UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – charge payable on demand provided not less than one month's notice given – demand for payment in 30 days – whether demand valid – appeal dismissed

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

BETWEEN:

H STAIN LTD

Appellant

-and-

MS CAROL RICHMOND

Respondent

Re: Flat 8,
Clarence Court,
London NW7

Martin Rodger QC, Deputy Chamber President

16 March 2021

By remote video platform

Jonathan Upton, instructed under the Bar's Public Access Scheme, for the appellant
Sam Madge-Wyld, instructed under the Bar's Public Access Scheme, for the respondent

The following cases are referred to in this decision:

Brent London Borough Council v Shulem B Association Limited [2011] 1 WLR 3014

Mannai Investments Co Ltd v Eagle Star Assurance [1997] UKHL 19

1. This appeal raises a short point concerning a demand for payment of a service charge of £2,255.77 under the lease of a flat in Mill Hill. The charge was claimed by managing agents on behalf of the appellant landlord, H Stain Ltd, from the leaseholder, Ms Carol Richmond, on 18 August 2015. Whether it was payable was one of a large number of issues which arose between the landlord and three leaseholders which were determined by the First-tier Tribunal (Property Chamber) on 13 February 2020. The FTT decided that the service charge was not payable.

2. No.8 Clarence Court is a residential flat on the second floor of a block of flats at 135 The Broadway, London NW7. In 1977 it was let on a long lease for a term of 99 years. In 1995 the reversion to the lease was acquired by the appellant. In 2002 the unexpired term of the lease was purchased by the respondent.

3. The lease is in conventional form, placing responsibility on the landlord for the repair of the structure and the maintenance of the common parts, and requiring the tenant to pay a service charge to meet the landlord's expenses incurred in discharging those obligations. By clause 3(6), so far as relevant, the tenant covenanted as follows:

> "The Tenant shall pay to the Landlord upon demand a rateable or due proportion … of such sums as may be incurred or provided for by the landlord in accordance with the covenants on that behalf hereinafter contained for the maintenance and repair for those parts of the building and the block not forming part of this demise but of which the Tenant has the benefit and use thereof in common with the Landlord and other owners or occupiers thereof and any other parts of the building and block used in connection with or supporting and protecting the flat including if so required a contribution in advance and/or to a sinking fund on account of expense and payment anticipated Provided that if the tenant so requires the amount of any such contribution is certified as being fair and reasonable by the Landlord's chartered accountant and that not less than one month's notice of such advance payment or contribution is given to the Tenant."

4. In July 2015 the appellant appointed a new managing agent to manage the block. On 18 August 2015 the agent wrote to the respondent enclosing an invoice for the service charges for the period 25 March 2015 to 24 March 2016. The invoice showed how the charges of £2,395 were made up and, after giving credit for money previously received, stated that the total amount outstanding was £2,255.77. The covering letter described the sum as "projected expenditure" and although no reference was made to clause 3(6) it was clear that the invoice was a demand for a contribution in advance.

5. At the bottom of the invoice the landlord's name and address were given along with details of the agent's bank account. The following statement also appeared in capital letters:

> "Payment due 30 days after date of demand, arrears by return."

6. The parties were in dispute over the maintenance of the building and the respondent did not pay the sum demanded by the invoice. In May 2016 the appellant brought proceedings in the County Court to recover the 2015-16 service charge contribution. It also brought proceedings against other leaseholders in the building, all of which were eventually transferred to the FTT. Delays in transferring some of the claims may explain the very lengthy delay in the FTT making a determination.

7. The argument before the FTT concerning the 2015-16 contribution in advance focussed on the meaning and effect of clause 3(6) of the lease. Counsel then instructed for the appellant submitted that the 18 August 2015 demand was not invalidated by the statement that payment was due 30 days after the date of the demand even though the lease required the landlord to give one month's notice. The effect of clause 3(6) was said to be simply that, whatever the invoice may say, the respondent was not liable to pay anything until a month after the demand was made. It was argued, relying on the test for the validity of notices in *Mannai Investments Co Ltd v Eagle Star Assurance* [1997] UKHL 19, that a reasonable recipient of the invoice would understand that clause 3(6) entitled them to a full month's time to pay.

8. The FTT said that it could not be known exactly when the demand was received by the respondent but as it was sent by post it could not have been earlier than 19 August 2015. It then held:

> "On its best case, allowing for the time taken for postal delivery, the landlord only gave 29 days' notice of its demand; but it may have been less. Accordingly, the essential pre-requisite for demanding these estimated service charges was not met and that failure cannot be saved by the application of the *Mannai* 'reasonable recipient' test."

