IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2019] UKUT 402 (LC)
Case No: LRX/98/2019

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – reasonableness - jurisdiction of the county court and of the First-tier Tribunal

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

BETWEEN:

HOLDING AND MANAGEMENT (SOLITAIRE) LIMITED

Appellant

- and -

MR LESLIE STAFFORD MILLER

Respondent

Re: Flat 9,
Cousins Court,
3 Alwyn Gardens,
London,
NW4 4XN

Elizabeth Cooke, Upper Tribunal Judge

Determination on written representations

Introduction

1. This is an appeal from a decision of the First-tier Tribunal ("the FTT") in relation to service charges and other items that the appellant seeks to recover from the respondent, who is the lessee of a flat in Cousins Court of which the appellant is the freeholder.

2. The appeal has been determined on the basis of the parties' written representations, drafted for the appellant by Brooke Lyne of counsel; the respondent has not been legally represented. In the paragraphs that follow I set out the factual and procedural background, and then turn to the grounds of appeal. As will be seen, the appeal is brought on the basis that the FTT failed to decide what it should have decided, and did decide a number of matters that fell outside its jurisdiction. The appeal succeeds, for the reasons I shall set out.

The background

3. The respondent holds a 125-year lease of his flat, granted to him in 1993. The demise of the flat includes the glass in the windows but not the window frames. It contains standard provisions for the landlord to be responsible for the repair and maintenance of the structure and exterior of the building and to recover its costs through a service charge.

4. On 15 January 2019 the appellant brought proceedings in the county court against the respondent. It claimed a sum of £2,440.47 made up as follows:

a. Service charges and administration fees £1,123.03[1]

b. Interest at 8% per annum under the County Courts Act 1984 being £76.44 and accruing at 0.23p per day

c. Alternatively contractual interest

d. Legal costs of recovery, due under the lease, £1,056

e. Court fee £105 and solicitor's costs £80.

5. The respondent's defence to the claimed sum of £1123.03 was that (a) "the service charge element of this claim is a charge for window replacement". He argued that he should not have to pay it, because he had himself replaced the windows of his flat, having paid a £200 fee for the appellant's licence to do so. Further (b) he said that the administration charge element "should never have been made and anyway are exorbitant". He also made a counterclaim of £480 for damage to his health and the work and costs he had had to undertake.

[1] This sum was described on the claim form as "rent, service charges, administration charges interest and fees" but the appellant's reply and defence to the counterclaim stated that it represented service charges and administration fees. It appears not to be in dispute that there is no element of rent or of any other fee in this sum.

6. On 29 March 2019 District Judge Rand ordered "This claim be sent to the First-tier Tribunal (Property Chamber)." On 10 April 2019 the FTT gave directions headed "Directions on an application under section 27A of the Landlord and Tenant Act 1985." That section sets out the FTT's jurisdiction to determine whether a service charge is payable and the amount payable.

7. On 5 June 2019 the FTT conducted a hearing, and on 24 June 2019 it issued its decision, which was as follows:

> 1. "In relation to the claim under the service charge account in respect of replacement windows and front door at Cousins Court the Tribunal determines that a reasonable amount for the Respondent to pay is (i) £280 including VAT and (ii) in respect of surveyors' fees and associated costs of that project the sum of £224.36 including VAT (totalling £504.36) (as particularised below.
>
> 2. No administration charges are recoverable (as particularised below).
>
> 3. Further or alternatively the claim for £1056 (or the balance thereof after deduction of any claimed administration fees) described in the county court claim form as "legal costs incurred to date in connection with the default" is refused on the grounds that it is irrecoverable (particularised below).
>
> 4. The claim for interest on unpaid arrears is refused whether under s69 County Courts Act 1984 or pursuant to the lease.
>
> 5. If required, and for the avoidance of doubt, an order is made under s20C LTA 1985 in favour of the Respondent on the grounds that it is just and equitable to make such an order.
>
> 6. The Respondent's counterclaim is struck out/dismissed."

8. The FTT's decision then goes on to set out its reasons for those determinations, and I will say more about them insofar as they are relevant to the appeal.

The appeal

9. The grounds of appeal fall into two groups, relating on the one hand to points of jurisdiction and on the other to the substantive decision about service charges and administration charges. Finally it is said that the order under section 20C of the Landlord and Tenant Act 1985 ("the 1985 Act") should also be set aside.

