IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2017] UKUT 289 (LC)
Case No: LRX/123/2017

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT - Service Charge – landlord's application for interim service charges over six year period – whether certification a condition precedent to liability for interim service charge – appeal dismissed

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

BETWEEN:

MS NOËLLE KLOSTERKOTTER-DIT-RAWË **Appellant**

- and -

GREYCLYDE INVESTMENTS LIMITED **Respondent**

Re: Flat 3, Jefferson House
11 Basil House
London
SW3 1AX

Hearing date: 26th June 2018

His Hon Judge Bridge and Peter D McCrea FRICS

Royal Courts of Justice, London WC2A 2LL

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The Appellant in person
Ben Stimmler, instructed by Mark Wagner and Co, for the Respondent

The following cases are referred to in this Decision:

Akorita v Marina Heights (St. Leonards) Limited [2011] UKUT 255 (LC)

Arnold v Britton [2015] UKSC 36 AC 1619

Gilje v Charlegrove Securities [2003] EWHC 1284 Ch

Pendra Loweth Management Limited v North [2015] UKUT 91 (LC)

Urban Splash Work Ltd v Ridgway [2018] UKUT 32 (LC)

Warrior Quay Management Company Limited v Joachim (Lands Tribunal - LRX/42/2006, [2008] EWLands LRX_42_2006)

DECISION

Introduction

1. The appellant, Ms Noëlle Klosterkotter-Dit-Rawë ("Ms Rawë") is the tenant under a long lease of Flat 3, Jefferson House, 11 Basil Street, London, SW3 1AX ("the appeal property"). For many years she has been in dispute with her immediate landlord, the long-leaseholder of Jefferson House, Greyclyde Investments Limited ("the respondent") concerning the service charges payable under her lease. The latest dispute was determined by the First-tier Tribunal (Property Chamber) ("the Ft-T") on 4 August 2017. Ms Rawë appealed against that decision on many grounds, but permission was granted on only one, namely whether the Ft-T was wrong to conclude that certification of the annual service charge was not a condition of Ms Rawë's liability to pay it.

2. The respondent accepts, for the purposes of this appeal, that no certificates were issued during the period of dispute which complied with any certification provisions contained in the lease. However, the respondent resists the appeal on the basis that Ms Rawë is liable to pay the interim service charge in any event.

3. The appeal proceeded by way of a review of the Ft-T's decision. Ms Rawë represented herself, while the respondent was represented by Mr Ben Stimmler of counsel, who also appeared before the Ft-T. We are grateful to them both for their submissions.

The Lease

4. The lease to Ms Rawë was granted on 10 March 1986 for term commencing on 29 September 1979 and expiring on 1 September 2052. The annual rent is payable by equal half-yearly payments on 24 June and 25 December each year. The lease provides for a service charge so that the outgoings incurred by the respondent during its financial year in respect of certain heads of expenditure, defined in the fourth schedule, are recharged to and divided between the tenants. It is unnecessary for the purposes of this appeal to describe the services in any detail, but they include maintaining, repairing, redecorating and cleaning the building, its heating, hot water and ventilation systems, and insuring the building. Provision is made for the landlord to charge separately for major works and for a reserve fund.

5. Clause 2(2) of the lease sets out the mechanism by which Ms Rawë should be notified of the amount of the service charge each year:

> "2(2)(d): As soon as practicable after the end of each financial year of the Lessor the Lessor shall cause the amount of the Service Charge payable by the Lessee for such financial year to be determined by an accountant (hereinafter called "the Accountant" who shall be a member of a body of accountants established in England and for the time being recognised for the purposes of section

161(1)(a) of the Companies Act 1948 by the Secretary of State) to be appointed by the Lessor.

"2(2)(e) For the purposes hereof the costs expenses and outgoings incurred by the Lessor as aforesaid during the relevant financial year of the Lessor shall be deemed to include not only the costs expenses and outgoings which have been actually disbursed incurred or made by the Lessor during the relevant financial year in respect of the Fourth Schedule Expenditure but also sum or sums (hereinafter called "the Contingency Payment") on account of any other costs expenses and outgoings (not being of an annually recurring nature) which the Lessor shall have incurred at any time prior to the commencement of the relevant financial year or shall expect to incur at any time after the end of the relevant financial year in respect of the said Fourth Schedule Expenditure as the Accountant may in his reasonable discretion consider it reasonable to include (whether by way of amortization of costs expenses and outgoings already incurred or by way of provision for expected future costs expenses and outgoings) in the amount of the Service Charge for the relevant financial year.

