UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – whether leaseholder entitled to seek determination of service charges paid by deceased predecessor in title – whether application concerning years pre-dating leaseholder's interest ought to have been permitted to proceed to hearing – section 27A, Landlord and Tenant Act 1985 – appeal allowed in part

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

BETWEEN:

GATEWAY HOLDINGS (NWB) LIMITED

Appellant

and

(1) MRS LYNDA MCKENZIE

(2) MR SIMON GREENFIELD

Respondents

Re: Flats 2 and 8,
Charles Willow Court,
Colehill Road,
Atherton,
Warwickshire CV9 1B

Martin Rodger QC, Deputy Chamber President

Birmingham Civil & Family Justice Centre

23 October 2018

Simon Allison, instructed by J B Leitch, solicitors, for the appellant
Mr Hugh McKenzie spoke on behalf of the respondents

The following cases are referred to in this decision:

Cain v LB Islington [2015] UKUT 542 (LC)

Oakfern Properties v Ruddy [2006] EWCA Civ 1389

Re: Sarum Properties Ltd's application [1999] 2 EGLR 131

Westmark (Lettings) Ltd v Peddle [2017] UKUT 449 (LC)

Introduction

1. The main issue in this appeal is whether a residential leaseholder may apply to the first-tier tribunal under section 27A, Landlord and Tenant Act 1985, for a determination in respect of service charges paid by her predecessor in title before she acquired her lease.

2. Section 27A(1) of the 1985 Act provides that:

> 'An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to-
>
> (a) the person by whom it is payable,
> (b) the person to whom it is payable,
> (c) the amount which is payable,
> (d) the date at or by which it is payable, and
> (e) the manner in which it is payable.'

3. Section 27A(4)(a) provides that no application under subsection (1) may be made in respect of a matter which "has been agreed or admitted by the tenant…".

4. The appeal is against a decision of the First-tier Tribunal (Property Chamber) ("the FTT") made on 19 December 2017 on an application made under section 27A by the first respondent, Mrs Lynda McKenzie, on 16 December 2016. Mrs McKenzie is the owner of the long leasehold interest in flat 2, Charles Willow Court, Colehill Road, Atherton. She acquired her interest in the flat in June 2016 when she was registered as proprietor of a lease granted to her father Mr Ronald Backhouse in June 2006. Mr Backhouse died in December 2015 and his lease was transferred to his daughter by his personal representatives on 30 March 2016.

5. The respondent to the application, and now the appellant, is Gateway Holdings (NWB) Ltd, the owner of the freehold interest in Charles Willow Court and Mrs McKenzie's landlord.

6. At the hearing of the appeal Gateway was represented by Mr Simon Allison and both respondents were represented by Mrs McKenzie's husband, Mr Hugh McKenzie. I am grateful to them both for their assistance.

The dispute

7. In part 7 of the standard form of application to the FTT Mrs McKenzie listed the years 2013, 2014 and 2015 as years in respect of which she sought a determination, but after stating for each year the amount of the service charge her father had paid she described that sum as "not in dispute". She also specified 2016 as the current year for which a determination was sought and referred in particular to a sum of £32,412.34, being the cost of major works which had been the subject of consultation under section 20 of the 1985 Act. She recorded that "the section 20 claim is in dispute." The standard form also required that for each year for which a service charge was in question the applicant should complete an additional page explaining the dispute. Mrs McKenzie completed only one such page in which she identified the year in question as 2016 and referred again to the section 20 claim for £32,412.34.

8. Although Mrs McKenzie was the sole applicant to the section 27A application she included a request for an order under section 20C, Landlord and Tenant Act 1985 providing that any costs incurred by Gateway in connection with the proceedings should not be included in any service charge payable by her or by the leaseholders of any of the 12 flats at Charles Willow Court.

9. The sum referred to by Mrs McKenzie in her application as "the section 20 claim" related to the cost of proposed works to redecorate the exterior wood and metal work of Charles Willow Court. The building had been completed and the flats let in 2006 but it soon became apparent that the quality of the exterior decoration was poor, particularly the window frames. The original developer appears to have carried out some remedial work before transferring the freehold interest in the building to Gateway in 2010 but this work is said also to have been unsatisfactory.

