IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2018] UKUT 230 (LC)
Case No: LRX/132/2017

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES- Landlord and Tenant Act 1985 section 27A(4)- whether FTT has jurisdiction to hear application- matters "agreed or admitted"- matters "subject to determination by a court"- application to strike out under Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, rule 9- appeal from refusal to strike out tenant's application allowed in part

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

BETWEEN:

MARLBOROUGH PARK SERVICES LTD **Appellant**

and

MR MICHA LEITNER **Respondent**

Re: (1) 22 Collingwood Court, Washington, Tyne & Wear, NE37 3EB
(2) 54 Kenilworth Court, Washington, Tyne & Wear, NE37 3EA

Before: His Honour Judge Stuart Bridge

Written Representations

The following cases are referred to in this decision:

Cain v Islington BC [2015] UKUT 542 (LC)

Crosspite Ltd v Sachdev [2012] UKUT 321 (LC)

Shersby v Grenehurst Park Residents Co Ltd [2009] UKUT 241 (LC)

DECISION

Introduction

1. This is an appeal by the freehold owner, Marlborough Park Services Ltd (hereafter "the appellant"), of two properties, 22 Collingwood Court and 54 Kenilworth Court, which are situated in Washington, Tyne & Wear, from a decision of the First-Tier Tribunal (Property Chamber) (hereafter "FTT") dated 11 October 2017 dismissing its application to strike out the application of the leaseholder of those properties, Mr Micha Leitner (hereafter "the respondent"), for a determination pursuant to section 27A of the Landlord and Tenant Act 1987 as to whether service charges claimed for those properties were payable or reasonable. The appellant seeks to review the FTT decision, and permission to appeal was given by the FTT on 14 November 2017. The Deputy President of the Tribunal directed that the appeal should be determined, as requested by the appellant, under the Tribunal's written representations procedure.

2. Before the FTT the appellant submitted that the charges being challenged by the respondent in its section 27A application were either "already determined by the court" (default judgments having been entered in relation to claims made previously by the appellants for unpaid service charges) or "expressly" or "impliedly" "admitted" by the respondent; and that accordingly the FTT had no jurisdiction to determine the respondent's application. Reference was also made by the appellant to the FTT's jurisdiction to strike out proceedings where they were "frivolous" or "otherwise an abuse of process" or had "no reasonable prospect of success".

3. The appellant has been represented throughout by JB Leitch Limited, solicitors; the respondent has not been represented. In determining the appeal, I have had regard to the FTT decision, the appellant's notice, the appellant's statement of case and accompanying documents, the respondent's notice, the respondent's statement of case, and the documents contained in the appeal bundle. I am grateful to the appellants' solicitors and the respondent for the submissions that have been made.

Background

4. It is not in dispute that the respondent is the leaseholder in respect of two properties the freehold of which is owned by the appellant, that pursuant to those leases the respondent is obliged to pay a service charge, and that the respondent is entitled to make application under section 27A of the Landlord and Tenant Act 1987 for a determination of the service charge payable. The respondent made two such applications, one in respect of each property, dated 29 November 2016. Each application listed, under "Service charges to be considered by the tribunal", 2007 to 2012 as "past years" and 2013 to 2016 as "current or future years" for which a determination was sought.

5. Prior to that determination being sought, the appellant had obtained monetary judgments against the respondent in respect of claims for service charge.

- In respect of 22 Collingwood Court, judgment was entered in default, the respondent having failed to respond to the claim, on 18 December 2013, in the sum of £1,744.33.
- In respect of 54 Kenilworth Court, judgment was entered in default, the respondent having failed to respond to the claim, on 22 May 2014, in the sum of £2,723.59.

6. On 7 March 2016, the appellant's then solicitors sent two letters, one in respect of each property, to the respondent. Both letters made reference to the Practice Direction on Pre-action Conduct contained in the Civil Procedure Rules.

7. The letter in respect of 22 Collingwood Court stated that the appellant's solicitors had been instructed to collect outstanding rent and service charge, the amount outstanding being £1,744.33, and made a final demand for payment of that sum together with legal fees, totalling £1,837.33 within seven days. In the event of payment not being received, instructions would be sought to issue county court proceedings for a determination that the service charge is due, and the letter went on to explain the consequences of such a determination, including the appellant's intention to issue forfeiture proceedings.