"2(2)(f): As soon as the Accountant shall have determined the amount of the Service Charge payable by the Lessee for the relevant financial year of the Lessor the Accountant shall prepare a written statement (hereinafter called "the Accountant's Certificate") containing a summary of the costs expenses and outgoings incurred by the Lessor during the relevant financial year together with any future sums indicated by the Accountant pursuant to Clause 2(2)(e) hereof in respect of the said Fourth Schedule Expenditure and specifying the amount of the Service Charge payable by the Lessee as aforesaid and in the Accountant's Certificate the Accountant shall certify:

(i) that in his opinion the said summary represents a fair summary of the said costs and outgoings set out in a way which shows how they are or will be reflected in the Service Charge

(ii) that in his opinion the said summary is sufficiently supported by accounts receipts and other documents which have been produced to him

(iii) that the sum specified as aforesaid represents the amount of the Service Charge payable by the Lessee for the relevant financial year of the Lessor."

6. The lease makes separate provision for the landlord to demand an on-account sum:

"2(2)(h): The Lessee shall if required by the Lessor with every half-yearly payment of the rent first reserved hereunder pay to the Lessor such sum in advance and on account of the Service charge as the Lessor or its agents shall

> from time to time specify at its or their discretion to be a fair and reasonable interim payment."

7. The on-account sum payable under clause 2(2)(h) is referred to in clause 2(2)(j) as an "interim payment". That clause sets out the consequences of the tenant's failure to pay the sum due:

> "…the Lessor shall not be entitled to re-enter….by reason only of non-payment by the Lessee of any such interim payment…but nothing herein contained shall disable the Lessor from maintaining an action against the Lessee in respect of non-payment of any such interim payment as aforesaid notwithstanding that the Accountants' [*sic*] Certificate had not been furnished to the Tenant at the time such action was commenced subject nevertheless to the Lessor establishing in such action that the interim payment demanded and unpaid was of a fair and reasonable amount having regard to the amount of the Service Charge ultimately payable by the Lessee".

The respondent's operation of the service charge

8. The respondent's practice has been to divide its expenditure into two schedules – schedule 1 encompassing most of the expenditure, and schedule 2 comprising boiler repairs and maintenance, and the supply of gas. Up to 2015, the respondent's management company charged Ms Rawë 1.732% of expenditure within schedule 1, and 1.956% of expenditure within schedule 2. After that point, it appears to have charged her the same proportion (1.73%) of expenditure in both schedules.

9. While the rental payment dates under clause 1(ii) of the lease were the 24 June and 25 December, the respondent's service charge year is the calendar year, and its interim service charge demands under clause 2(2)(h) fell due on 1st July and 1st January.

The respondent's claim at the Ft-T

10. The dispute before the Ft-T concerned the service charge years 2011 – 2016. In its application to the Ft-T, the respondent claimed the following amounts, all of which were on-account interim sums under clause 2(2)(h) of the lease:

Year	Schedule 1	Schedule 2	Major works	Reserve fund	Total claimed
2011	£2,959.12	£508.56	-	-	£3,467.68
2012	£2,959.12	£508.56	-	-	£3,467.68
2013	£2,127.23	£146.70	-	-	£2,273.93
2014	£1,859.13	£58.68	£3,504.82	-	£5,422.63
2015	£2,152.99		-	£389.25	£2,542.24

2016	£2,300.38	-	£389.25	£2,689.63[1]

11. In addition, the respondent claimed administration and late payment charges (which the Ft-T disallowed) and electricity costs (for which the parties came to a separate settlement during the Ft-T hearing).

12. During the period in question, Ms Rawë has paid her ground rent, but has not paid any of the service charges demanded.

The Ft-T's decision

13. Having outlined the evidence and submissions it heard regarding certification, the Ft-T made reference to two previous decisions of HH Judge Huskinson, *Warrior Quay Management Company v Joachim* (LRX/42/2006) and *Akorita v Marina Heights (St. Leonards) Limited* [2011] UKUT 255 (LC). In *Warrior Quay*, a decision of the Lands Tribunal, the landlord had failed to provide a certificate as required under the lease, but it was held that certification was not a condition precedent to the tenant's liability to pay the service charge. In *Marina Heights*, a decision of the Lands Chamber of the Upper Tribunal, the opposite conclusion was reached, the express words of the lease clearly indicating that the service charge was to be calculated on the basis of the sums duly certified by the landlord's surveyor.