The FTT therefore determined that the 2015-16 advance payment had not been validly demanded and that no sum was payable by the respondent at the time the proceedings in the County Court had been issued.

9. This Tribunal subsequently gave permission to appeal and at the hearing of the appeal the appellant was represented by Mr Jonathan Upton, who had not appeared before the FTT.

10. The sum directly in issue in the appeal is a modest one, but Mr Upton explained that similar demands had been made for subsequent years. For 2015-16 at least, no demand has been made based on actual expenditure. The costs of the county court proceedings are also liable to depend on the outcome of the appeal.

11. Mr Upton submitted that the appeal gave rise to two questions: first, what does clause 3(6) require as to the form of a demand; and secondly, did the invoice of 18 August 2015 satisfy those requirements? That was how Morgan J had approached his consideration of the validity of a service charge demand in *Brent London Borough Council v Shulem B Association Limited* [2011] 1 WLR 3014 at [38]. At [40], having referred in general terms to a number of authorities dealing with the requirements of valid demands in different contexts, Morgan J summarised their effect:

> "What the authorities show is that the form and content of the demand depends upon the wording of the contractual or statutory provision in question and, critically, on the perceived purpose of that provision."

12. Mr Upton submitted that while it was clear that the landlord must serve a demand under clause 3(6) before the leaseholder will become liable to pay a sum of money, and although that sum must be specified in the demand, properly construed, the clause did not require the demand for payment to specify when payment was due. As Mr Upton put it "the tenant can work that out for herself by reading the lease". A demand was not invalid if it failed to specify when a payment was due or if it specified that payment was due within a shorter period than clause 3(6) suggested. The meaning of clause 3(6) was that the tenant was not liable to pay until one month after the amount payable had been demanded. It was not to make it a condition of the tenant's liability to pay that the demand should specify a date for payment which was at least a month away.

13. Mr Upton submitted that the parties to the lease could not have intended that the tenant would avoid liability because the landlord demanded payment in 30 days rather than in one month. If, contrary to his first submissions, clause 3(6) required the landlord to give the tenant one month's notice to pay, the consequence of its failing to do so was not that the demand was invalid but was simply that the tenant would not be liable to pay until one month after the demand rather than on the date specified.

14. I do not accept Mr Upton's submissions. In agreement with the FTT, and with the submissions of Mr Madge-Wyld, who appeared on behalf of the respondent at the hearing of the appeal, I am satisfied that this demand failed to comply with the minimum requirements of clause 3(6). At the risk of over-analysing a relatively simple clause, I make the following comments about clause 3(6).

15. First, it looks very much as though the clause has been drafted in stages, with some or all of the proviso dealing with certification and notice (the part from the words "Provided that …") having been bolted on as an afterthought, perhaps at the suggestion of the tenant's solicitor in the course of negotiating the detailed terms of the lease. The use of language is not consistent between the main part of the clause and the proviso, nor is the thinking behind the different parts.

16. The clearest indication that the clause may have been drafted in a piecemeal way is the inconsistency between the first line and the proviso at the end of the covenant. The clause begins with a clear statement that the tenant shall pay her proportion of the sums incurred by the landlord "upon demand". An obligation to pay on demand requires payment to be made straight away, without delay, and it is quite different from an obligation to pay after a period of notice. Yet, the clause ends with the qualifying words "Provided that … not less than one months notice of such advance payment or contribution is given to the Tenant". Requirements to pay on demand and to pay on one months' notice are, on the face of it, inconsistent. But the parties included both requirements in their agreement and they must be reconciled. The obvious way of respecting both stipulations is to read the clause as a whole as requiring the tenant to pay the sum demanded immediately on the expiry of the period of notice given by the landlord.

17. Secondly, the clause is the only service charge payment obligation in the lease. It is performing tasks which in a modern lease would be divided into a number of separate and detailed provisions, but which here are combined in one rather unwieldy lump. The basic obligation is to pay a proportion of the sums "incurred or provided for" by the landlord for the maintenance and repair of the parts of the building specified. But the sum demanded may also include "a contribution in advance and/or to a sinking fund on account of expense and payment anticipated". The landlord is therefore entitled to demand both expenditure already incurred and a contribution in advance to expenditure which has not yet been incurred. Clause 3(6) does not require the landlord to differentiate between those sums when making a demand although, in practice, separate demands have been made for service charges payable in advance and for any balancing charge (or credit) once a full account has been prepared of the annual expenditure (as required by clause 4(4) of the lease).

