UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2016] UKUT 421 (LC)
UTLC Case Number: LRX/121/2015

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – failure to comply with contractual method of calculation – no objection by tenant – whether service charge payable – estoppel by convention – whether first-tier tribunal entitled to raise issue not previously relied on by tenant – procedural fairness – appeal allowed

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

BETWEEN:

ADMIRALTY PARK MANAGEMENT COMPANY LIMITED

Appellant

and

MR OLUFEMI OJO

Respondent

Re: Flat 125 Frobisher Road,
Erith,
London DA8 2PU

Martin Rodger QC, Deputy President

The Royal Courts of Justice

8 September 2016

Carl Fain, instructed by Brethertons LLP, solicitors, for the appellant
There was no attendance by the respondent

The following cases are referred to in this decision:

Regent Management Limited v Jones [2012] UKUT 369 (LC)

Birmingham City Council v Keddie [2012] UKUT 323 (LC)

Republic of India v India Steam Ship Company Limited [1998] AC 878

Introduction

1. This is an appeal against a decision of the First-tier Tribunal (Property Chamber) (FTT) given on 25 June 2015 by which it decided that Mr Ojo, the leaseholder of flat 125 Frobisher Road, Erith was not liable to pay service charges for the years 2010 to 2014 for services provided by the appellant, because the service charges had not been calculated in accordance with the method prescribed by his lease. That objection was not taken by Mr Ojo before the hearing of the application, but was raised for the first time by the FTT at the start of the hearing. The FTT refused to permit the appellant an adjournment to enable it to respond to the new point or to argue that as a result of long usage its method of calculating the service charge was not one to which any objection could now be taken.

2. Permission to appeal was granted by this Tribunal to enable the appellant to argue that there had been a serious procedural irregularity in the conduct of the proceedings.

3. At the hearing of the appeal the appellant was represented by Mr Carl Fain of counsel. Mr Ojo took no part in the proceedings after permission to appeal was granted.

The facts

4. 125 Frobisher Road is a two bedroom flat on the first floor of a purpose built block of 16 flats. The block is part of Admiralty Park, an estate of 12 self-contained blocks comprising 104 flats in total. Three of the blocks are owned and managed by London & Quadrant Housing Association, which I assume lets the individual flats on periodic tenancies, while the remaining nine blocks are let on long leases and managed by the appellant, Admiralty Park Management Company Limited.

5. Mr Ojo became the leaseholder of 125 Frobisher Road in June 2004. His lease was granted to a predecessor on 24 September 1993 and is for a term of 99 years. In addition to the landlord (Freehold Managers Ltd) and tenant the parties to the lease include the appellant, whose function is to provide certain services for which it is entitled to be reimbursed by the tenant through a service charge, referred to in the lease as the "Management Charge".

6. This dispute concerns the appellant's entitlement to recoup £5,228.88 in service charges for the years 2010 to 2014. In 2014 the appellant commenced proceedings in the county court to which Mr Ojo seems to have been slow to respond. As a condition of being allowed to continue to defend the appellant's claim Mr Ojo was required by the county court to make an application to the FTT for it to determine any issues he wished to raise concerning the disputed service charges. Mr Ojo duly complied with that requirement by applying to the FTT for a determination under section 27A, Landlord and Tenant Act 1985 of his liability to pay service charges for

each of the disputed years. Directions were given by the FTT which were intended to define the issues, and Mr Ojo was required to identify the grounds on which he challenged his liability to pay the sums claimed in a schedule to which the appellant responded.

7. The lease includes a covenant by the tenant to pay to the appellant on 1 January each year in the manner identified in the fourth schedule. That schedule prescribes a conventional service charge scheme requiring the tenant first to pay on account of the Management Charge a sum specified by the appellant and then, on demand, to pay the difference between the sum paid on account and the Management Charge certified by a certificate given by the appellant under paragraph 4 of the fourth schedule. The sums required to be certified are the total "Management Expenditure" incurred by the appellant and the Management Charge payable by Mr Ojo, which is a proportion of that total.