10. I have been shown correspondence and email exchanges which were not before the FTT but which demonstrate that the quality of external decoration was a contentious issue from at least August 2010. Gateway's initial response had been to deny liability for the condition of the window frames of individual flats, on the basis that the frames were part of the premises demised to the individual leaseholders. It ignored or misunderstood the covenant on the part of the landlord (paragraph 1 of Part 2 of the Fifth Schedule to the standard form of lease) which required it to maintain, repair, redecorate, replace and renew the main structure of the building including fences and railings, window frames, doors and door frames. The tenant's repairing covenant, at paragraph 5 of the fourth schedule, extended to the repair and decoration of "the Property" (i.e. the individual flat) but specifically excluded liability for any work for which the landlord was made liable under its covenants. Despite Gateway's protestations over a number of years that it had no responsibility for the condition of the windows of individual flats, it is clear (as it now recognises) that the repair and redecoration of the exterior of the building including railings, window frames, doors and door frames is its responsibility.

11. In 2016 Gateway belatedly (and, as it would turn out, temporarily) acknowledged its responsibility and began consultation over the necessary external works. The leaseholders considered that sums which they had paid over a number of years into a reserve fund ought to be sufficient to cover the cost of the works and felt that any shortfall was attributable to Gateways in carrying out the work in a timely manner. In her application to the FTT Mrs McKenzie complained that Gateway was using the section 20 process to get leaseholders to pay £32,412.34 for work which was required because of its own failure to carry out its obligations. She asked that the section 20 demands should be set aside and that Gateway should be ordered to remedy the exterior and interior condition of the building at its own cost.

12. On 8 March 2017 Mr Simon Greenfield, the leaseholder of flat 8, applied to be joined to the proceedings as a second applicant. The FTT allowed his request but, it appears, did not require him to file any separate notice of application or statement of case.

The proceedings before the FTT and its decisions

13. The application came before the FTT for hearing on 25 May 2017. At the conclusion of the hearing on that day some matters remained to be dealt with and the FTT directed a further

hearing in September. It appears that both Mrs McKenzie and Mr Greenfield had sought to widen the scope of the application to include service charges for the years 2011 to 2015 as well as charges for the year just ended, 2016. The FTT seems to have been willing in principle to consider those additional years but Gateway had not come to the hearing prepared to deal with them and there had in any event been insufficient time available.

14. Before the second day of the hearing the FTT issued what it called a case management decision and further directions on 1 August 2017 in which it explained that it had heard sufficient evidence to enable it to determine the leaseholders' liability to contribute towards the cost of the external redecoration. It recorded that it had also permitted Mrs McKenzie to pursue a challenge to other aspects of the 2016 service charge accounts and gave directions for that challenge to be progressed. It stated that the service charges for the years 2011 to 2015 were also in dispute and mentioned that it had received representations from Mrs McKenzie and from Gateway since the first hearing which it proceeded to deal with.

15. In its case management decision the FTT addressed two objections by Gateway to Mrs McKenzie being entitled to dispute the service charges for the years 2011 to 2015. The first was that those earlier years (or at least some of them) had been admitted by her in her application with the result that section 27A(4) of the 1985 Act (see paragraph 3 above) deprived the FTT of jurisdiction. Gateway argued that by describing the service charges for the years 2013 to 2015 as "not in dispute" Mrs McKenzie had agreed those years and was prevented by section 27A(4) from subsequently seeking a determination in respect of them.

16. The FTT gave two reasons for rejecting Gateway's case on section 27A(4). It considered that an admission for the purpose of section 27A(4) could only be made by the tenant, and as Mrs McKenzie had not been the tenant during the earlier years "the debts were not hers to admit". If it was wrong on that point the FTT said that it did not accept that "the apparent admissions" in the application form should be construed as admissions for the purpose of section 27A(4). Mrs McKenzie had explained that what she had meant when she described the service charges as "not in dispute" was that the amount had been paid, but she never intended that to be construed as an admission of the underlying correctness of those amounts. The FTT considered that the words used would more naturally be construed in the way the respondent has understood them but said that they were "not unambiguous" and that it was prepared to give Mrs McKenzie "the benefit of the doubt" by allowing her to challenge the earlier years.

17. The second ground on which Gateway contended that Mrs McKenzie was not entitled to challenge the years 2011 to 2015 was that she had not been the tenant during those years. The FTT dismissed that argument by reference to the decision of the Court of Appeal in *Oakfern Properties v Ruddy* [2006] EWCA Civ 1389. The Court had there concluded that there was no justification for implying any restriction into the language of section 27A. The FTT considered that *Oakfern* meant that Mrs McKenzie was entitled to challenge service charges for years prior to her ownership; it explained her interest in those charges as follows:

> "The first applicant is a current tenant. It is her case that the charges in earlier years were excessive which directly led to the reserve fund being insufficient to cover the major works proposed in 2016. For that case to be considered, the expenditure in earlier years will need to be reviewed."

