was common ground that the ground rent fee was an administration charge for these purposes.

18. The applicants took two points on the ground rent fee. The first was that it was not covered by the terms of the Lease at all; the second was that if it was, the charge was unreasonable. The FTT (Judge Simon Brilliant and Mr A Lewicki FRICS) gave their decision on 26 February 2021. They decided against the applicants on both points. On the first point, they said that serving the s. 166 notice and the work associated with it was part and parcel of collecting the rent. On the second point, they said that from their own knowledge and experience £30 + VAT was a reasonable amount to charge.

The decision of the UT

19. Mr Stampfer applied for permission to appeal to the UT (Lands Chamber). This was refused by the FTT, but granted by the UT (Judge Elizabeth Cooke) on one ground only. This was that the right to make a charge for the collection of rent does not entitle the landlord to make a charge for issuing demands for ground rent. She refused permission on two other grounds, one of which was procedural, and the other a challenge to the FTT's conclusion that £30 for each demand was reasonable.

20. The appeal therefore proceeded solely on the question of construction. It was heard by Judge Cooke on 2 March 2022, and she gave her decision on 10 March 2022 at [2022] UKUT 68 (LC). She allowed the appeal.

21. Her reasoning was as follows. She first dealt with a question as to what the ground rent fee was for, there being a dispute as to what the FTT had decided on this point. Avon argued that the FTT had decided it was a fee for a package of work, but Judge Cooke said that the fee was explained to the FTT as a charge for giving the s. 166 notice as indicated in the e-mail of 1 July 2019. She therefore took the view that the £30 + VAT was, exactly as the landlord had said in correspondence, a charge for giving the s. 166 notice (at [35]).

22. She then dealt with the question of construction as follows (at [39]):

> "There is no mention in paragraph 7-2.3.2.4 of the giving of notices. Section 166 notices were introduced in order to protect tenants from forfeiture for trivial amounts; it is open to the parties to a lease to make provision for a tenant to pay for such a notice, but that provision would need either to be express (as must provision for the recovery of costs associated with a section 146 notice), or at the very least to take the form of a reference to ancillary or incidental costs. There is no such reference, and the omission is conspicuous because of the inclusion of provision for incidental costs in paragraph 5-10. Rent cannot be collected until it is due, and giving a s.166 notice in order to make it due is not the same as collecting it."

Avon's appeal

23. Avon now appeals to this Court. Judge Cooke herself granted permission for a second appeal on the question of construction. Avon also sought permission to challenge her conclusion as to what the ground rent fee was for, but permission on that ground was refused both by Judge Cooke, and again in this Court by Lewison LJ.

24. The result is that there is only one question before us. On the basis that Avon cannot now challenge the fact that the ground rent fee is for preparation and service of the s. 166 notice, and that Mr Stampfer cannot now challenge the reasonableness of the charge if it can be made at all, the only question before us is whether it falls within paragraph 7-2.3.2.4 of the Lease as a charge for attending to the collection of rents from the Building. Avon's sole Ground of Appeal is that the UT was wrong on this point.

25. Mr Bates' argument was a very simple one. It was that the landlord needed to serve a s. 166 notice in order to make the ground rent due. It was therefore all part and parcel of the process of collecting the rent. It was artificial to separate out the service of the s. 166 notice from the process of collection. This was the argument that had been accepted by the FTT.

26. I am not persuaded by this argument. As Judge Cooke said in the UT, rent cannot be collected until it is due. Mr Bates himself said that the effect of s. 166 of the 2002 Act is that rent cannot be collected unless and until the s. 166 notice is served. In other words, the covenant in the Lease to pay rent (and the reservation of rent) imposes only a potential or inchoate liability on the leaseholder, which does not become an actual liability until the s. 166 notice is served (or given, to use the language of the Act). The effect of giving the notice is therefore to make payment due. It may be noted that rent becomes due on the date specified in the notice, which cannot be earlier than the date specified in the lease but can be later: thus in the sample s. 166 notice before us the date specified in the notice was 5 January 2021 and

the effect was that rent became due on that date not on the date of 1 January 2021 specified in the Lease. Indeed if no s. 166 notice is served rent never becomes due.