8. The letter in respect of 54 Kenilworth Court stated explicitly that the respondent had failed to pay the judgment amount and implicitly that other sums by way of ground rent and service charge were outstanding. A notice pursuant to section 146 of the Law of Property Act 1925 was enclosed by way of service, the right of re-entry exercisable in the event of rent being unpaid for 21 days after becoming due being invoked. In order to avoid forfeiture, the appellant required payment of the total sum of £5,364.92, this sum being made up of the outstanding judgment and interest, unpaid service charges for three periods each of six months between 1 October 2014 and 31 March 2016, ground rent for 2015-2016, solicitors' fees plus VAT, together with Land Registry disbursements and Recorded Delivery fees. The respondent was given 14 days to pay, following which instructions would be sought to commence possession proceedings.

9. The respondent Mr Leitner replied by letter of 21 March 2016. He contended that the letters dated 7 March 2016 were the first communication he had received from anybody for at least the past two years on any matter relating to the Ground Rent or Service Charges of the two properties, and asked why it was that Town & City Management Ltd had failed to send him any invoices "for at least the past two years". The letter continued:

> "My accountant has just finished last week my accounts for the year ended 6 April '15 and he can categorically confirm that:
>
> > 1) On 22 Collingwood Court a service charge was paid by me in April 2014. Thereafter nothing has been received regarding this property until at least April 2015.

2) Likewise on 54 Kenilworth Court, nothing at all has been received from anybody regarding this property during the period April 2014- April 2015 and beyond.

"How can it be that you state a judgment was dated 22 May '14 against me; yet I have never heard or received ANY communication on this matter?

"In order to move forward, I will state this:

"I am more than happy to pay for any arrears accrued on these two properties on Ground Rent and Service Charges not paid.

"I am NOT prepared to pay for any interest, nor fees nor any other charges.

"Please let me have an up-to-date statement, and copy invoices, of what remains outstanding to date on the basis set out above and I shall be more than happy to let you have by return a cheque in full and final settlement to date.

"I look forward to hearing from you soon."

10. The appellant's then solicitors responded to this letter on 4 April 2016 re-stating their position. After thanking the respondent for his letter, they continue:

"With respect to 54 Kenilworth Court, we do not propose to debate matters which have been the subject of court proceedings. The last payment received in respect of this property dates back to May 2012. Our letter of 7 March sets out the amounts required to be paid which total £5,364.92. If that amount is not now paid as a matter of urgency then possession proceedings will be issued on the basis of forfeiture of the lease.

"Similarly, our letter of 7 March relating to 22 Collingwood Court set out the amount required to be paid and enclosed a detailed statement of those amounts. You will recall that court proceedings were previously issued against you and a court judgment was obtained on 18 December 2013. A Section 146 notice was served upon you in respect of that judgment on 8 January 2014 and you made payment to us of £1,747.26 by cheque on 27 January 2014. No payment has been received since.

"If full payment in respect of 22 Collingwood Court of £1,837.33 is not now paid as a matter of urgency court proceedings will be issued against you.

"If you are unclear as to your position we would recommend that you obtain legal advice."

The principles

11. Rule 9 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 imposes a duty and confers a power on the FTT. I refer to those parts of the Rule which are relevant to the current case.

12. Under rule 9(2), a duty is imposed:

> "the Tribunal must strike out the whole or a part of the proceedings or case if the Tribunal-
>
> > (a) does not have any jurisdiction in relation to the proceedings or case or that part of them."

13. Under rule 9(3), a power is conferred:

> "the Tribunal may strike out the whole or a part of the proceedings or case if-
>
> > (d) the Tribunal considers the proceedings or case (or part of them), or the manner in which they are being conducted, to be frivolous or vexatious or otherwise an abuse of the process of the Tribunal; or
> >
> > (e) the Tribunal considers there is no reasonable prospect of the applicant's proceedings or case, or part of it, succeeding."

14. Section 27A of the Landlord and Tenant Act 1985 permits applications to be made to the appropriate tribunal (that is the FTT) for a determination whether a service charge is payable, and, if it is, the amount which is payable. However, and this is central to the current appeal, section 27A(4) states:

> "No application… may be made in respect of a matter which-
>
> > (a) has been agreed or admitted by the tenant; [or]
> >
> > (c) has been the subject of determination by a court."

15. Section 27A(5) qualifies section 27A(4)(a):

> "But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment."

16. The issue in this case is jurisdictional. It is whether, in view of section 27A(4), the FTT has any jurisdiction to hear the respondent's current application. The appellant contends that the whole matter has been "agreed or admitted" by the respondent; and that a significant part of the application has already been the subject of determination by the court. If the appellant is right, then the FTT should have struck out the whole or part of the claim pursuant to rule 9(2), as it is obliged to do in the event of its not having jurisdiction.