8. The Management Expenditure referred to in the fourth schedule is defined in clause 1 of the lease as all of the costs and expenses incurred in a relevant year by the appellant in relation to its obligation specified in the fifth schedule. The fifth schedule is divided into two parts. Part 1 comprises covenants by the appellant in relation to the building of which 125 Frobisher Road is part (referred to in the lease as "the Building"). Part 2 comprises covenants in relation to the "Management Areas"; these comprise the parking areas, forecourts, access ways and communal grounds of Admiralty Park, all of which are shown on a plan attached to the lease. The point of significance to note at this stage is that the Management Expenditure described in the fifth schedule does not include expenditure by the appellant on buildings on the estate other than Mr Ojo's own Building.

9. The Management Charge which Mr Ojo is required to pay is also defined in clause 1. His annual contribution comprises two elements. The first is a proportion of the Management Expenditure specified in Part 1 of the fifth schedule (i.e. expenditure on the maintenance and insurance of the Building). The second element is a proportion of the expenditure in respect of the obligations in Part 2 of the fifth schedule (i.e. expenditure in relation to the Management Areas of the estate). In each case the relevant proportion is to be certified annually by the accountants or auditors of the appellant or its managing agents. The intention therefore seems to have been that each tenant in the Building should contribute a proportion of the expenses of maintaining their own Building, together with a different proportion of the expenses of maintaining the communal areas of the estate.

10. Each of the flats in the Building is leased on similar terms, as are the flats in the other buildings on the estate managed by the appellant.

11. In a witness statement prepared for the appeal by the appellant's managing agent, Maxine Fothergill (whose firm assumed responsibility for the management of Admiralty Park in May 2009), the method of calculating the Management Charge

used by the appellant up to this year has differed from the scheme described in the lease.

12. Rather than charging each tenant in the Building a proportion of the costs of maintaining and administering their own block, and only their own block, as the definition of the Management Charge requires, the managing agents have charged a proportion of the costs of maintaining and administering all nine of the buildings on the estate which the appellant manages (i.e. all of the blocks except those owned by London & Quadrant). This charge is referred to by the managing agents as the "Block Service Charges". It has been paid by all of the leaseholders, and the proportion each of them pays reflects that. Mr Ojo has therefore been charged 1.0272% of the costs incurred in providing services to all nine leasehold buildings on the estate.

13. Miss Fothergill has calculated that if the Block Service Charge was restricted to expenditure on the Building alone, and that expenditure was apportioned equally between the 16 leaseholders in the building, each would pay 6.25% of the expenditure.

14. Mr Ojo has also been charged 0.694444% of the costs of complying with the obligations in Part 2 of the fifth schedule. Those obligations are in respect of the Management Areas, or common parts, of the estate and this part of the charge has been referred to by the managing agents as the "Estate Service Charges".

15. The exact consequence of apportioning the service charges in this way (which the appellant's managing agent inherited from a previous agent) is impossible to ascertain and is likely to vary from year to year. Whether paying a small percentage of expenditure on 12 buildings is more expensive than paying a larger percentage of expenditure on one building depends on the relative expenditure on different buildings during the relevant period. No information is available on whether different levels of expenditure have been incurred on different buildings.

16. The method of accounting adopted by the appellant is no doubt simple and more convenient because it avoids the need to keep separate accounts for each of the nine buildings, but it is admitted by the appellant that it does not conform to the scheme laid down by the lease.

17. No objection to the appellant's mode of accounting was taken by Mr Ojo. Nor has any other tenant on the estate objected.

The FTT hearing and its decision

18. The issues identified by the parties for determination by the FTT did not include any mention of the calculation of the Management Charge. Mr Ojo's complaints were

not well particularised, and the appellant's response to those complaints were obtuse and unhelpful.

19. When the application came before the FTT it immediately spotted that the strict terms of the lease had not been complied with. This came as a surprise to the parties since up to that point, as the tribunal noted in its decision, "neither side actually considered the question of construction of the relevant lease."

