UPPER TRIBUNAL (LANDS CHAMBER)

[2023] UKUT 197 (LC)

LC-2022-584

Royal Courts of Justice,
London WC2A

14 August 2023

Corrected pursuant to rule 53, (Upper Tribunal) (Lands Chamber) Rules 2010 – 25 August 2023

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

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

LANDLORD AND TENANT – SERVICE CHARGES – effect of dismissal of County Court claim – whether leaseholder entitled to credit for on-account sums already paid – limitation – appropriation – whether costs of proceedings recoverable as administration charges – s.27A, Landlord and Tenant Act 1985 – Schedule 11, Commonhold and Leasehold Reform Act 2002 – appeal allowed in part

BETWEEN

ADAM DAVIES

Appellant

-and-

BENWELL ROAD RTM COMPANY LTD

Respondent

Re: 3 Benwell Road,
London N7

Martin Rodger KC,
Deputy Chamber President

27 June 2023

Jonathan Ward, instructed directly, for the appellant
Miss Amanda Gourlay, instructed by Lazarev Cleaver LLP, for the respondent

The following cases are referred to in this decision:

Khandanpour v Chambers [2019] EWCA Civ 570

Mayor and Burgesses of the London Borough of Tower Hamlets v Khan [2022] EWCA Civ 831

Introduction

1. This appeal concerns a dispute over a service charge of £616 which the appellant refused to pay in 2014 because, he said, he was entitled to a credit from an earlier year. In 2022 judgment for the disputed sum was entered by the County Court, after a determination by the First-tier Tribunal (Property Chamber) (the FTT). By that time contractual interest, administration charges and costs had inflated the original charge to £14,917.

2. The appeal is against the decision of the FTT dated 31 August 2022, following the transfer to it of proceedings commenced in the County Court by Benwell Road RTM Co Ltd, the respondent to the appeal, against Mr Davies, the appellant. The decision was given by the two-person panel acting both in their tribunal capacity and in their capacity as, respectively, a judge of the County Court and an assessor, and the judge also entered a County Court judgment purporting to give effect to their decision. One of the problems which it will be necessary to address in the appeal is that it is unclear in which capacity the panel reached different parts of its decision; for that reason it is also unclear whether they had jurisdiction to make parts of their orders, and whether the proper route of appeal lies to this Tribunal or to the Court.

3. The County Court judgment was for the sum of £6,719.59 (including interest) claimed under a long residential lease granted to Mr Davies on 6 March 2006, together with costs assessed at £8,197.50.

4. The judgment sum comprised four separate elements which the FTT had determined the appellant was liable to pay, namely:

    1. £616.60, that being the unpaid part of an interim service charge for the year to 31 March 2015 which had been demanded by the respondent on 15 May 2014 and paid in part on 31 May 2015;
    2. £3,240, representing contractual administration charges attributable to the unpaid portion of the interim service charge;
    3. £2,444.29, contractual interest from an unspecified date up to 11 May 2021;
    4. £418.70, further contractual interest from 12 May 2021 to 10 June 2022 (the date of the hearing).

5. At the hearing of the appeal both parties were represented by counsel, Jonathan Ward for the appellant and Miss Amanda Gourlay for the respondent. I am grateful to them both for their assistance in navigating this muddled case.

Facts

6. To start to understand the muddle it is necessary to begin in 2012.

7. The Respondent RTM company was incorporated on 19 March 2012 and in the same year, after following the procedure in Part 2 of the Commonhold and Leasehold Reform Act 2002, it acquired the right to manage property referred to in its memorandum and

articles of association as 1 Benwell Road. That is the address shown on the register of title of land on which a purpose-built block of flats and other buildings were constructed in about 2006. Whether the RTM Company acquired the right to manage the self-contained townhouse described in Mr Davies' lease as "Live/Work Unit 3, Benwell Road" was initially a point of contention between them, but that issue was eventually settled in the company's favour.

8. Mr Davies' lease was made between him as Lessee, the original landlord and a management company which was to be responsible for the provision of the usual services. He is required by paragraph 2 of the Twelfth Schedule to pay a service charge notified to him by the management company as being its estimate of his proportionate contribution for the year. Paragraph 5 provides for a final account to be taken once the costs have been incurred, leading to a final payment or credit as the case may be. Mr Davies' obligation in respect of the estimated charge is specified in paragraph 3 of the Twelfth Schedule, as follows:

> "On ten dates during each year nominated by the Management Company and with not less than one month between each date (or such other dates as shall from time to time be nominated by the Management Company at its sole discretion) the Lessee shall pay by Banker's Standing Order or such other payment method as may be stipulated by the Management Company".

Although paragraph 3 does not say what it is that is to be paid, it can only be understood as referring to the estimated amount notified under paragraph 2, and it makes that sum payable by instalments on ten dates nominated by the management company.

9. On 26 February 2013 the RTM Company's managing agents, Urang Property Management Ltd, issued a request for payment of an interim service charge of £616.60 for the period 1 October 2012 to 31 March 2013. The request showed no other sum as outstanding at that time and Mr Davies promptly paid the charge. He did so under protest, asserting that he was not liable to pay anything to the RTM Company because, he maintained, the premises described in its memorandum and articles over which it had acquired the right to manage did not include his property.

10. The next request was for payment of the estimated contribution for the full year ending 31 March 2014. Mr Davies refused to pay that charge and on 8 August 2013 the RTM Company commenced proceedings in the County Court. I was not shown a copy of the claim form, but it is common ground that the sum claimed was £3,847.27, of which £2,451.56 represented arrears of service charges. Part of those arrears was said to have been demanded by a previous managing agent (before the RTM Company acquired the right to manage) and part was the unpaid on-account charge for the year 2013-14.