The basis of that reasoning would seem to be a belief that Mrs McKenzie would be entitled to benefit from any service charge surplus from years pre-dating her ownership which ought to have been paid into the reserve fund.

18. Gateway applied for permission to appeal the case management decision but the FTT refused to consider the application on the basis that a right of appeal was only available against a decision on a preliminary issue or when a determination had been made which finally disposed of all issues. The FTT referred to rule 36 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 as the source of that supposed prohibition. It may also have had in mind a decision of the Lands Tribunal restricting the right of appeal against decisions of the former leasehold valuation tribunal under paragraph 2 of Schedule 22 to the Housing Act 1980: *Re: Sarum Properties Ltd's application* [1999] 2 EGLR 131. I have heard no argument on the question whether the FTT was correct to refuse to entertain an application for permission to appeal against a case management decision either generally or specifically in this case where its decision was not limited to purely procedural matters. I am surprised at that approach, which seems to me to read more into rule 36 than may be justified, but it is not necessary for me to reach a conclusion on that question in this case.

19. The matter returned to the FTT on 9 October 2017 for the second day of the hearing, and the tribunal's final decision followed on 19 December. It identified the issues as being the reasonableness of the service charges for the years 2011 to 2016, and the reasonableness of the contribution on account of the cost of the proposed works of redecoration (the section 20 works) which amounted to £1,867.69 per leaseholder. The FTT recorded Gateway's objection to Mrs McKenzie's application to consider any year earlier than 2016 on the two bases I have already described. It then repeated its reasons for dismissing those objections in substantially the same terms as it had in its case management decision.

20. The FTT next considered the service charges for all of the disputed years in detail. Permission to appeal its conclusions has been refused so it is not necessary to refer to them except to note that at paragraph 192 the tribunal included a helpful table summarising the effect of its conclusions showing the service charge it had found to be reasonable in each of the disputed years. It described those figures as "the amount of the service charge payable for each year by each Applicant" (it will be remembered that there were only two applicants, Mrs McKenzie and Mr Greenfield). The FTT also summarised the effect of its decision in relation to the cost of the section 20 works, which it reduced from the £1,867.69 demanded to £1,502.46. The net result of the FTT's determinations was a reduction in the routine service charges for the years from 2011 to 2016 by an amount which, in aggregate, exceeded the sum demanded in 2016 as a contribution towards the anticipated cost of the section 20 works.

21. Finally, the FTT made an order under section 20C of the 1985 Act in favour of the applicants alone. It did not refer to the fact that an order had been sought by the applicants on behalf of all of the leaseholders.

The appeal

22. In his skeleton argument Mr Allison first withdrew the appeal against the FTT's decision so far as it concerned Mr Greenfield. He argued that the determination in relation to Mrs

McKenzie was flawed and should be set aside in relation to the years 2011 to 2015, and that so far as Mrs McKenzie's section 27A application related to those years it should be struck out. The order made by the FTT in favour of Mrs McKenzie under section 20C of the 1985 Act should also be set aside and replaced by an order reflecting the outcome of the appeal.

23. Mr Allison explained that Gateway did not accept that it was liable to credit Mrs McKenzie's service charge account with sums found by the FTT to have been overpaid by her father at a time when she was not the tenant. Since the FTT's decision the other ten leaseholders at Charles Wills Court who had not been party to the original proceedings had made an application of their own for a determination relating to the same period. Two of those leaseholders had acquired their leases at some point between 2011 and 2015, so the same issue would arise in their applications as arose in the appeal.

24. Mr Allison had not been instructed in the proceedings when they were before the FTT. He submitted that it had been correct to find that Mrs McKenzie was not barred by section 27A(4) from pursuing her application in relation to the years before she acquired the lease, but only for the first of the two reasons it had given. The first reason was correct because section 27A(4) applied only to an agreement or admission by a tenant, and not to things said or done by someone who was not tenant at the time the service charge in question was payable. The second reason was wrong, Mr Allison submitted, because Mrs McKenzie's subjective intention was not relevant to the meaning of her application, and because, read objectively, the statement that charges for 2013 to 2015 were "not in dispute" could only be understood as an admission or agreement that they had been claimed and paid in an appropriate amount.