20. The FTT asked the appellant's representative how the method of apportionment it had adopted could be reconciled with the charging provisions of the lease. In paragraph 13 of its decision the tribunal recorded the subsequent exchanges as follows:

> "The short answer appeared to be: this is the way the respondent has run the estate. In other words the respondent] could not submit that it had followed the service charge regime outlined above. Later, after a substantial adjournment for [the appellant's representative] to take full instructions, he sought to justify the respondent's position by seeking to argue that it was entitled to charge Mr Ojo on this basis by virtue of an estoppel by convention as this was the way in which the service charge had been calculated for a number of years. All blocks, he argued, were treated to the same regime and there were useful and beneficial economies of scale. That, with respect, arguably confuses management with charging for it, though it might well be for Mr Ojo's benefit. But it also runs the risk that a tenant in one building is charged for works carried out in another building for which he has no liability. That much is clear from the schedule submitted by the respondent which starts with a charge for another block for which Mr Ojo has no liability. Further, it would be wholly unacceptable to allow a litigant to put forward such an argument at this late stage, without pleadings, evidence, and advance notice to Mr Ojo that the respondent was claiming the service charge on some variation of the contractual basis."

21. Having refused to allow the appellant any further opportunity to attempt to answer the point it had raised, the FTT went on to determine that, because the appellant was unable to justify the charges it sought to recover by reference to the terms of the lease, Mr Ojo's liability was nil for the four years in issue. It described this outcome as "inevitable though regrettable" because it was clear that Mr Ojo should owe at least something, but it was impossible for the FTT to determine what that might be on the limited evidence before it.

The overriding objective

22. Proceedings in the FTT are regulated by the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. Rule 3(1) identifies the overriding objective of the rules as being to enable the FTT to deal with cases fairly and justly. Rule 3(2) explains some of the requirements imposed by this objective. They include:

(a) dealing with a case in ways which are proportionate to its importance and complexity, and to the anticipated costs and resources of the parties and the tribunal;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

The FTT is required to give effect to the overriding objective of dealing with cases fairly and justly whenever it exercises any power under the rules.

23. The specific demands of the overriding objective of the FTT's rules which are given in rule 3(2) differ noticeably from the comparable description in the Civil Procedure Rules applied in the civil courts. CPR 1.1(2) makes no reference to the avoidance of formality, the task of facilitating participation or the effective use of special expertise. These omissions are not accidental, but reflect some of the long-standing differences between dispute resolution in tribunals and in the civil courts.

The issues

24. The appeal raises three issues:

(1) Whether the FTT had acted without jurisdiction, or in a way which was procedurally unfair, by reaching its decision on the basis of a new point which had not been relied on by Mr Ojo or identified before the hearing, and without the appellant having been allowed an effective opportunity to consider and address it.

(2) Whether Mr Ojo was prevented from objecting to the manner in which the Management Charges had been calculated in the past, because he had not raised any such objection since at least 2009.

(3) What Management Charge, if any, was Mr Ojo liable to pay in respect of the years 2010 to 2014.

Issue 1: procedural fairness

25. On behalf of the appellant Mr Fain argued that the procedure adopted by the FTT had been unfair. It had determined Mr Ojo's liability at nil on the basis of a point which had not been taken by Mr Ojo himself but which had been raised for the first time at the hearing by the FTT. Moreover, having taken that new point the FTT had declined to permit the appellant's representative to answer it by developing an

argument based on long practice. The FTT either should not have taken a point of its own, or it should have allowed the appellant to answer the point by deploying new arguments and evidence, if necessary, after an adjournment.

26. In *Regent Management Limited v Jones* [2012] UKUT 369(LC) the Tribunal (His Honour Judge Mole QC) commented on the entitlement of the LVT (the FTT's predecessor tribunal) to raise issues which had not occurred to the parties:

> "The LVT is perfectly entitled, as an expert tribunal, to raise matters of its own volition. Indeed it is an honourable part of its function, given that part of the purpose of the legislation is to protect tenants from unreasonable charges and the tenants, who may not be experts, may have no more than a vague and unfocussed feeling that they have been charged too much. But it must do so fairly, so that if it is a new point which the tribunal raise, which the respondent has not mentioned, the applicant must have a fair opportunity to deal with it."