18. Thirdly, the obligation to pay is then made subject to a proviso or condition, which is in two parts. The first condition is that the sum demanded must be certified as fair and reasonable, but only if the tenant so requires. Mr Madge-Wyld suggested that any request for certification would have to be made before the landlord had issued a demand, but that seems to me to be an improbable construction. It is much more likely that the parties would have intended the tenant to have the right to require certification of the sum once the amount being demanded was known, and that seems to me to be the natural reading of the first part of the proviso. The effect is that, if the tenant requires her contribution to be certified, the sum demanded does not become payable until the landlord's chartered accountant provides the certificate.

19. The second part of the proviso makes it a condition of payment that "not less than one months notice of such advance payment or contribution is given to the Tenant". I refer to this as a condition because the requirement is prefaced by the words "provided that", meaning that the obligation which has already been described is not to arise until the steps which follow have been taken.

20. The proviso for notice gives rise to at least two questions. The more difficult of those questions also arises in relation to the first part of the proviso, the requirement of certification of the tenant's "contribution" (if required). What is it that is made conditional on the provision of a certificate or on the giving of notice?

21. Mr Madge-Wyld submitted that the notice requirement related to all of the service charges payable by the tenant, whether they were demanded as an "advance payment" or as a "contribution". He interpreted those words as referring separately to the payments in advance which the landlord is entitled to demand, and to any balancing charge which the tenant may be required to pay at the end of the year.

22. I do not read the proviso in that way, although I acknowledge that the language is not as clear as it might be. The requirement to give notice applies to "such advance payment or contribution" which I read as a single composite expression in which "advance" qualifies both "payment and contribution". In other words, it is only the contribution which the tenant is required to pay in advance which must be the subject of at least one month's

notice. The same "contribution in advance" is to be the subject of certification, if the tenant so requires. The word "contribution" is not used to describe the sum payable in respect of expenditure already incurred, to which the tenant is to pay a "rateable or due proportion". The lease also makes separate provision, in clause 4(4), for a full account to be prepared of the landlord's expenditure and for certification of "what proportion thereof is attributable to the flat". Double certification of the same amount does not seem likely to have been intended.

23. In my judgment, therefore, both parts of the proviso, the requirement of certification and the requirement of notice, apply only to the "contribution in advance and/or to a sinking fund on account of expense and payment anticipated". A demand for any shortfall after the year end would not need to be the subject of one months' notice.

24. The easier question about the proviso is the issue raised in this appeal, namely, the effect of the requirement that "not less than one months notice of such advance payment or contribution is given to the Tenant." To my mind the meaning is quite clear. The tenant is entitled to receive not less than one month's notice of the sum demanded in advance before the liability to pay it takes effect. The giving of notice is a condition of liability and it requires a particular step to be taken by the landlord to inform the tenant not only of the amount which must be paid, but of the date by which it must be paid. That date must not be less than one month from the giving of the notice. If the condition is not satisfied the sum is not payable.

25. Mr Upton's submission that the tenant need only be told the sum payable and that she can find out for herself when it is payable by looking at her lease is not consistent with the language or with the purpose of the notice provision. Clause 3(6) does not specify a date of payment, it identifies a minimum period of grace, not less than a month, which is only made specific by the landlord identifying a date. The requirement of notice has at least two purposes. The first is to fix a date for payment, so that both parties know when the tenant's obligation must be performed. The second is to give the tenant time to make arrangements to pay, such as by transferring funds from a bank account. The identification of a specific date is therefore important for both parties. As Mr Upton acknowledged, the giving of one month's notice is not difficult, and (at least in 1977 when the lease was granted) there was no risk that the landlord would be unable to recover its expenditure; if it gave insufficient notice it could simply serve a sufficient notice and the charge would become payable on its expiry. There is therefore no reason not to give the language its ordinary meaning.

26. A requirement to give one month's notice means one calendar month (see section 61, Law of Property Act 1925). 30 days' notice may suffice in some months, but the demand for payment in 30 days which arrived on 19 August expired on 18 September and did not provide the required one months' notice.

27. The FTT came to the right conclusion and the appeal is dismissed.

Martin Rodger QC,

Deputy Chamber President
16 March 2021