11. In his defence Mr Davies questioned the RTM Company's right to collect service charges from him, and alternatively disputed its right to claim an on-account contribution for the whole year in a single sum rather than by instalments as paragraph 3 of the Twelfth Schedule to the lease appeared to provide. He succeeded on both of those defences at a hearing before Deputy District Judge Byrne on 2 December 2013. It might more accurately be said that the claim was dismissed on the first ground for lack of proper

evidence. The Judge decided that the RTM Company had failed to prove that the premises described as 1 Benwell Road in its memorandum and articles included Mr Davies' property at 3 Benwell Road. She also held that there was no evidence that the contractual procedure for determining the date of payments on account had been followed, or that sums claimed by the previous managing agents had not been paid.

12. Mr Davies has always interpreted the dismissal of the RTM Company's 2013 claim as if the Judge had decided that he was not liable to pay any service charges to the Company at all. A transcript of the Judge's *ex tempore* judgment is available but not a copy of any order she may have made. There is nothing in the transcript to suggest that the Judge made a declaration of the parties' rights or determined Mr Davies' liability for any sum other than the payment on account for 2013-14 and the sum said to have been claimed by the previous managing agent. In particular, the Judge did not decide that Mr Davies had not been liable to pay the on-account charge of £616.60 for 2012-13 which he had paid under protest on 5 March 2013. That sum was simply not in issue in the proceedings.

13. Having failed to persuade the County Court, the RTM Company tried again in January 2014, but this time in the FTT. It issued an application under section 27A, Landlord and Tenant Act 1985 for a determination of Mr Davies' liability to pay service charges for the years 2011-12 (before it had acquired the right to manage), 2012-13 and on account for 2013-14.

14. The FTT first considered the application at a case management hearing on 13 May 2014. It determined that payability of £3,847.27 which had been included in the 2013 County Court claim could not be considered in the new proceedings because the earlier claim had been dismissed and there had been no appeal. The FTT directed that the RTM Company was entitled to pursue its application only in so far as it related to "any other service charges (not claimed in the County Court proceedings referred to above) and said to be due from [Mr Davies]". It was also entitled to ask the FTT to determine whether it could demand and receive future service charges from Mr Davies, because the County Court had made no decision regarding the validity of the RTM Company's formation or acquisition of the right to manage and had dismissed its claim simply because it had failed to prove its case.

15. The FTT's substantive decision on the 2014 application was dated 17 October 2014. It explained that the parties had agreed that the estimated service charges of £1,279.02 for the year 2014-15 should be added to the periods covered by the original application. That sum had first been demanded on 15 May 2014, immediately after the case management hearing.

16. The estimated charges for 2014-15 were described in the FTT's final decision as the only charges in issue before it. I infer that the RTM Company had not identified any other charges for the years 2012-14 which had not been claimed in the County Court proceedings and in respect of which it sought a determination of payability. It could have sought a determination about the payability of the interim charge of £616.60 which Mr Davies had paid under protest on 5 March 2013, as could Mr Davies, but neither of them did.

17. The FTT's 2014 decision was all about the extent of the right to manage acquired by the RTM Company in 2012. In paragraph 14 it recorded that Mr Davies had not questioned the validity of the 2014-15 demand for interim service charges other than on the basis that the RTM Company was not properly constituted. In paragraph 42 it said that he had accepted in principle that the sums claimed were reasonable and recoverable under the lease. The FTT refused to allow Mr Davies to call evidence to substantiate complaints about the managing agents because it "was not relevant to the fundamental issue of whether the applicant company had assumed the management responsibility". Having heard the evidence the FTT was satisfied that the RTM company had acquired the right to manage 3 Benwell Road. It therefore determined that the sum of £1,279.02 was "currently due" and should be paid by 19 November 2014. Mr Davies was refused permission to appeal.

18. Mr Davies did not pay the sum which the FTT had found to be due. On 25 March 2015 a new demand was made for the on-account service charge for 2015-16 which left a balance on Mr Davies' account of £2,725.35. Responding to that demand by email on 7 May 2015 Mr Davies maintained that he was entitled to credit for "the £616.60 that you already have on account". That was a reference to the sum he had paid on 5 March 2013 for 2012-13 for which he claimed credit on the basis of the dismissal of the 2013 County Court proceedings. On 31 May 2015 he paid £2,208.75, being the balance on the account less the £616.60.

19. After further email exchanges a member of Urang's staff, Paige McIntosh, wrote to Mr Davies on 23 June 2015: "As agreed, we refunded you the initial £616.80, we only have to reimburse you once and this has been done." It is not clear what agreement, or what refund, Ms McIntosh had in mind, and it is common ground that no reimbursement of that sum has ever been made. Mr Davies therefore replied, on 23 June 2015: "You are right it was agreed, but I have no record that you ever actually refunded the money."

20. The agreement which Mr Davies referred to in his email of 23 June 2015 is not documented and its basis is unclear. When he sought permission to appeal the FTT's decision on 18 November 2014 one of the reasons he gave for disputing his liability for the full amount for 2014-15 was that the RTM Company had "admitted and agreed in the directions hearing that they were holding £616.60 of mine on account, on the basis that (following the County Court decision) it had been wrongly paid to them for a year for which the Court had determined the Claimant could not claim against me." The FTT had not mentioned any such agreement in the introductory narrative to its directions of 13 May 2014 and, as will be seen, Mr Davies later gave a different account of how the suggested agreement had come about.

21. The position reached by 31 May 2015 was therefore that Mr Davies was withholding £616.60, claiming to be entitled to credit for it, based on the decision of the County Court in 2013, and also suggesting that agreement had been reached on that entitlement at the hearing in May 2014. The same sum remained outstanding for several years, but it is not necessary to follow the detail of correspondence about it.