14. The Ft-T concluded:

> "39. We considered we should follow *Warrior Quay* as we considered that there were no clear words which would indicate that a failure to provide the end of year certificate meant that no charges at all were recoverable. Absence of the end of year certification however means that the landlord is unable to recover any balancing charge. The landlord is entitled to the payments on account as it has followed the procedure in the lease for providing an estimate. We did not consider *Marina Heights* to be relevant as in that case the interim amounts demanded required certification.
>
> "40. We were provided with actual accounts and noted that no criticism was made of the individual items within those accounts. We also have regard to the fact that we have allowed the actual figures save for electricity which was agreed.
>
> "41. We therefore concluded that the amounts demanded on account are allowed. In all years apart from one the actual amounts are under those demanded. However in 2014 and 2015 the actual amounts exceed the estimated amount and in that case the amount recoverable is capped to the estimated sum. We have removed the electricity charges (as the parties have reached a separate global agreement) and have adjusted the gas charges.

[1] In fact, the on account demands aggregate to £2,708.44, but nothing turns on this

> "42. We would point out however that the landlord's recovery should be limited to the actual amount incurred for the service charge year where the costs actually incurred fall below the interim amount demanded."

15. The Ft-T decided that the service charge for the years 2011 and 2012 were not recoverable from Ms Rawë, because the demands for those years had not included the statutory summary of the rights and obligations of the tenant required by s.21B of the 1985 Act.

16. As regards the later years, the Ft-T determined that Ms Rawë was liable for the following amounts, which were net amounts after a deduction for electricity (agreed separately between the parties at £900):

Year	Schedules 1&2	Major works	Reserve fund	Total awarded
2013	£1,948.73	-	-	£1,948.73
2014	£2,009.76	£3,111.97	-	£5,121.73
2015	£2,111.98	-	£389.25	£2,501.23
2016	£2,067.32	-	£389.25	£2,456.57

Submissions

17. Ms Rawë was given permission to appeal confined to paragraphs 34-39 of her statement of case. She submitted that she did not owe any of the service charges owing to the respondent's failure to supply lease-compliant accounts. The essence of her complaint was that the respondent had unilaterally and impermissibly changed the mechanism for financial reporting under her lease from certification to non-certification. Ms Rawë referred to the definition of "certification" by the Association of Certified Accountants: "the accountant's report if referred to in primary legislation as a 'certificate'….certification is only appropriate to a matter capable of determination with certainty". What the respondent had done in its "statement of services charge accounts" commencing with year 2011 was by reference to TECH 03/11, on each occasion the accountants stating "…we do not express any assurance on the service charge accounts…". The Ft-T's only comment on this change was that "the format of the accounts had changed".

18. Before the Ft-T, Ms Rawë's counsel relied on *Marina Heights*, whilst Mr Stimmler relied on *Warrior Quay*. In the view Ms Rawe expressed before the Tribunal, neither case had anything to do with the facts of this appeal – this was not a case of the lessor "not issuing certified accounts as specified in the lease", it was that the lessor unilaterally changed the mechanism for financial reporting from "certification" to "no certification".

19. In a letter of 16 March 2017, the Ft-T's case officer had indicated that "for the sake of clarity, the tribunal will require at the hearing copies of the original service charge accounts,

fully audited and certified in accordance with the lease, including the original signature of the accountant charged with completing the certification". Ms Rawë complained that the Ft-T did not ensure this happened. She had not received lease-compliant accounts because the 2004 accounts were deficient, and she had to wait six years to receive the accounts for years 2005-2010, and to be sent the 2011 "statement of service charges". She did not receive the accounts for 2014 and 2015 until a matter of days before the Ft-T hearing.

20. For the respondent, Mr Stimmler, relying on *Arnold v Britton* [2015] UKSC 36; [2015] A.C. 1619, submitted that the proper approach to the interpretation of service charge provisions was no different from the principles applicable to any other contract. The meaning of a provision had to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.

21. Mr Stimmler again relied upon *Warrior Quay* and also referred to *Pendra Loweth Management Ltd v North* [2015] UKUT 91 (LC) in support of his contention that there was no condition precedent within the lease which required the on-account service charge to be certified.

Discussion

22. It is common for the service charge machinery in leases to require tenants to pay, in advance, an amount on account of their service charge liability for each relevant accounting year. The contractual purpose of such a provision is obvious, namely to put the landlord in funds to discharge its obligations under the lease, typically to repair and clean common parts, to carry out maintenance, and to insure.

23. After the service charge year has ended, the landlord knows how much has actually been incurred. This amount can be compared with the amount demanded on account and paid by the tenants, and a balancing exercise carried out to ascertain whether the tenants have underpaid or overpaid for that year. Section 19(2) of the 1985 Act requires that any necessary adjustment shall be made by repayment, reduction or by subsequent charges or otherwise, depending on the provisions of the lease.