17. Although reference has been made to rule 9(3) which gives the FTT power to strike out in the circumstances there specified, no reliance has been placed on that provision in the course of this appeal.

The FTT decision

18. In determining the application to strike out, the FTT found no practical distinction between the two properties, and did not therefore differentiate between them.

19. The respondent, who it was noted by the FTT had not engaged with the strike out application, had not challenged the fact that default judgments were made, and the FTT accordingly held that it did "not have jurisdiction to determine the service charges claimed within those judgments." But that did not result in the FTT striking out that part of the claim. The FTT explained, at [15]:

> "Having considered the accounts annexed to the [appellant's] position statement, it is noted that default judgements likely relate to service charges on account or budgeted amounts and not to the final out turn. This is apparent from the date of the certified accounts. Accordingly, it is open to the [respondent] to request a determination of the final sums now that this expenditure has crystallised. Accordingly, the [appellant's] strike out application fails in that regard."

20. The FTT went on to consider the argument that there was an express or implied admission of the charges payable. It held that the evidence did not contain an express admission or agreement to a specific service charge demanded, the correspondence indicating payment of arrears to avoid proceedings; it therefore did not find that there was an express agreement to pay service charges. The FTT further held that this was not a case of a tenant paying "without qualification or protest", finding that there was a reluctance to pay and a need to resort to legal proceedings to enforce payment. No agreement to the specific service charges could therefore be implied. Finally, the FTT did not find that the provisions of rule 9(3) were engaged, and the application to strike out was dismissed.

The appeal

21. The appeal has been brought to this Tribunal with permission from the FTT. The respondent to the appeal (the original applicant) wrote to the FTT on 16 November 2017 respectfully asking the FTT to reconsider its decision and withdraw the permission it had granted, asserting that the appellant had failed to supply any evidence of what they had done in favour of the two properties other than supplying copies of budgets of costs and sets of financial accounts. The respondent repeated his allegation that the charges levied were excessive and that service on the part of the appellant had been "rotten" for many years.

22. A respondent's notice dated 30 January 2018 was filed late, with an apology, on 31 January 2018, the notice attaching a copy of the original claim for a determination and the letter of 16 November 2017. The notice asked the Tribunal to dismiss outright the appeal, setting out grounds as follows:

> "This Tribunal Case has been going on for more than twelve months now. Throughout, JB Leitch Solicitors have been "waffling" their way through the case, producing files and files of figures which repeat financial budgets and financial accounts year after year, without even ONCE, spelling clearly what exactly have their clients, Marlborough Park Services Ltd., actually DONE ON MY BEHALF, for my two properties over many years of charging me excessive management fees."

That is the extent to which the respondent has engaged with this appeal. There has been no engagement on the distinct jurisdictional issues raised by the appellant in its Statements of Case.

23. In considering the issues, I intend to divide the service charges which the appellant claims into distinct periods: (1) Charges payable between 1 April 2012 and 31 March 2013; (2) Charges payable prior to 1 April 2012; and (3) Charges payable after 31 March 2013. The reasons for doing so will become apparent in the course of the discussion that follows.

Charges payable between 1 April 2012 and 31 March 2013

24. The appellant, by its Grounds of Appeal and Amended Statement of Case dated 6 April 2018, contends that the FTT had copies of the default judgments upon which reliance was placed when it heard the application to strike out. It further submits that those judgments constituted final determinations and that the FTT was therefore correct to hold (as it did at [14] above) that it did not have jurisdiction to determine the service charges claimed within those judgments.

25. The appellant states in its Amended Statement of Case at paragraph 23:

> "The accounts for the period 01/04/2013- 31/03/2013 [*sic*] were certified on 16 December 2013; prior to the date of both default judgments. The primary case for the Appellant is that, because the expenditure, as at the date of the default judgment, had crystallised then it must be said that the FTT has made an error of law."

26. There is a clear error in the Amended Statement of Case: it is an error which appeared both in the earlier Statement of Case, prior to its amendment, and in the Position Statement filed with the FTT. The period stated as "01/04/2013- 31/03/2013" should read "01/04/2012-31/03/2013" in order to make sense, and it is that period which is supported by the documentary evidence that has been filed, including an accountant's certificate endorsing the accounts for that year.