The current proceedings

22. On 11 May 2021 the RTM Company issued a new claim against Mr Davies in the County Court for £7,276.49. That sum comprised £3,856.60 in service charges and contractual administration charges, £2,444.29 in interest and £975.60 in contractual costs for the claim itself. The principal sum was later broken down further to reveal that it comprised the same £616.60 which had been in dispute since at least May 2015 and £3,240 in administration charges. The largest single administration charge was £2,400 relating to the 2014 FTT proceedings, which Urang demanded on 7 August 2015 under the description "time spent on tribunal application and hearing". The balance comprised two sums of £300 in November 2016 and July 2020 each recorded as "administration fee, arrears collection" and two of £120 on 24 February and 30 March 2020 each recorded as "first reminder, arrears collection".

23. In a detailed defence dated 28 June 2021 Mr Davies denied that he was in arrears and disputed his liability to make payments of interim service charges by a single annual charge (as the lease provides for 10 instalments). He denied that the administration charges claimed fell within the scope of the contractual charging provision (which allows only the recovery of costs incurred "in connection with the recovery of arrears of rent and service charge" or "in contemplation of proceedings under sections 146 and 147 of the Law of Property Act 1925") or that they had been properly demanded or were reasonable in amount.

24. The County Court proceedings were transferred to the FTT under section 176A, Commonhold and Leasehold Reform Act 2002 on 8 December 2021. Directions were issued on 25 February 2022. These included a narrative explanation of the history of the dispute and a statement that the issues were agreed to concern service charges of £616.60 and administration charges of £3,240. The directions did not identify the period to which the disputed service charges related but recorded Mr Davies' case as being, first, that a claim for the same charges had been considered and dismissed by the County Court in 2013, and secondly, that "after the case management hearing in the previous [2014] tribunal proceedings, the RTM Company had agreed to withdraw its claim for the £616.60". Despite that concise summary of his case, Mr Davies did not abandon the points he had taken in his defence of 28 June 2021, which were repeated in a new statement of case and a supporting witness statement.

25. The FTT's directions also included the following statement:

> "These proceedings will be administered by the Tribunal. The Judge who eventually hears the case will deal with all the issues in the case, including, interest and costs, at the same time as the tribunal decides the payability of the Service and Administration charges and the Judge (sitting alone as a Judge of the County Court) (DJ) will make all necessary County Court orders".

The FTT's decision

26. The FTT considered the application at a hearing at which evidence was given by Mr Davies and by Mr Cleaver, a director of Urang. Its decision was issued on 31 August 2022 and summarised the main points of Mr Davies' case. First, the dismissal of the 2013 County Court proceedings meant that the RTM Company had never been entitled to

demand the sum of £616.60; in 2014 the FTT dismissed a claim for the same sum; therefore, he was entitled to a credit which he could deduct from his liability as he had done on 31 May 2015. Secondly, he "relied on a purported agreement made with Urang's employee, Ms Paige McIntosh, to refund him this amount on the basis that it was not owed by him". The FTT referred to "various emails passing between him and Ms McIntosh from May to August 2015" but did not consider what those emails said.

27. The FTT reached its conclusion on the argument that Mr Davies was entitled to a credit which extinguished his liability, as follows:

> "15. The tribunal was satisfied that the 2013 County Court proceedings did not extinguish the Respondent's service charge liability for the period 1 October 2012 to 31 March 2013. The only reason those proceedings were dismissed is that the Applicant had not come up to proof that it had been validly constituted. Indeed, when giving directions in the 2014 Tribunal proceedings, Tribunal Judge Martynski indicated as much and this was restated in the decision issued following those proceedings (see above).
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> 16. In concluding that the Applicant had in fact been validly constituted from the outset, this meant that all service charge demands served on the Respondent were retrospectively valid, including the one for the sum of £616.60. As this was not challenged and paid by the Respondent at the time, he is now prevented from doing so pursuant to section 27A(4) of the Act and he is not entitled to make any further challenge in respect of this sum.
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> 17. The Tribunal was also satisfied that the sum of £616.60 was withdrawn from the 2014 Tribunal proceedings and was not the subject matter of the decision issued by the Tribunal then."

28. It then considered the suggestion that there had been an agreement that the disputed service charge was not payable:

> "18. The Tribunal found that there was no agreement made between the Respondent and Ms McIntosh (or anyone else at Urang) that he was not liable for the sum of £616.60 and it would be refunded to him. The Tribunal also accepted the evidence of Mr Cleaver in those terms. It is clear from the email exchanges that, at best, there was only a proposal made to the Respondent to defer payment until such time as he sold the property, which was not accepted by him.
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> 19. Accordingly, for the reasons given, the Tribunal was satisfied that the Respondent is liable for the sum of £616.60. As he did not dispute the quantum, it was allowed as claimed."

29. The decision went on to find that the administration charges levied for work done on the 2014 FTT proceedings and subsequent attempts at debt recovery were reasonable and payable; interest at 10% per annum was also payable under the terms of the lease.

30. The final issue was a claim for legal costs of the County Court and FTT proceedings totalling £14,569.50 including VAT. The FTT was satisfied that these were recoverable

under paragraph 33 of Part II of the Sixth Schedule to the lease, and then proceeded to assess the sum payable, explaining, at paragraph 29:

> "The assessment of the quantum of the costs by the Tribunal was carried out by way of a summary assessment."

Having reduced the sum claimed to £8,197.50 by that summary process the FTT concluded at paragraph 32 with the following statement:

> "The Tribunal orders that the service and administration charges and the costs awarded are payable by the Respondent within 28 days of this decision being served on the parties."

31. An order of the County Court dated 1 August 2022 was then made entering judgment for £6,719.59 including interest and ordering Mr Davies to pay the RTM Company's costs summarily assessed at £8,197.50.

The issues

32. Permission to appeal was given by this Tribunal on the following issues:

1. Whether the FTT had been right as to the effect of the 2013 County Court decision on the service charges payable for the period from 1 October 2012 to 31 March 2013.

2. Whether the FTT had dealt adequately with the allegation that there had been an agreement that the service charge was not payable and with a limitation defence which Mr Davies had included in his statement of case.