27. Mr Bates was inclined to accept that there was a conceptual difference between making the rent due and collecting it, but said they were both part of the same process of getting the rent in. But it seems to me that although they are both part of the means by which the landlord gets its rents, they are in principle different stages. Giving the s. 166 notice turns the lessee's potential liability to pay rent into an actual liability. That is a necessary prerequisite to the collection of rent, as without it the rent does not become due and cannot be collected at all, but it is not itself the collection of rent. It is a logically prior stage. This is what Judge Cooke said, and I agree with her.

28. The point is a short one that is not capable of much elaboration. Phillips LJ put it well in argument when he said that there was a distinction between liability and collection: you cannot collect rent unless there is liability but you can in principle have a liability for rent without it being collected. Mr Bates accepted that but said that collecting the rent included the act of giving the s. 166 notice which gives rise to the collectability of rent. That however to my mind in fact illustrates the point: giving the s. 166 notice does make the rent "collectable", but that is not the same as collecting it. If the process of collection included any step that was a necessary prerequisite to the rent being collected, it would, as Phillips LJ pointed out, logically include the granting of the lease itself as without that there would be no rent due. But as Mr Bates himself said the grant of the lease cannot realistically be regarded as part of the process of collecting the rent.

29. A few other points were touched on in argument, but none of them affects this analysis. One is perhaps worth referring to. It is noticeable that the Lease does contain (in paragraph 5-10.2) a Tenant's covenant in familiar terms obliging the Tenant to pay to the Landlord the costs incurred by the Landlord "in relation to or incidental to … the contemplation, preparation and service of" a notice under s. 146 of the Law of Property Act 1925. As Bean LJ said in argument, the Lease does not contain any similar express reference, as it could have done, to service of a s. 166 notice, despite the fact that the Lease was granted in 2010, several years after the 2002 Act came into force in 2005.

30. Mr Bates' answer was that those who drafted leases tended to have a very conservative style of drafting in which they relied heavily on precedents. That does not seem to me to quite meet the point. It is one thing for those drafting leases to be wary of re-writing traditional language in case some subtlety was thereby inadvertently lost, but that does not really explain why the drafter should not add an express reference to a s. 166 notice. I think there is some force in the point that Parliament, which enacted s. 166 to protect lessees from having their leases forfeited for trivial amounts (as Judge Cooke said), could scarcely have been expecting thereby routinely to impose extra costs on lessees; and that if landlords wanted to seek to pass those costs on, they should have included express provision to that effect. We were told that the point is unlikely to arise with new leases because ground rents for new long residential leases have in effect been abolished by the Leasehold Reform (Ground Rent) Act 2022.

31. That is sufficient to explain why I agreed that the appeal should be dismissed.

Postscript on reasonableness

32. I should just like to add that because of the limited scope of the appeal we heard no argument at all as to whether the charge of £30 + VAT every 6 months would have been a reasonable fee for preparing and serving a s. 166 notice if it had been in

principle chargeable. I think that may be open to question and would not want to be regarded as endorsing it without having heard argument specifically directed at the point.

33. As referred to above the Lease here permits the Landlord to include the expenses of collecting rents from the Building, so it seems to me that the question would have been what a reasonable deemed cost would be for the whole run of s. 166 notices, not for each individually. The s. 166 notices would all be in the same form apart from the names and addresses of the individual lessees and one would have thought that a professional landlord, as Avon obviously is, would already have the requisite details of each lessee in computerised form and that to generate a batch of s. 166 notices every 6 months would not be very difficult or time-consuming, involving little more than the press of a button or two.

34. Mr Bates accepted that under paragraph 7-2.3 the deemed costs that could be charged were subject to two separate limitations for the protection of lessees, namely (i) that they be reasonable and (ii) that they not exceed what independent agents might properly have charged (and in any event administration charges are limited to what is reasonable by statute). That means that even if an independent agent would in fact have charged £30 + VAT per notice, it does not follow that it would have been reasonable for Avon to charge the same amount. That would I think depend on evidence as to what work by Avon was actually involved.

35. I of course do not mean to decide any of these points which do not in fact arise, but add them in case they are of any assistance in other cases where the relevant clause does on its true construction cover the preparation and service of s. 166 notices.

Lord Justice Phillips:

36. I agree.

Lord Justice Bean:

37. I also agree.