27. The default judgments were entered on 18 December 2013 and 22 May 2014. It is therefore contended by the appellant that service charges which were duly certified and the payment of which outstanding debt was ordered by those judgments must be treated as having been the subject of determination by a court.

28. The logic of the appellant's argument is in my view compelling. The FTT should take a robust approach where it is clear that an application under section 27A is seeking to challenge service charges which have been the subject of the judgment of the court, whether that judgment follows contested proceedings in the county court or whether it has been entered by default. The issue goes to jurisdiction. The FTT should therefore have struck out the application insofar as it related to service charges the subject of prior judgments of the court, that is to say for the period from 1 April 2012 to 31 March 2013. Although the judgments also related to service charges for later periods (from 1 April 2013 to 31 March 2015), those charges could not have been certified prior to default judgments being entered, and the FTT was right not to strike out the application in relation to such charges on this ground.

Service charges before 1 April 2012

29. The appellant contends that the respondent's conduct in paying service charges since 2007 without qualification or protest has been such that it is safe to infer an agreement that he was liable for those charges. This submission is in my view of particular significance when considering the service charges which pre-date but are not the subject of the default judgments to which reference has been made.

30. In order to satisfy the FTT that it should strike out the proceedings as it relates to these charges, the appellant must prove that the respondent had agreed or admitted those charges. Putting to one side the letter of 21 March 2016, consideration should be given to the conduct of the respondent in the period between 2007 and 2012. The charges for that period have been paid, and charges accrued subsequently have led, as explained above, to default judgments being entered.

31. In *Shersby v Grenehurst Park Residents Co Ltd* [2009] UKUT 241 (LC), the lessee made payments towards insurance premiums pursuant to his obligations under the lease between 1997 and 2004, only challenging the payments demanded in 2007, and having made a separate application to a leasehold valuation tribunal in the interim in relation to service charges in the course of which he did not raise the issue of insurance. The Tribunal held, in conducting a re-hearing on appeal from the FTT, that the lessee must be taken to have agreed or admitted the insurance premiums.

32. In *Cain v Islington BC* [2015] UKUT 542 (LC), the lessee paid service charges between 2001 and 2007 without any protest, challenging the sums payable by application to the FTT in 2014. The FTT took the view that it was "now no longer appropriate" for those years to be litigated: not only had the lessee made the payments, he had also waited an extremely long time before making his challenge, in the meantime there having been other cases involving the same parties. The Tribunal upheld the decision of the FTT to treat the lessee as having admitted or agreed the amounts of service charge over the period between 2001 and 2007. Following the reasoning in *Shersby*, the Tribunal addressed section 27A(4) as follows:

> "[14]… An agreement or admission may be express, or implied or inferred from the facts and circumstances. In either situation the agreement or admission must be clear, the finding being based upon the objectively ascertained intention of the tenant which may be express or implied or inferred from the conduct of the tenant—usually an act or a series of acts or inaction in the face of specific circumstances or even mere inaction over a long period of time or a combination of the two.
>
> "[15] Absent [section 27A(5)] and depending upon the facts and circumstances, it would be open to the FTT to imply or infer from the fact of a single payment of a specific sum demanded that the tenant had agreed or admitted that the amount claimed and paid was the amount properly payable, a fortiori where there is a series of payments made without challenge or protest. Part of the reason for this is that people generally do not pay money without protest unless they accept that that which is demanded is properly due and owing, and certainly not regularly over a period of time. Whilst it would generally be inappropriate to make such an implication or inference from a single payment because it could not be said that the conduct of the tenant was sufficiently clear, where there have been repeated payments over a period of time of sums demanded, there may come a time when such an implication or inference is irresistible."

33. In my judgment, the FTT erred in law in failing to recognise the significance of the payment of service charge without protest over a period of time long before the application to the FTT was made, the issue of proceedings in the county court to enforce payment of subsequent amounts of service charge and the entry of default judgments in favour of the lessor. As the Tribunal said in *Cain* at [18], "it would offend common sense for a tenant who without qualification or protest has been paying a series of demanded service charges over a period of time to be able to turn around and deny that he has ever agreed or admitted to that which he has previously paid without qualification or protest."

34. It should be noted that the FTT acknowledged the weakness of the respondent's claim in this regard where, having observed that the application related to service charges back to 2007, it stated that the respondent had "not taken timely action in respect of those charges and we find it likely that little evidence will be available of the services provided" but added "We do not consider this should prevent the application proceeding in its entirety." On the basis of this statement, with its reference to the "entirety" of the application, it appears that the FTT may not have taken into account its statutory duty to strike out part of the proceedings or case where it does not have jurisdiction in relation to that part: see rule 9(2) above.