27. Mr Fain placed considerable reliance on another decision of the Tribunal (His Honour Judge Gerald) in *Birmingham City Council v Keddie* [2012] UKUT 323 (LC) in which it was said that the LVT was not "an inquisitorial tribunal", but was limited to resolving issues which had been identified by the parties in their statements of case as the subject matter of their dispute. Judge Gerald considered that occasions when the tribunal would be required to raise issues not expressly raised by the parties would be "rare" and emphasised, as had Judge Mole QC in *Regent Management,* that:

> "… where an LVT does feel compelled of its own volition to raise an issue not raised by the application or the parties, it must as a matter of natural justice first give both parties an opportunity of making submissions and if appropriate, adducing further evidence in respect of the new issue before reaching its decision."

28. Where an application is made to the FTT for a determination under section 27A of the 1985 Act the overarching question to be addressed is, usually: what sum, if any, is payable as a service charge by leaseholder. In order to answer that question a number of sub-questions or individual issues are likely to have to be addressed, but the tribunal's most important task is to determine that amount.

29. Bearing in mind the FTT's overriding objective of dealing with cases fairly and justly, avoiding unnecessary formality, seeking flexibility and using its expertise effectively, care should be taken by tribunals to avoid adopting an approach which is too narrow, technical or fixated on adherence to procedure for its own sake. This is especially the case where one or more of the parties is unrepresented and where the FTT is likely to be very much better equipped than the parties to identify all of the important issues which need to be considered before the correct sum due from the leaseholder can be identified. An experienced tribunal, guided by the overriding objective, will have no difficulty in distinguishing between a point of significance which the parties may have overlooked, and a point with no real merit which it would be in nobody's interest to raise for consideration.

30. In this case the appellant's departure from the scheme of accounting required by the lease was so fundamental that it was both proper and inevitable, in my judgment, that the FTT should raise the issue at the hearing. When it appeared to the tribunal that sums had been claimed and included in the service charge which fell outside the scope of the fifth schedule because they related to other buildings, it was undoubtedly entitled to ask for an explanation. The fact that Mr Ojo may not have appreciated that the service charges were being demanded on a different basis from the lease did not require the FTT to shut its eyes to an obvious and potentially fatal irregularity. It was, in any event, part of Mr Ojo's challenge to the service charges that they included at least one item of expenditure, on the employment of a caretaker, which was not wholly for the benefit of his building or even of his estate. It was within both the broad question which the FTT was required to determine, namely the quantum of Mr Ojo's liability, and this more specific issue, for it to consider the extent to which the charges were consistent with the contractual scheme.

31. I therefore do not accept that part of Mr Fain's argument which suggests the FTT was simply not entitled to raise the issue of the compatibility of the appellant's practices with the contractual charging provisions.

32. Where I am much more sympathetic to the appellant's case is in response to its complaint that the FTT's failure to allow the appellant to answer the point it had raised was a breach of natural justice and a significant procedural irregularity. As was emphasised in both *Regent Management* and *Keddie*, where a tribunal raises a new point which has not previously been referred to by either party, before reaching its decision it must as a matter of natural justice give both parties an opportunity of making submissions and, if appropriate, adducing further evidence in respect of the new issue. The FTT regarded it as unacceptable to allow the appellant to put forward an argument based on long practice without giving notice in advance to Mr Ojo. I agree that that would have been unfair, but the same unfairness was visited on the appellant by its not being given adequate notice of, or a sufficient opportunity to respond to, the point taken by the FTT.

33. I therefore agree with the appellant that the FTT's decision was arrived at on a basis which was unfair and the decision must be side aside.

34. When the Tribunal gave permission to appeal it indicated that in the event that the appeal was allowed the original application would be re-determined on the same occasion.

Issue 2: estoppel by convention

35. It is acknowledged by the appellant that the service charges were demanded during the relevant period in a manner inconsistent with the accounting provisions of the lease. The first issue is therefore whether it is open to Mr Ojo to rely on that discrepancy as a means of reducing his service charge liability, or whether the

adoption of the same system of accounting for a prolonged period without objection from Mr Ojo prevents him from relying on that point.