3. Whether Mr Davies was contractually liable to pay the administration charges.

4. Whether the FTT had had jurisdiction to determine the costs of the proceedings.

5. Whether the FTT had dealt fairly with an application by Mr Davies for a determination under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 that the costs of the proceedings should not be payable by him as an administration charge under the lease.

Issue 1: The effect of the 2013 County Court decision

31. Mr Davies paid the first interim service charge of £616.60 demanded by Urang for the period 1 October 2012 to 31 March 2013. The FTT was clearly right that the County Court decision did not extinguish Mr Davies' service charge liability for that period. There was no question of his liability being extinguished because he had already satisfied it by promptly paying the sum demanded.

32. In his grounds of appeal Mr Davies took issue with the FTT's suggestion that its 2014 determination that the RTM Company was properly constituted and had acquired the right to manage was sufficient retrospectively to validate all service charge demands served on him, including the one for the sum of £616.60. Whatever precisely the FTT may have meant by that statement, the general effect of its decision was to reject Mr Davies' argument that he was entitled to a credit for the sum he had paid on 5 March 2013 making it available to set off against his liability for the estimated charge demanded on 25 March 2015 and reducing that liability by £616.60.

33. In his argument in support of the appeal Mr Ward submitted that the dismissal of the 2013 County Court claim meant that the sums claimed in those proceedings were rendered irrecoverable and the RTM Company was prevented from bringing a new claim in respect of them. Neither of those propositions is in doubt. The FTT had accepted them at the case management hearing on 13 May 2014 when the procedural judge determined that the payability of sums included in the 2013 County Court claim could not be considered in the new proceedings. But neither of those propositions assist Mr Davies in the appeal, because the sum of £616.60 which the 2022 FTT found to be due had not been claimed in the 2013 proceedings but instead represented part of the estimated charge for 2014-15.

34. Mr Ward next focused on the 2014 FTT proceedings. The FTT had struck out those parts of the 2014 claim which overlapped with the claim dismissed by the County Court, but it had left open the RTM Company's right to pursue a determination of the payability of "any other service charges (not claimed in the County Court proceedings …) and said to be due from [Mr Davies]". Mr Ward suggested that the RTM Company had therefore had the opportunity to seek a determination as to the payability of the estimated charge of £616.60 for October 2012 to March 2013 which Mr Davies had paid. Because it had not done so, but had abandoned any investigation into the earlier years, it could not later assert that that sum had been payable; instead it must be taken to have agreed that it had not been payable. The RTM Company was therefore required to give credit for the sum which had been paid against Mr Davies' liability for 2014-15.

35. I do not accept Mr Ward's argument.

36. First, because the March 2013 payment of £616.60 was not part of the 2013 County Court proceedings, the dismissal of those proceedings had no effect on the state of account between the parties in respect of the period covered by the payment. In particular, it did not give Mr Davies a right to reimbursement of the money paid on account. The lease provides for reimbursement or credit where the sum paid on account is greater than the leaseholder's proportion of the final expenditure, but nothing in the County Court decision required that balance to be struck on the false assumption that no expenditure had been incurred. I was not shown a final account (and it may be that none has ever been prepared) but it has never been suggested that the RTM Company did not incur the expenditure it had estimated. The County Court did not determine that the RTM Company was not entitled to collect any service charges, only that it had failed to prove that it had a right to collect the estimated service charges which Mr Davies had not paid. Mr Davies simply read too much into the 2013 dismissal of the claim, and his long-held belief that he was entitled to a credit for sums already paid is and has always been without any foundation.

37. Secondly, by the time they came to be determined, the 2014 FTT proceedings were only about the estimated charges for 2014-15. There was no need for the RTM Company to introduce the payability of the £616.60 paid in March 2013 because it had already received that sum. On the contrary, it was for Mr Davies to raise the 2013 charge if he wished to establish that it had not been payable and should be treated as available as a credit, but he did not do so. Nor did he suggest that the sum payable for 2014-15 should be reduced by the £616.60 he had already paid for the earlier year. Instead he explained to the FTT that he did not question the validity of the 2014-15 estimated service charges other than on the basis that the RTM Company was not properly constituted.

38. For each of these reasons there is no procedural obstacle to the RTM Company maintaining its claim for the sum of £616.60 which Mr Davies withheld for the year 2014-15.

Issue 2: The suggested agreement and the limitation defence

39. This ground of appeal concerns the adequacy of the FTT's treatment of two specific grounds of defence which had been included in Mr Davies' statement of case. Its decision dealt only very briefly with the suggestion that there had been an agreement that Mr Davies was not liable for the sum of £616.60 and did not deal at all with his defence that the disputed sum was not payable because it was barred by the Limitation Act 1980.

The suggested agreement

40. The FTT simply said that it accepted the evidence of Mr Cleaver that there was no agreement between Mr Davies and anyone at Urang that the disputed sum would be refunded to him. It referred to but did not analyse or discuss the emails in 2015, including in particular the email of 23 June 2015 from Ms McIntosh which appeared specifically to confirm that there had been an agreement of some sort: "As agreed, we refunded you the initial £616.80, we only have to reimburse you once and this has been done."

41. The FTT's reasons for dismissing Mr Davies' case about the agreement were barely adequate. If it was correct that there had previously been an agreement that Mr Davies' was entitled to a refund, as the email of 23 June 2015 asserted, two issues would have needed to be considered. First, whether the suggested refund had been made, as Ms McIntosh suggested, or not, as Mr Davies maintained. Secondly, whether the supposed agreement had any effect on the FTT's jurisdiction to determine the payability of the disputed sum. The FTT did not address the evidence of an agreement in any detail and, in particular, it did not explain how its acceptance of Mr Cleaver's evidence that no agreement had been reached was consistent with Ms McIntosh's apparent admission that something had been agreed.