The jurisdiction of the FTT

10. I can deal first, and briefly, with the challenge on the basis of jurisdiction.

11. The appellant says that the FTT had jurisdiction to make decisions only under section 27A of the 1985 Act. It did not have jurisdiction to make a determination about legal costs due under the lease (item 3 of the decision set out at paragraph 7 above), about the claim for interest under the County Courts Act 1984 or under the lease (item 4), nor to dismiss the counterclaim (item 6).

12. Understandably the respondent has not addressed the jurisdiction point in his written submissions.

13. The FTT in its paragraph 11 said "… we have decided that the District Judge intended to pass the whole of the claim to the Tribunal, otherwise he would have made that clear (eg if limited to a s27A unreasonable charges claim). We therefore intend to deal with the whole of the claim, having already disposed of the counterclaim." The FTT purported to dismiss the counterclaim at its paragraph 10.

14. Section 176A of the Commonhold and Leasehold Reform Act 2002 provides that where the court has to decide a question arising under any of a list of statutes, which includes the 1985 Act, "which the First-tier Tribunal … would have jurisdiction to determine", it "may by order transfer to the First-tier Tribunal so much of the proceedings as relate to the determination of that question".

15. Section 27A of the 1985 gives the FTT jurisdiction to determine the reasonableness and payability of service charges. When service charge disputes are commenced in the county court it is usual for issues of payability and reasonableness to be transferred to the FTT. The order making that transfer is sometimes less than specific, and the Tribunal (the Deputy President) in *Cain v London Borough of Islington* [2015] UKUT 0117 (LC) at [15] has encouraged the FTT to interpret such orders

> "in a practical manner, with proper recognition of the expertise of the FTT in relation to residential service charges. When trying to identify which subsidiary issues ought properly to be treated as being included within the scope of the questions transferred it is not appropriate to be too pedantic, especially where an order transferring proceedings is couched in general terms and where there is no suggestion that the court intended to reserve for itself any particular question."

16. But if a practical approach leads to the crossing of jurisdictional barriers then it has gone too far. Section 176A of the 2002 Act only enables the county court to transfer to the FTT a question that the FTT has jurisdiction to answer. The FTT has no inherent jurisdiction and cannot decide matters that remain within the sole jurisdiction of the county court.

17. All judges of the FTT are by statute judges of the county court (paragraph 4 of Schedule 9 to the Crime and Courts Act 2013), and so can be deployed to sit as county court judges at the hearing in which they determine the questions transferred to the FTT. No such deployment arrangement had been made in this case, and the FTT judge is not free to decide to sit as a county court judge unless he or she has been specifically deployed to do so. It does not appear that the FTT judge thought that she was sitting as a county court judge, nor that the member who sat with

her had been deployed as an assessor in the county court, and the decision under appeal was not a decision of the county court.

18. Accordingly flexible deployment is irrelevant to this appeal.

19. The decisions numbered 3, 4 and 6 of those quoted in paragraph 7 were made without jurisdiction and are set aside. I have made no comment about the FTT's reasons for those decisions, because it is irrelevant. In due course those issues will be decided by the county court (whether by a judge at a county court centre or by an FTT judge deployed as a county court judge).

Service charges and administration charges

20. It will be recalled that £1,123.03 of the claim related to service charges and administration charges. The FTT's decisions about these are items 1 and 2 in the list quoted at my paragraph 6 above; to understand how those decisions came to be made we have to look at the parties' respective cases both in the county court and in the FTT.

21. The pleadings in the county court did not provide any breakdown of the sum of £1,123.03. The respondent's defence (see paragraph 7 above) was that the service charge element was for window replacement, and as he had replaced his own windows he was not prepared to pay for this again, and that the administration charge element was "exorbitant".

22. In the FTT the respondent made a statement of case on 1 May 2019. In it he explained that he had replaced his own windows in 2014, with the appellant's consent. He went on to say that on 16 September 2017 he received a letter from the appellant's managing agents saying that he was to contribute £1,569.77 to the replacement of the windows in the rest of Cousins Court (although his own windows having been replaced the appellant was not going to replace them again), and that this would be taken from the reserve fund to which he had contributed. In response the respondent wrote to the managing agents saying that he was not willing to pay and would be deducting half the sum of £1,569.77 from the next two service charge demands. He attached to his statement of case a copy of his letter of 16 November 2017 to the managing agent in which he explained that he had made a deduction from the half-yearly service charge representing half the sum of £1,569.77 and would be deducting the same from the next charge.