24. What has to happen before the tenant is liable to pay or be repaid, has exercised the Ft-T and this Tribunal on many previous occasions, but the common thread running through those decisions is that the wording of the lease, reflecting the agreement which the parties made (and any subsequent landlord or assignee tenant inherited), is crucial. As the Tribunal (Martin Rodger QC, Deputy President) observed in *Urban Splash Ltd v Ridgeway* [2018] UKUT 32 (LC) at [75]-[77] the decision will turn on the particular language of the lease, and different leases adopt different approaches. Each case concerns the interpretation of individual contracts. Previous decisions are all fact-specific and should not be be relied upon as precedents. We do

not therefore agree with the Ft-T that the question was whether it should "follow" *Warrior Quay*: it was whether, on a true interpretation of the lease, certification was a condition precedent to the tenant's liability to pay the service charge. It so happened, on the interpretation of the current lease, the Ft-T came to the view that certification was not a condition precedent, a view which was consistent with the result in *Warrior Quay*.

25. We do not therefore find it necessary to analyse each previous decision in detail, although we note the following. In *Marina Heights*, the lease required that the on-account amount payable by the tenant Ms Akorita was to be certified by the landlord's surveyor as being a reasonable interim sum. The Tribunal was satisfied, on a construction of the lease, that it was a condition precedent to any liability of Ms Akorita to make a payment on account that the landlord obtained such a certificate. This can be contrasted with *Warrior Quay* where the Tribunal held, on a construction of the lease, that the failure of a management company to obtain auditor's certificates did not have the effect of making the amounts demanded on account irrecoverable. Whilst it was clearly unsatisfactory that the management company had failed to comply with its obligations to provide auditor's certificates, the failure did not result in no service charge being paid whatsoever, since liability to pay the service charge invoiced on account was not conditional on prior certification.

26. We agree with the recent observation of the Deputy President in *Urban Splash Work Ltd v Ridgway* [2018] UKUT 32 (LC) at [77]:

> "It may well be the case that, ordinarily, non-compliance with a certification regime will not prevent a landlord from recovering service charges payable *on account* (as in both *Pendra Loweth* and *Elysian Fields*) but, if so, that is because payments on account are likely to be set by reference to an estimate of future expenditure, rather than by the definitive certification of past expenditure…. In every case the function and significance of the certificate will depend on the terms of the agreement."

27. Accordingly, rather than analysing and relying upon the Tribunal's interpretation of leases in other decisions, in this appeal it is necessary simply to consider and to construe the provisions of the contract between the parties. That is what we shall do.

28. Clause 2(2)(h) is a stand-alone clause which permits the landlord to render an on-account service charge in advance requiring half yearly payment. That payment obligation is not conditional upon the accountant's certificate being made available. Indeed, clause 2(2)(j) specifically envisages the certificate not being available at that point, because the landlord is not disabled from "maintaining an action against the Lessee in respect of non-payment of any such interim payment as aforesaid *notwithstanding that the Accountants' Certificate had not been furnished to the [Lessor] at the time such action was commenced* ". We therefore find that the Ft-T was correct in deciding (at [39]) that "there were no clear words which would indicate that a failure to provide the end of year certificate meant that no charges at all were recoverable." Indeed, we would go further. There are clear words indicating the contrary.

29. Ms Rawë's core complaint is really about the respondent's failure to comply with requirement to provide an accountant's certificate in respect of the sums actually expended in

each year. While that failure blatantly disregards the respondent's obligation under the lease, it does not excuse Ms Rawë's own obligation to pay the sums claimed on account, since her liability is not conditional on the performance by the respondent of its obligation under clause 2(f). We well understand why the repeated disregard of the respondent's obligation may appear to Ms Rawë, in effect, to have changed the basis of her liability from one under which she was required to pay certified sums, to one where she must pay uncertified sums, but the reality is different. She remains liable to pay the service charge pursuant to her contract with the respondent, and there is no basis upon which she can properly resist the respondent's claim.

30. We have not overlooked the provisions of section 19(2) of the 1985 Act provides:

> "(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise."

31. However, as the Ft-T noted at [40], no criticism was made of individual items in the actual accounts by Ms Rawë, and for the years that the interim service charge exceeded the actual accounts, Ms Rawë's liability has been limited accordingly. We are therefore satisfied that the interim service charge for each year, in so far as they might have been unreasonable, have been properly adjusted by the Ft-T in accordance with s19(2).

Conclusion

32. This appeal must therefore be dismissed. However, we conclude by expressing some sympathy for Ms Rawë, who presented her case with skill and tenacity. We understand her frustration and we have sympathy with her case. Landlord and tenant relations might be improved not only by her paying the amounts owed, but also by the respondent issuing duly certified accounts in the future and amending Ms Rawë's account to remove the alleged arrears which the Ft-T disallowed.

Dated: 31 August 2018

His Honour Judge Bridge

Peter D McCrea FRICS