42. The FTT's omission to deal sufficiently with the email exchanges could only be a ground for allowing the appeal and remitting the matter for further consideration if it was Mr Davies' case that the agreement he relied on was contained in those emails, or there was some basis for saying that the emails otherwise supported his case. That makes it necessary to look in a little detail at what his case was.

43. In Mr Davies' statement of case of 31 March 2022 he explained that:

> "11.5 At the 2014 case management hearing, the claimant agreed, at the suggestion of the presiding judge, to "go away and have a serious think" about whether it was sensible or realistic to continue to claim entitlement to the £616.60, and on that basis [the presiding Judge] removed it from the scope of the 2014 FTT proceedings.
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> 11.6 The claimant later agreed again to credit the £616.60 and confirmed in writing that it had done so."

44. It was on the basis of that statement of case that when the FTT gave directions it described Mr Davies' case as being that "after the case management hearing in the previous tribunal proceedings, the RTM Company had agreed to withdraw its claim for the £616.60".

45. The statement of case does not say when the suggested agreement had been made, only that it was after the 2014 case management hearing. Nor does it seem to say that any agreement was made in writing; what was said to have been put in writing was confirmation of the agreement or confirmation of the credit. But in his 30-page witness statement dated 22 April 2022 Mr Davies again repeated that at the Judge's suggestion in 2014 the claimant had agreed to "go away and have a serious think" about "whether it should give me credit for the £616.60". He did not repeat the suggestion in paragraph 11.6 of his statement of case that "the claimant later agreed again to credit the £616.60" and he referred to no other conversation or exchange in which any agreement was reached. His witness statement also includes a "timeline of key events" which makes no reference to any agreement. It does not suggest an agreement by email in June 2015 but does include an entry that "[the] claimant falsely claims the £616.60 had already been refunded". Instead, Mr Davies explained at paragraph 9.2 of his witness statement that as a result of the comments made by the Judge at the case management hearing he had been "relying on the assumption that the claimant would drop its claim for the £616.60". That statement, and the absence of any affirmative evidence of an agreement made between Mr Davies and anyone else, demonstrates that there was no agreement (other than an agreement with the judge to "go away and think about it"). Mr Davies may have made an assumption, and that assumption may have been fuelled by the reference in Ms McIntosh's email sent more than a year after the case management hearing to a refund "as agreed". But Ms McIntosh's statement was referring to a previous agreement, yet Mr Davies had never made any agreement with her and had only assumed that the claim would be dropped. The one thing his exchanges with Ms McIntosh established without doubt, was that the RTM Company had not dropped its claim for the £616.60.

46. In his written submissions Mr Ward did not explain how the alleged agreement was supposed to have come about. In his oral submissions he hedged his bets, saying that there had been an agreement at the case management hearing, or if not, by the later exchange of emails. But the former suggestion is contradicted by Mr Davies' own witness statement, and by the letter he sent to Mr Cleaver the day after the hearing on 13 May 2014 in which he said "As I understand it … the amount you are now claiming … is at most c£616". The latter suggestion is not supported by the emails themselves.

47. In my judgment therefore, although inadequately explained, the FTT's conclusion that there had never been an agreement that the 2013 payment would be reimbursed or that the 2014-15 service charge would be reduced by an equal credit was correct. Whatever Ms McIntosh thought had been agreed, the only conclusion that could have been reached on the way Mr Davies put his case was that she was simply mistaken. Mr Davies did not suggest he had reached agreement with Ms McIntosh or Mr Cleaver (whose evidence, in any event, the FTT accepted).

48. There is one final short point on this aspect of the case. It was not suggested that the RTM Company had allowed Mr Davies to assume that it had dropped the claim for £616 and was estopped from pursuing it. Nor could it have been. His own email of 14 May 2014 shows that at that time Mr Davies understood the proceedings still included the disputed sum; Ms McIntosh's email of 23 June 2015 made clear that any credit she mistakenly thought had been agreed did not affect the claim for 2014-15. Nothing which occurred after those dates was relied on as creating any different impression.

Limitation

49. The limitation period applicable to a claim for arrears of rent is six years from the date on which the arrears became due (section 19, Limitation Act 1980). Unlike other forms of debt, a payment of part of the rent due at any time does not extend the limitation period for claiming the remainder (section 29(6), 1980 Act).

50. By clause 2 of Mr Davies' Lease the service charges payable under the Twelfth Schedule were reserved as rent. The right to recover those charges by proceedings would therefore expire six years after the payment became due if no proceedings had been brought by that time.

51. The RTM Company commenced these proceedings by issuing a claim form in the County Court on 13 May 2021 attaching a statement of account showing, as the opening balance, the sum of £1,279.02 which had been issued on 15 May 2014. The first payment from Mr Davies was the sum paid on 31 May 2015 which left the £616.60 which Mr Davies had withheld because he claimed a credit. On the face of it, time for the recovery of that disputed sum began to run on 15 May 2014 and expired in May 2020. The claim commenced on 13 May 2021would therefore have been too late.

52. Mr Davies did not plead a limitation point in his defence to the County Court claim, because he said the sums claimed were unclear, but he did so in the statement of case of 31 March 2022 which he was directed to file by the FTT.

53. The RTM Company was not directed to plead a reply to Mr Davies' statement of case and it did not do so. Nor was the point dealt with in Mr Cleaver's witness statement made on 22 April 2022, except inferentially in a passage in which he explained that payments received from tenants were allocated to the oldest liability first.

54. The FTT simply did not refer to the limitation issue in its decision, but it was necessary for it to do so in order to determine how much was payable by Mr Davies.

55. Miss Gourlay took two points in her written argument on behalf of the RTM Company. The first was that there was no limitation defence to be raised because Mr Davies had paid the demand for £616.60. But that was true only of the demand for that sum issued on 26 February 2013, when it represented the interim service charge for the period 1 October 2012 to 31 March 2013. Mr Davies did indeed pay that sum, under protest. But the sum of £616.60 claimed in these proceedings is the unpaid part of the estimated service charges of £1,279.02 for the year 2014-15 which was first demanded on 15 May 2014, and which was found by the FTT to be payable in its decision of 17 October 2014. That sum has never been paid because Mr Davies has (wrongly) maintained his entitlement to set-off the earlier payment of the same amount.

