UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2023] UKUT 8 (LC) UTLC Case Numbers: LC-2022-191

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – decision by the FTT about contested facts without a hearing – appeal allowed

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

BETWEEN:

ROSS SMITH

Appellant

-and-

WATERLOO WAREHOUSE RTM CO LTD

Respondent

Re: 6 and 47 East Waterloo Dock,
Waterloo Road,
Liverpool,
Merseyside,
L3 OBG

Judge Elizabeth Cooke
Determination on written representations
Decision Date: 5 January 2023

The appellant was not legally represented.
SLC Solicitors for the respondent

The following cases are referred to in this decision:

Enterprise Home Developments LLP [2020] UKUT 151 (LC)
Webb v Sunley (Findlay Close) Residents Limited [2022] UKUT 171 (LC)

Introduction

1. This is an appeal from a decision of the First-tier Tribunal ("the FTT") about the reasonableness and payability of service and administration charges demanded by the respondent from the appellant, Mr Ross Smith, in respect of his two leasehold flats in East Waterloo Docks. The respondent is an RTM company, which has been managing East Waterloo Docks in exercise of the leaseholders' right to manage since May 2004.

2. The appeal has been determined under the Tribunal's written representations procedure; Mr Smith has not been legally represented; written representations for the respondent were made by SLC Solicitors.

The factual and legal background

3. Mr Smith is the leaseholder of Flats 6and 47, East Waterloo Dock, Liverpool; the leases are in materially identical terms and require payments of variable service and administration charges. Those charges have been demanded quarterly, until March 2015 by managing agents Peter Kenny Property Management and from April 2015 by Keppie Massie; both companies acted as agents for the RTM company.

4. Section 47 of the Landlord and Tenant Act 1987 requires that demands for service and administration charges must include prescribed information, namely the landlord's name and address for service. Where a demand does not include that information the amount demanded is to be treated as not due from the tenant until the information is provided.

5. Furthermore, section 21B of the Landlord and Tenant Act 1985 requires that demands for service charges be "accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges" and provides that the charges may be withheld if that requirement is not complied with.

6. In August 2018 the respondent RTM company commenced proceedings in the county court against Mr Smith for recovery of arrears of service and administration charges in respect of both properties for the years 2015, 2016, 2017 and 2018. The service charge demands for the sums said to be unpaid were all issued by Keppie Massie. The first two demands, one for each flat, were dated 1 April 2015; each simply demanded a "Take On balance", in the sums of £6,931.92 for flat 47 and £5,598.84 for Flat 6, said to be the sum remaining unpaid from demands issued by the previous managing agents. The rest are the quarterly demands May 2015 to 31 December 2018. The total claimed in respect of Flat 6 was £9,083.20 service and administration charges plus interest and costs, and in respect of Flat 47 £11,567.58 plus interest and costs.

7. Eventually, in December 2019, the matter was transferred to the FTT (pursuant to section 176A of the Commonhold and Leasehold Reform Act 2002) for it to determine the reasonableness and payability of service charges. That of course was all that the FTT was concerned with; it has no jurisdiction in relation to interest and costs.

8. On 4 March 2020 the FTT gave directions; the RTM company filed a statement of case and a witness statement; on 19 August 2020 the FTT made a decision without a hearing. Later it set aside that decision, once it became clear that Mr Smith had asked for the FTT's directions to be amended and that his request had been overlooked. Further directions were given; Mr Smith filed a statement of case with an accompanying bundle of documents.

9. The issues raised by Mr Smith were:

    a. That the service charge demands issued by the previous managing agent did not contain the prescribed information and were not accompanied by the requisite summary of the tenant's rights and obligations.

    b. That none of the service charge demands made by Keppie Massie from April 2015 onwards was accompanied by the requisite summary of the tenant's rights and obligations, and some did not contain the prescribed information (stating instead that the RTM company was the landlord). He provided copies of the demands he had received. Mr Smith's case was that the copy demands provided to the county court and to the FTT by the RTM company had been doctored, by the addition of a separate sheet including the prescribed information and a summary of the tenant's rights.

    c. That payments he had made after April 2015 had been allocated to service charges outstanding from the years before 2015 (that is, to the first two demands, see paragraph 6 above), and should not have been because he had agreed with Keppie Massie that those payments should be allocated to the service charge for the current year.

    d. That some of the charges were not reasonable.

10. I observe that the demands sent out by the previous managing agents, before April 2015, are not directly in issue in these proceedings; the charges demanded are all the subject of demands sent out by Keppie Massie made from 1 April 2015 onwards. But what Mr Smith says about the earlier demands is relevant insofar as it explains why he was not prepared to pay the sums that were claimed to be outstanding from before April 2015. Indeed, the RTM company in its supplementary statement of case in the FTT agreed that the name of the landlord was not stated in the pre-April 2015 invoices and that that was why it sought to cure matters by issuing fresh demands in April 2015 – although Mr Smith said that those two demands were themselves not in proper form.

11. The RTM company filed a supplementary statement of case in August 2021. Its response to the issues raised by Mr Smith was :

    a. That all the demands had been accompanied by the requisite statement of rights and obligations.

b. That Mr Smith had not made the arrangement he alleged with Keppie Massie for the allocation of his payments and they were therefore allocated to the oldest debt.

c. Various charges were explained.

12. The parties were invited to notify the FTT if they wanted an oral hearing and neither did so. The FTT made a decision on the papers, dated 24 November 2021.