23. In its statement of case dated 20 May 2019 in the FTT the appellant provided a breakdown of the service and administration charges owed by the respondent. The sums listed amount to £917.91 for service charges due in April 2018, together with administration charges for 2018 and 2019 being three sums of £60. Copies of the service charge accounts for the years 2016, 2017 and 2018 are included in the statement of case at paragraph 17, and it can be seen that they cover items such as insurance, fire systems maintenance, contributions to reserves, electricity and so on.

24. It is unhelpful that the appellant did not provide a breakdown of the sum of £1,123.03 into service charges and administration charges, or rather that the breakdown provided did not add up to that sum. However, piecing things together it appears that what happened was that the respondent took exception to the use of the reserve fund, to which he had contributed, for the replacement of windows in the block and therefore deducted his share of the cost of the windows from the service charges demanded of him. For some reason the amount claimed by the appellant is not the same as the amount the respondent claims to have deducted, but leaving aside the figures that is clearly the reason why the respondent is in arrears with his service charge payments. Nowhere is there any suggestion of a challenge to the service charges themselves.

25. Against that background the FTT made understandably critical comment about the figures provided by the appellant, but acknowledged at paragraph 4 that the respondent "does not contest ordinary ie the usual estate or block service charges".

26. The FTT explained what had happened about the windows. It noted the appellant's argument that the respondent's decision to replace his own windows does not affect this contractual liability to contribute to the block service charge, but did not discuss that point or say why it disagreed. Instead it went on to say that it was unreasonable of the appellant to charge the respondent (and others who had taken the same course) with the repair of the windows for the other flats in the block. He had paid for his own windows and should not have to subsidise the cost of replacing windows in the other flats, However the FTT accepted that the respondent had to contribute to the replacement of windows in the common parts; it made some calculations based on the number and sizes of the various windows and came up with the figures of £280 including VAT for the cost of the communal window and front door and £224.36 towards surveyors and administration fees in respect of those windows.

27. The respondent had made no objection at all to the reasonableness and payability of the service charge. He had made a deduction from it because of his own view about the fairness of the use of the reserve fund. He does not claim to have obtained from the appellant any assurance that his usual proportionate liability for the repair and maintenance of the block would change as a result of his having replaced his own windows. The FTT, instead of making a decision about the reasonableness and payability of the service charge, regarded "the critical issue" and "the nub of the dispute" as being the charge to the reserve fund for the windows (paragraphs 2 and 3 of the FTT's refusal of permission to appeal). It accepted the respondent's view of the fairness of a different matter (the use of the reserve fund), made a determination about the fairness of the use of the reserve fund (which was not relevant to the reasonableness and payability of the service charge), and on the basis of that assessment approved a deduction from the service charge, albeit not as great a deduction as the respondent wanted.

28. The respondent in his written representations on the appeal has reiterated his account of the replacement of the windows. He also asserts that the appellant is not entitled under the lease to replace the window frames. That was not part of his case before the FTT and it is not open to him to raise that point now. The FTT found at paragraph 6 that the window frames fell within the appellant's repairing covenant, and did not record any challenge to that. The respondent also raises concerns about the appellant company's having changed its name on two occasions; I am afraid that that is not relevant to this appeal.

29. The appellant is correct to say the FTT failed to decide what it was asked to decide about the service charges and instead made a different decision on an issue that was not before it. The decision about the service charge, item 1 of the lost quoted at paragraph 6, was made in error and is set aside.

30. At paragraphs 27 and 28 the FTT purports to make a decision about the administration charges, which it will be recalled formed part of the £1,123.03, but which the FTT appeared to think was the sum of £1,056 (which it will be recalled was the legal expenses due under the lease, not the administration charge). The FTT made reference to the administration fees of £60 mentioned in the appellant's statement of case, and dismissed then as unreasonable since no evidence was produced to sustain them. Yet the respondent made no challenge to administration charges save for his unexplained assertion that they were exorbitant; it appears that the FTT has confused the legal expenses fee of £1,056 with the small sums relating to administration, but the FTT has not said in what respect any of the administration charge – whatever the FTT supposed it to be – was unreasonable.

31. The decision about the administration charges, at item 2 in the list quoted at paragraph 6, was irrational and is set aside.

The order under section 20C of the Landlord and Tenant Act 1985

32. Because none of the decisions made by the FTT have been upheld, the order made under section 20C of the Landlord and Tenant Act 1985 is also set aside.

Conclusion

33. The matter is remitted to the FTT for it to decide the reasonableness and payability of the sum of £1,123.03 relating to service charges and administration charges.

31 December 2019

Upper Tribunal Judge Elizabeth Cooke