56. Miss Gourlay's second point was that the RTM Company had been entitled to appropriate payments received from Mr Davies to the earliest debt on his account. Relying on Mr Cleaver's witness statement she suggested that payments made by Mr Davies had indeed been appropriated in that way. But that suggested appropriation is not apparent from the statement of account itself and there is nothing to indicate that it was ever communicated to Mr Davies while he was making his payments. No appropriation was pleaded and it seems first to have been mentioned in Mr Cleaver's witness statement, but that was made after the limitation period had expired and after Mr Davies himself had begun to rely on the limitation defence, and was therefore too late for any effective appropriation. In any event, Mr Davies had made it clear in May 2015 that he considered himself entitled to deduct his payment of 26 February 2013 from the amount demanded in May 2014 and he maintained that position consistently thereafter. In my judgment that was sufficient to prevent the RTM Company from appropriating subsequent payments received from Mr Davies to cover the outstanding portion of the May 2014. It is not necessary that a debtor should appropriate a payment expressly, and it is enough if an intention to discharge one debt rather than another can be clearly inferred from the facts and circumstances known to both parties (see *Chitty on Contracts* (34th Edn) at 24-059, and *Khandanpour v Chambers* [2019] EWCA Civ 570 at [25]). Objectively, each of Mr Davies' payments was tendered on the basis of the claimed credit, and when Urang next received a payment after 31 May 2015 (which was in November 2017) it knew that Mr Davies made it on the basis that the May 2014 demand had already been satisfied. It was not entitled to appropriate the receipt inconsistently with that appreciation.

57. I am therefore satisfied that the RTM Company's entitlement to bring proceedings against Mr Davies for the unpaid service charge of £616.60 expired in May 2020, before the commencement of proceedings. In determining the amount payable the FTT should therefore have omitted that sum.

Issue 3 – Was Mr Davies liable to pay the administration charges assessed by the FTT?

58. This part of the appeal is concerned with two sets of administration charges. The first relates to the costs of the proceedings in the FTT in 2014, which were found to be payable in the full amount claimed, £2,400. The issue in relation to that sum is whether those costs were within the scope of the contractual charging provisions in the lease. The second concerns the costs of the current proceedings which were claimed at £14,300 and were reduced by the FTT on assessment to £8,197. Whether the FTT had jurisdiction to make that determination is the subject of issue 4.

59. The important point about an administration charge is that it is a contractual charge. So far as relevant to this appeal, an administration charge is defined by paragraph 1 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 as "an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly … in respect of a failure by the tenant to make a payment by the due date to the landlord …" Where such a charge is variable (in the sense it is not fixed by the lease or determined in accordance with a formula) it is subject to statutory control and is payable only to the extent that it is reasonable (paragraph 2, Schedule 11, 2002 Act). The first question, however, is whether there is a contractual obligation to pay the charge.

60. By paragraph 33 of the Sixth Schedule to the Lease Mr Davies covenanted with the Lessor, the Management Company and the owners of other apartments to pay the following:

> "(a) all expenses including Solicitors costs and Surveyors fees incurred by the Management Company incidental to the preparation and service of a Notice under Section 196 of the Law of Property Act 1925 or incurred in or in contemplation of proceedings under Sections 146 and 147 of that Act notwithstanding in any such case forfeiture is avoided otherwise than by relief granted by the Court
>
> (b) […]
>
> (c) all costs charges and expenses which may be incurred by the Management Company in connection with the recovery of arrears of the Rent and the Service Charge"

61. It is agreed that after the RTM Company acquired the right to manage, the payment obligation applied to charges incurred by it for the same purposes.

62. Mr Davies has always maintained that he has never been in arrears with his rent or service charges. I have already decided that he was mistaken in believing that he was entitled to a credit extinguishing his liability to pay the outstanding part of the 2014-15 interim service charge, nor was there any agreement discharging his liability for that sum. For those reasons, his assertion that he has never been in arrears cannot succeed. From May 2014 until May 2020 he owed £616.60 and was therefore in arrears; that history was not rewritten when, as I have also found, the RTM Company's right of recovery was barred by the expiry of the limitation period.

63. Miss Gourlay submitted in her written argument that the costs of the 2014 FTT proceedings were recoverable under paragraph 33(a) and (c) of the Sixth Schedule because they were connected with the recovery of those arrears of service charge. She suggested that, had there been no dispute as to the standing of the RTM Company to claim service charges from Mr Davies, he would have paid the service charges demanded and the RTM Company would not have applied to the FTT in 2014.

64. Paragraph 33(a) is concerned only with costs incurred incidentally to "the preparation and service of a notice under section 196 of the Law of Property Act 1925" or incurred "in or in contemplation of proceedings under sections 146 and 147 of that Act". Section 196 of

the 1925 Act is a general provision dealing with the method of service of notices of all types, and it was not suggested that it was relevant to the appeal. Sections 146 and 147 of the 1925 Act are concerned with forfeiture. There has never been any suggestion that the 2014 FTT proceedings were in contemplation of the forfeiture of Mr Davies' lease, and Miss Gourlay made no submission to that effect.

65. Paragraph 33(c) is wider and allows the RTM Company to recoup any costs incurred "in connection with the recovery of arrears" of rent or service charges. But the 2014 FTT proceedings were mainly concerned with the question whether the RTM Company's management extended to Mr Davies' property. It is true that when the Company applied to the FTT on 20 January 2014 it asked for a determination of the payability of service charges from 2011 to 2014. But at the case management hearing on 13 May 2014 the FTT struck out the claim so far as it related to the sums identified for the period up to 31 March 2014, because Mr Davies had already been found not to be liable to pay those sums by the County Court. It follows that, when the proceedings were commenced, there were no arrears of rent or service charges. The costs incurred in commencing the proceedings and preparing for and attending the case management hearing on 14 May 2014 are therefore not recoverable under paragraph 33(c).