36. Mr Ojo has had notice that it would be the appellant's contention in the appeal that he is "estopped" or prevented from relying on the failure to implement the contractual scheme. That was made clear in Miss Fothergill's witness statement dated 8 July 2016, a copy of which was served on him on the same date. He has chosen not to participate in the appeal and I am satisfied that there is no unfairness in the Tribunal proceeding to re-determine the original application on all issues.

37. In the *Republic of India v India Steam Ship Company Limited* [1998] AC 878 Lord Steyn described the legal principle on which the appellant's rely in this case as follows:

> "It is settled that an estoppel may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by both of them or made by one and acquiescing by the other. The effect of the estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on an assumption…. it is not enough that each of the two parties acts on an assumption not communicated to the other. But it was rightly accepted by counsel for both parties that a concluded agreement is not required for an estoppel by convention."

38. The facts relied on by Mr Fain on behalf of the appellants are quite limited. Since at least 2009, and possibly since as early as 1993 when the lease was granted, the liability of leaseholders to contribute towards the expenses of the appellant have been calculated by apportioning the expenses incurred in the maintenance of all nine leasehold buildings amongst all of the leaseholders, rather than apportioning expenditure on individual buildings to the leaseholders of those buildings alone.

39. That method of apportionment was obvious to the leaseholders, including Mr Ojo, because the annual Maintenance Charge statements which they received showed that they were being charged 0.69444% of each item of estate expenditure (for example garden and grounds maintenance) and 1.0272% of block expenditure (for example general repairs, communal lighting and heating or buildings insurance).

40. No objection was taken by Mr Ojo or by any other lessee to this method of accounting. Mr Ojo made periodic payments of service charges in response to service charge demands supported by statements showing that breakdown. Moreover, on a previous occasion when service charges were disputed before the LVT, in January 2011, Mr Ojo was recorded by the tribunal as saying that he did not deny his contractual liability to pay the service charges which were claimed against him but rather he understood that those charges had already been met by his mortgagee.

41. The opportunity for Mr Ojo to take issue with the manner in which the service charges had been calculated was thus available to him in formal proceedings in 2011,

and was available once again in these proceedings but had not been taken. It was against that background that the appellant had continued to administer the service charge in the same way as it had always done and it would be unfair, Mr Fain submitted, for Mr Ojo now to be able to rely on the discrepancy between the contractual accounting method and the appellant's method to avoid liability to contribute towards the services which had been provided to him and other leaseholders.

42. I accept Mr Fains' argument. It would in my judgment have been clear to anyone who considered the Maintenance Charge statements that the expenditure on buildings maintenance was not being divided amongst 16 flats in a single building but was being apportioned amongst a much greater number. I accept that it might not have been clear how the proportions for building and estate expenditure had been arrived, although I was informed that the proportions are different because buildings expenditure does not include at cost in respect of the three buildings owned London & Quadrant, which undertakes its own building maintenance. It would nevertheless have been obvious to Mr Ojo, had he considered the statements, that he was being asked to pay a much smaller percentage of expenditure on the building than he would have been if only the leaseholders in his building had been required to contribute.

43. Mr Ojo acquiesced in that manner of calculating the Maintenance Charge (which may have been more or less favourable to him than the method strictly required by the lease). He may not have fully appreciated the requirements of the lease (as indeed the appellant and its managing agent appear not to have done) but he had the opportunity to read his lease and understand how service charges were supposed to be accounted for.

44. Taking his prolonged acquiescence into account, and having regard additionally to the fact that in 2011 Mr Ojo did not dispute liability in principle for charges computed in the same way, it seems to me that a conventional mode of dealing existed between the appellant and Mr Ojo under which it was understood the Maintenance Charges were to be apportioned on the basis that each leaseholder was obliged to contribute towards expenditure on all nine leasehold buildings.