35. The Tribunal takes the view that the FTT should have found that the respondent had agreed or admitted the service charges due before 1 April 2012, and have struck out that part of the respondent's claim which related to service charges between 2007 and 1 April 2012.

Service charges after 31 March 2013

36. The appellant seeks to strike out the claim as a whole on the basis of the respondent's letter dated 21 March 2016 where the respondent stated "I am more than happy to pay for any arrears accrued on these two properties on Ground Rent and Service Charges not paid."

37. The letter must be read in the context of the correspondence of which it forms part. It was a response to the letters from the appellant's solicitors dated 7 March 2016 in which demands for payment were being made. The letter concerning 54 Kenilworth Court threatened forfeiture proceedings in the event of non-payment within 14 days and enclosed a section 146 notice. The letter concerning 22 Collingwood Court did not threaten forfeiture but made reference to proceedings being issued in the county court for a determination that the service charge was due. It should be said that it is not entirely clear what jurisdiction that letter was referring to.

38. It is important to note that the respondent's letter does not admit any particular sum being owed. It is a statement that the respondent "is more than happy to pay", that is he is willing, if not necessarily ready or able to pay. What is he "more than happy to pay"? He is more than happy to pay "any arrears accrued" on the two properties "not paid". There is an element of tautology in the words used, as the existence of arrears that have accrued presupposes debts owed to the landlord that have not been paid. But grammatical inelegancies apart, the natural construction of the words used is that the respondent is willing to pay whatever arrears there might be.

39. At this stage in the correspondence, the appellant had demanded two specific sums, one in relation to each property. There is nothing in the words of the letter whereby the respondent expressly, or by necessary implication or inference, accepts any liability to pay those sums. On the contrary, the respondent's response is ambivalent, quite possibly deliberately so, and in the event of further correspondence one might anticipate the respondent to dispute the actual amount due, and to challenge the appellant to prove what arrears have accrued and have not been paid.

40. The respondent's letter continues. The respondent, having asserted that he is "NOT" prepared to pay for "any interest, nor fees nor any other charges", then requests an "up-to-date statement, and copy invoices, of what remains outstanding to date on the basis set out above", and then states, in similar terms to the earlier paragraph, "I shall be more than happy to let you have by return a cheque in full and final settlement to date."

41. It could be argued that those words tend to negate the fact that the respondent is contesting the amount that is payable to the appellant and that he is indicating that he is willing to pay whatever sum the appellant demands. But that would, in my judgment, be going too far. There remains an express condition that the appellant provide further documentation, the purpose for which, one assumes (taking a generous view of the respondent's conduct as one must on an application to strike out), being to enable the respondent to assure himself that he is paying sums that are properly due. There is still no

express or implied agreement or admission of the amount that is actually owing, and in the absence of such agreement or admission, the FTT would have been wrong to allow the appellant's application to strike out for want of jurisdiction.

42. It is important to consider what issue it is to which the application under section 27A relates. In *Crosspite Ltd v Sachdev* [2012] UKUT 321 (LC), a lessee who stated that he was "not averse to paying an administration charge" was held to have admitted that a charge could be made. As a result the tribunal did not have jurisdiction to determine whether the lessor was entitled to demand an administration charge at all, the lessee having admitted, by implication or inference, that he was under a liability to pay such a charge.

43. In this case, there is no dispute that the respondent is liable to pay a service charge under the terms of the lease, and if the issue before the FTT was whether the respondent was so liable, then the respondent's letter would in all likelihood have been decisive of that issue, as the respondent could properly be taken to have admitted liability to pay. In this case, however, the issue is not merely entitlement to charge, but the reasonableness of the charge being claimed. The respondent may have accepted, in the letter of 7 March 2016, that the appellant is entitled to a service charge, and agreed that he will pay such arrears as may be due, but there is no agreement or admission of the amount that he is liable to pay.

44. In the circumstances, the FTT was correct in law in determining that the appellant's application to strike out the entirety of the respondent's application should fail.

Conclusion

45. The appeal is therefore allowed in part. The Upper Tribunal determines that the FTT had no jurisdiction to determine the service charges payable by the respondent in respect of periods prior to 1 April 2013 and that the FTT should therefore have struck out that part of the respondent's application pursuant to rule 9(2).

Dated 31 July 2018

His Honour Judge Stuart Bridg