66. On the day after the case management hearing a new service charge demand was issued for charges of £1,279.02 demanded on account for 2014-15 on 15 May 2014. The demand stated that payment was due immediately, but it was not paid by Mr Davies for over a year, and then only in part. If that charge was in arrears between 15 May and 28 August 2014, when the hearing before the FTT took place, then costs incurred for work in connection with the proceedings during that period would be recoverable under paragraph 33(c). Mr Davies suggested in his written material that the 2014 proceedings were never about money due, but only about the principle of entitlement to charge, but it is clear from the statement of case filed on behalf of the RTM Company on 27 May 2014 that it did seek to recover the sum it had just demanded for 2014-15.

67. Mr Ward submitted that a service charge cannot be in arrear until it has been found or agreed to be reasonable, but that is not the effect of section 19, Landlord and Tenant Act 1985. The statutory ceiling does not prevent a liability arising for the amount which is reasonable.

68. Mr Ward's next point was that the 2014-15 charge was not validly demanded, and so was never due or in arrears. Mr Davies had made that point in his defence to the County Court claim in June 2021 and in his statement of case for the FTT proceedings in March 2022. The FTT did not refer to the point in its decision.

69. I have quoted the payment provision in paragraph 3 of the Twelfth Schedule of the Lease at paragraph 8 above. It provides for payment by 10 instalments, not by a single lump sum in advance. My reading of the clause is that those instalments are payable on ten dates nominated by the Management Company with at least a month between each date; the Management Company is given power to vary those dates so that payment can be required on "such other dates as shall from time to time be nominated". How many "other dates" is not specified but there must be at least two, and arguably ten, since the clear intention is that the payment in advance is to be by instalments, rather than in a lump sum. I do not know whether the demand on 14 May 2014 was the first occasion on which a

request was made for the full year, and up to February 2013 at least instalments seem to have been demanded half yearly.

70. Mr Davies' obligation was to pay the service charge in the manner stipulated in the Twelfth Schedule to the lease. The 2013 County Court claim was dismissed not only because the RTM Company could not prove that it was entitled to manage but also because it could not show that the Management Company had nominated dates for payment as required by paragraph 3 of that Schedule. The demand served on 15 May 2014 did not cure that problem as it purported to require payment on a single date (which, oddly, was 1 April 2014, which had already passed) rather than by instalments. For that reason I am satisfied that it created no liability to pay and did not give rise to arrears.

71. At the hearing before the FTT on 28 August 2014 Mr Davies did not dispute that, if the RTM Company was validly constituted and entitled to manage his property, he should pay the charge for 2014-15. The FTT found in the Company's favour and directed that payment should of the £1,279.02 should be made by 19 November 2014. It made no determination of the date at which that sum had become payable. In my judgment, neither Mr Davies' decision not to question the validity of the demand, nor the FTT's decision that the sum demanded was payable, caused the interim service charge retrospectively to have been in arrears at any time before 19 November 2014. It had not been in arrears before that date because it had not been properly demanded. The FTT's determination that the sum was due was of course definitive and meant that any defences which could have been taken became irrelevant to Mr Davies liability. But the FTT specified a date for payment in the future and it did not consider or determine when the sum had first fallen due. Its decision does not prevent Mr Davies from maintaining, correctly, in these proceedings that he was not in arrears at any time before 19 November 2014 and that the 2014 proceedings were not concerned with the recovery of arrears because there had been no arrears.

72. The FTT was therefore wrong to find that the cost incurred in the 2014 proceedings were incurred in connection with the recovery of arrears of rent or service charges.

73. The other administration charges which the FTT found to be payable were for four letters demanding payment of arrears which were sent in November 2016 and then in February, March and July 2020, totalling £840.

74. As a result of Mr Davies' non-payment of the full sum the FTT found to be due on the date it specified, 19 November 2014, he fell into arrears for the first time. Despite the absence of a valid demand, he cannot claim that the 2014-15 payment on account was not due because the FTT had found that it was and there was no appeal against that decision. He remained in arrears by leaving £616.60 outstanding when he paid the balance of the sum on 31 May 2015 and has been in arrears ever since because of his misguided claim to be entitled to a credit for that amount.

75. Although the letters sent by Urang demanded payment of a greater sum than was owed (because they included the irrecoverable costs of the 2014 proceedings) they were nevertheless proper attempts to recover arrears which Mr Davies is liable to pay under paragraph 33(c).

76. The FTT found that the sums claimed for debt collection letters were payable by the RTM Company under the terms of its contract with Urang and that the sum charged was reasonable. Mr Davies disputed the reasonableness of the charges in his grounds of appeal, but there is no basis on which this Tribunal could interfere with the FTT's assessment.

77. In conclusion on this part of the appeal, therefore, the administration charges which the FTT should have found to be payable are limited to the sum of £840.

Issue 4 - Did the FTT have jurisdiction to determine the costs of the proceedings?

78. In paragraph 29 of its decision (see paragraph 30 above) the FTT explained that it had carried out a summary assessment of the costs of the proceedings (including both the Court proceedings and the FTT proceedings). The sum it found to be payable was £8,197.50 (the aggregate of £6,425 plus £1,285 VAT, court fees of £455 and travelling costs of £32.50). At paragraph 32 of the decision the FTT ordered payment of that sum by Mr Davies within 28 days of the decision being served on the parties.