45. It would be unfair for Mr Ojo now to be allowed to dispute his liability in those circumstances on grounds which he had chosen not to raise for many years. For him to be permitted to do so would require the appellant to recalculate the service charges back at least to 2009 in order to ascertain Mr Ojo's correct contribution, which may be more or less than the sums he has actually been charged. If Mr Ojo has been overcharged (and there is no basis for the conclusion that he has) it would mean that other leaseholders in the estate have been under charged, but it would be difficult for the appellant to recoup the shortfall after so prolonged a lapse of time. In all of those circumstances I accept the appellant's case that Mr Ojo's liability should be ascertained on the assumption that the lease allowed the appellant to apportion liability for costs incurred in relation to the estate as a whole amongst all of its leaseholders, rather than requiring it to apportion liability for work to an individual building only amongst the leaseholders of that building.

46. I should add by way of a footnote that I was informed at the hearing of the appeal that the appellant has now instructed its agents to administer the service charge in accordance with the terms of the lease rather than on the basis which has been adopted for so many years.

Issue 3: the amount of Mr Ojo's liability

47. A Maintenance Charge statement dated 30 March 2015 produced by Ms Fothergill showed the charges claimed by the appellant from 31 December 2010 to 21 January 2015. The sums in issue in the application to the FTT were only those due up to the end of 2014. Omitting from the statement the yearly Maintenance Charge claimed in advance on 1 January 2015 the sums billed for the disputed period totalled £6,621.69. Mr Ojo was entitled to credit for sums paid during the same period totalling £2,415.34.

48. Mr Ojo did not attend the hearing of the appeal and had raised only a very limited number of issues before the FTT in relation to his liability. With the assistance of the evidence of Ms Fothergill I am satisfied that none of his challenges justifies a reduction in his liability for the sums claimed.

49. Mr Ojo sought an explanation for the excess Maintenance Charges of £261.92 for 2010 and £185.69 for 2011. I am satisfied on the basis of the certified annual accounts that these sums are payable under paragraph 3 of the fourth schedule as representing the difference between the sums collected on account and the total charges for 2009 and 2010.

50. Mr Ojo next queried sums transferred to the reserve fund in 2011, 2012 and 2013. The lease makes provision for a reserve against future expenditure and I am satisfied on the basis of the certified annual accounts that these have been properly transferred and accounted for.

51. Mr Ojo pointed out that the sums claimed in respect of general repairs and maintenance in 2012 and 2013 were not corroborated by invoices. The appellant had not been directed by the FTT to produce all of the invoices and relied instead on its certified annual service charge accounts and a schedule of invoices. Mr Ojo advanced no argument that sums had not been expended, or that the repairs and maintenance had been carried out to an inadequate standard or that the costs claimed were not reasonable. The information supplied by the appellant included a breakdown of individual items of work, none of which was challenged. In those circumstances I am satisfied that Mr Ojo is liable to contribute to the extent claimed in his Maintenance Charge statements.

52. Finally, Mr Ojo disputed his liability to contribute towards the salary of a caretaker on the grounds that the caretaker was employed in relation to another estate. I am satisfied by Ms Fothergill's evidence that the caretaker is engaged to provide

services on a number of estates managed by the appellant and that the contribution towards his salary sought to be recouped from the leaseholders of Admiralty Park is reasonable having regard to the duties he performs. No complaint was made about the standard of service provided by the caretaker.

53. I therefore determine that the service charges payable by Mr Ojo for the period from 1 January 2010 – 31 December 2014 amount to £6.621.69 against which he is entitled to credit for sums paid of £2,415.34 up to 31 December 2014, leaving a balance at that date of £4,206.35.

Disposal

54. In addition to determining the amount of the service charge I was asked by Mr Fain to reverse the FTT's decision to make an order under section 20C of the 1985 Act in Mr Ojo's favour. In the circumstances it does not seem to me appropriate to disturb the order made by the FTT. The appellant's representative ought not to have been taken by surprise by the point taken by the FTT and, although I have come to a different conclusion from a tribunal, it was entitled in my judgment to make an order preventing the appellant from adding any of the costs of the proceedings before it to a service charge payable by Mr Ojo.

Martin Rodger QC
Deputy President

20 September 2016