13. The FTT made a number of findings.

14. First, at its paragraph 31, it decided that on the balance of probabilities the service charge demands (both those sent out by the previous managing agents and the ones issued by Keppie Massie, although only the latter were relevant to the proceedings) contained the prescribed information and were accompanied by a statement of the tenant's rights because:

> "a. Including the prescribed information and summary is a basic function of a leasehold management company and the experience of the Tribunal is that such companies, even when the discharge of other functions is substandard, do produce service charge demands in the correct form.
>
> b. If the service charge demands had not contained the required information and summary, it is likely that other leaseholders would have sought to challenge them. There is no evidence that this has occurred.
>
> c. Copy documents produced by the [RTM company] are in the correct form and the Tribunal has not identified evidence of them being doctored. The [RTM company] has explained how the service charge demands are sent and the Tribunal accepts its account as being standard practice for a company operating in this field."

15. Second, at paragraph 32 the FTT said that it found that Mr Smith did not seek to have his payments allocated to any particular part of the outstanding debt, and that therefore the RTM Company was entitled to apply them to the oldest arrears.

16. Third, at paragraph 33 the FTT stated that the administration charges were reasonable. Fourth, at paragraph 34 it noted that the RTM company accepted that it had not served any demands for 2019 and that it could not therefore at that stage recover any sums for that year. Next, at paragraph 35 the FTT held that charges for £35, £65 and £192 for the work of third party suppliers were not payable, essentially because of a lack of information about them.

17. Those last three findings are not the subject of this appeal and will be unaffected by it.

18. Finally the FTT refused to make an order in the tenant's favour under section 20C of the Landlord and Tenant Act 1987 (which would prevent the RTM company from recovering its legal costs of the proceedings from him as part of the service charge) because the RTM company had been largely successful in the application.

The grounds of appeal, the arguments, and the Tribunal's determination

19. Mr Smith has permission to appeal on two grounds:

> "a. That the FTT should not have determined contested issues of fact (namely whether service charge demands had been served, and also whether an agreement was reached about the allocation of payments) without a hearing; and
>
> b. That the FTT's reasons in paragraph 31 of its decision for concluding that demands had been sent were flawed."

20. These two grounds are a summary of Mr Smith's grounds in which he set out in detail – and cogently – the difficulties with the FTT's decision and explanation. The RTM company has made written submissions; in response to the grounds relating to the FTT's factual conclusions about the contents of the demands and about whether Mr Smith made an arrangement about the allocation of its payment it says "The [FTT} reached its conclusion based on the evidence supplied and using the expertise of the [FTT]. The Respondent avers that [the FTT] did not apply the law incorrectly or overlook any binding cases".

21. Either Mr Smith is lying about the content of the demands or the RTM company has fabricated evidence. This point turned entirely on the credibility of the witnesses. And either Mr Smith is lying when he alleges that he arranged for his payments to be allocated to current demands, or he is telling the truth. Again, the point turned on the credibility of Mr Smith and of any witness the RTM company might have produced to give evidence about the content of telephone conversations with Mr Smith.

22. It is not the case that issues of disputed fact can never be decided without a hearing. There will be cases where corroborating documentary evidence, for example, makes a decision possible. But it is difficult to imagine that where disputed facts turn on credibility they could ever be decided fairly, or reliably, without a hearing.

23. The FTT in this case was confident that it could do so. But the reasons it gave for preferring the RTM company's evidence to Mr Smith's were wholly inadequate. No reason was given for the FTT's preference for the RTM company's evidence about the allocation of payments. And the reasons given in paragraph 31 for the preference for the RTM company's evidence about the content of demands does not stand up to scrutiny; as to point a, it may or may not be true that most management companies produce demands in the correct form, but in this case there was positive evidence that it had not done so; as to point b, the FTT had no information as to whether other leaseholders had challenged the demands; and as to point c, copy documents produced by the RTM company were in the correct form, but those produced by Mr Smith were not. And it would have been perfectly simple for the RTM company to correct its demands by adding an additional photocopied page to each one in the bundle of copy demands provided for the FTT.

24. It is regrettable that the FTT did not have in mind other decisions of this Tribunal where an appeal has succeeded because a disputed issue of fact was decided without a hearing. Examples include *Enterprise Home Developments LLP* [2020] UKUT 151 (LC), which the

Deputy Chamber President said at paragraph 1 was a case that "illustrates the perils of determining disputed issues of fact on the basis of written material provided by unrepresented parties", and *Webb v Sunley (Findlay Close) Residents Limited* [2022] UKUT 171 (LC). The FTT has sought, in this case as on other occasions, to justify its decision not to conduct a hearing by the fact that neither party requested one; but an unrepresented party such as the appellant Mr Smith may not be aware that it will be difficult if not impossible to determine contested issues of fact on written representations without the parties and the Tribunal being able to question witnesses and test the evidence. It is both unfair and unreliable to make a decision without a hearing in a case such as this one where it is inevitable that either one party or the other is lying and where there is nothing in the written material that could enable the FTT reliably to determine who is telling the truth.

Conclusion

25. The appeal succeeds on both grounds and the findings made by the FTT in paragraphs 31 and 32 of its decision are set aside. As a result, so is its decision on the application under section 20C of the Landlord and Tenant Act 1985. The matter is remitted to the FTT for a fresh determination, by a different panel, as to:

    a. Whether the service charges sent out by Keppie Massie from April 2015 to December 2018 inclusive contained the prescribed information and were accompanied by a summary of the tenant's rights;

    b. Whether Mr Smith agreed with Keppie Masie that the payments he made after 2015 would be allocated to charges demanded for the year in which they were paid and not to charges claimed to be arrears from before April 2015; and

    c. Mr Smith's application for an order under section 20C of the Landlord and tenant Act 1985.

Upper Tribunal Judge Elizabeth Cooke

5 January 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.