79. The County Court entered judgment for the sum which the FTT had assessed.

80. There are a number of difficulties with the way in which the FTT and the Court approached the question of costs.

81. The FTT was entitled to determine the sum which it was reasonable for Mr Davies to pay under paragraph 33(c) of the lease, because it was a variable administration charge over which the FTT is given jurisdiction by paragraph 5(1) of Schedule 11, Commonhold and Leasehold Reform Act 2002. Once it had made a determination, however, the charge would not become payable until it was properly demanded. By paragraph 4 of Schedule 11, 2002 Act a demand for the payment of an administration charge must be accompanied by a summary of the tenant's rights and obligations and a tenant is entitled to withhold payment until that requirement is complied with.

82. In determining the sum payable, the FTT assumed that the RTM Company had succeeded in respect of the full amount it was claiming in the proceedings. It is now clear that it should not have done, and that it should have determined the costs recoverable under paragraph 33(c) on the basis that the £616.60 service charge, and the £2,400 administration charge dating from 2014 were not payable, and that the only sum payable was £840 for four debt collection letters. It cannot be said that its assessment would have been the same if it had appreciated that the RTM Company had succeeded in only a little over 20% of its claim. Its decision must therefore be set aside.

83. The FTT also failed to determine an application made by Mr Davies under paragraph 5A of Schedule 11, 2002 Act, which gives it jurisdiction to reduce or extinguish a tenant's liability to pay an administration charge in respect of litigation costs (meaning the costs of proceedings before the FTT; the County Court has the same jurisdiction in respect of the costs of the proceedings before it).

84. For the RTM Company, Miss Gourlay's primary submission was that the decision on costs was not a decision of the FTT at all but had been made by the Judge in his capacity as a judge of the County Court pursuant to its powers under section 51 Senior Courts Act 1981 and the Civil Procedure Rules 1998. On that basis Mr Davies had no right to challenge the decision in this Tribunal and should have brought a separate appeal against the County Court's order.

85. I do not accept Miss Gourlay's submission. It is clear from its decision that the Judge (and the surveyor member of the FTT) were not exercising a statutory jurisdiction to determine an award of costs, nor did they think they were making a determination in Court. They stated specifically that the RTM Company "also *contractually* sought the legal costs it had incurred in bringing this claim" and pronounced themselves satisfied that the costs were recoverable under paragraph 33. To put the matter beyond doubt, they referred to the assessment of costs as having been undertaken "by the tribunal" and concluded with; "The tribunal orders that the service and administration charges and the costs awarded are payable by the respondent within 28 days". Nor does the Court's order (mistakenly dated 1 August 2022, but presumably drawn up on 1 September, after the FTT's decision) state that it had made any assessment of its own.

86. If Miss Gourlay was right, and if the costs were assessed by the Court, and not by the FTT, the Court would have exceeded its own jurisdiction under section 51(1) Senior Courts Act 1981, which is expressly stated to be subject to the provisions of any other enactment. By section 29(1), Tribunal, Courts and Enforcement Act 2007, the costs of and incidental to proceedings in the first-tier tribunal are "in the discretion of the tribunal in which the proceedings take place." The Court of Appeal has confirmed in *Mayor and Burgesses of the London Borough of Tower Hamlets v Khan* [2022] EWCA Civ 831 at [56]-[69] that where part of proceedings has been transferred from the County Court to the FTT (usually under section 176A of the 2002 Act), the County Court has no jurisdiction to make any order for costs in respect of the FTT proceedings.

Disposal

87. The outcome so far is that the appeal is dismissed to the extent that it related to Mr Davies' liability to pay ~~£616.60 as a service charge and~~ £840 as administration charges, and his liability for those sums is confirmed, but the appeal is otherwise allowed and the remainder of the FTT's decision is set aside.

88. This Tribunal has no power to interfere with the order made by the County Court. If Mr Davies wishes to see that order set aside, he must apply to the County Court itself, relying on this decision to show that, for the most part, the sum for which judgment was entered was not payable. In that regard I note that County Court proceedings included a claim for interest on unpaid service charges at the rate of 10% provided for by clause 10(i) of the lease. The calculation of interest is a matter for the Court, but the sum for which judgment was given was inclusive of interest and was therefore too high both as regards principal and interest. The sum should be recalculated taking account of the correct charges, and the effect of limitation on the interest payable on the £616.60 service charge.

89. As I have previously noted, the FTT did not determine the application made by Mr Davies under paragraph 5A of Schedule 11, 2002 Act, for protection against the litigation costs in the FTT. Its omission would have been the subject of issue 5, but it is not necessary to deal with it because I have set aside the FTT's assessment of the costs payable and I have power to substitute the order it should have made. I will give the parties permission to make any further submissions they wish, within 14 days, dealing with the assessment of the contractual costs and the application under paragraph 5A, in each case only so far as they concern the FTT proceedings.

90. Mr Davies has also made an application under paragraph 5A for protection against administration charges payable in respect of the appeal to this Tribunal. He has achieved a substantial measure of success, though he remains liable for ~~£1,456~~ £840. The parties may also make further submissions on the appropriate order in respect of the contractual costs of the appeal.

Martin Rodger KC,

Deputy Chamber President

14 August 2023

After this decision was published on 14 August 2023 it was pointed out by Mr Davies that the outcome stated in paragraph 87 was inconsistent with my conclusion under issue 2 that the RTM Company's entitlement to bring proceedings against Mr Davies for the unpaid service charge of £616.60 expired in May 2020, and that in determining the amount payable the FTT should therefore have omitted that sum. The respondent has been asked to comment but has not been prepared to acknowledge the inconsistency pointed out by Mr Davies. I am nevertheless satisfied that there is an inconsistency and that it was the result of an accidental slip which was not picked up by me, or by counsel when the decision was circulated in draft for proof reading. I am therefore issuing this amended decision, having corrected paragraphs 87 and 90 under the power contained in rule 53, (Upper Tribunal) (Lands Chamber) Rules 2010. Time for the further submissions permitted by paragraph 89 and for any application for permission to appeal shall run from the date of this corrected decision is sent to the parties.

Martin Rodger KC,

Deputy Chamber President

25 August 2023

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.