25. The main point on which Mr Allison concentrated his submissions was whether a person who had never been obliged to pay or entitled to receive a service charge could make an application under section 27A in relation to that service charge. He submitted that it cannot have been Parliament's intention that anyone, irrespective of their interest or lack of interest, could make a section 27A application, and suggested that such an application could only be brought by a party legally obliged to pay, or entitled to collect, a service charge. In practice, he suggested, this meant a landlord or a tenant in respect of the period in issue, or the guarantor of a tenant's obligations. A current tenant would also have standing to apply in respect of a period before they acquired the lease, if they were at risk of forfeiture because of the failure of a predecessor to pay. A person with a beneficial interest in a lease ought not to be able to apply because they were not liable to pay the service charges. A subsequent tenant, like Mrs McKenzie, ought not to be able to apply because she had, and has, no liability for the years she wishes to dispute. Mr Allison submitted that a determination by the FTT as to the amount of service charge payable in 2011 to 2015 could be of no benefit to Mrs McKenzie. Any right of recoupment of sums overpaid would belong to her father's estate and would be enforceable by his executors, and not by the beneficiaries under his will. She was not an executor and had no relevant interest in the outcome of the application.

Discussion

26. Mr Allison and the FTT were correct that section 27A(4)(a) only operates as a bar to jurisdiction where an agreement or admission has been made by a tenant. The provision says

so in terms. Thus, an agreement or admission by a guarantor or mortgagee would not prevent a tenant from seeking a determination as to the payability of a service charge.

27. In this case Mrs McKenzie was the tenant at the time she made the statement previously relied on as an admission, but she had not been the tenant during the years in which the disputed service charges had been levied and paid, she had not herself made the payments and nothing was due from her for the disputed years.

28. Because Mr Allison does not rely on the statement that the earlier years were "not in dispute" (on the basis that Mrs McKenzie was not the tenant when she made it) it is not necessary to deal with the effect of that statement on her entitlement to apply for a determination in respect of the earlier years. Whatever it meant it can have had no effect on the position of any leaseholder other than Mrs McKenzie, since at the time it was made she was the sole applicant under section 27A. Mr Allison's submission that the FTT was wrong to have regard to Mrs McKenzie's subjective intention is however consistent with the Tribunal's decision in *Cain v LB Islington* [2015] UKUT 0542 (LC) at paragraph 14. The proper question is whether, looked at objectively, there has been an admission or agreement.

29. The real issue in the appeal is whether Mrs McKenzie ought to have been permitted to seek a determination in respect of years during which she was not the tenant and as regards which she had no legal entitlement to recover any sums overpaid.

30. Section 27A(1) does not state who may make an application to the appropriate tribunal in relation to a service charge. This is in contrast to its predecessor, section 19(2A) of the 1985 Act, which was repealed by the Commonhold and Leasehold Reform Act 2002 at the same time as section 27A was inserted. Section 19(2A) limited the right to apply for a determination to "a tenant by whom, or a landlord to whom, a service charge is alleged to be payable."

31. In *Sarum Properties Ltd's application* [1999] 2 EGLR 131 the reference to "a tenant" in the former section 19(2A) was held by the Lands Tribunal to include a former tenant who has assigned her interest, but who might have remained liable to pay the service charge for the period of her interest in the lease (I assume the tenancy concerned was an "old tenancy" for the purpose of the Landlord and Tenant (Covenants) Act 1995, but the report does not say so expressly; on that assumption the original tenant would have remained liable for service charge arrears after she assigned her interest). The decision was reached on an application for permission to appeal against a case management decision of a leasehold valuation tribunal, and cannot be regarded as establishing any point of principle of continuing relevance since the current section 27A(1) is in unrestricted terms and must be taken to have been drafted in a deliberate attempt to minimise opportunities for jurisdictional disputes. There seems no doubt that a former tenant with a continuing liability would be able to make an application under section 27A, but the question is whether any other limitation ought to be read in to what is otherwise an unqualified entitlement.

32. The difficulty which Mr Allison faces, as he acknowledged, arises from the decision of the Court of Appeal in *Oakfern v Ruddy* which binds this Tribunal.

33. In *Oakfern* an application under section 27A was made by a sub-tenant who was required to pay a service charge to an intermediate tenant which in turn was obliged to pay a head landlord for services which it provided. It was argued by the intermediate tenant that the sub-tenant was not entitled to make such an application, and that an interpretation of section 27A which allowed anyone to make an application would be open to abuse. The Court of Appeal dismissed that argument, as Parker LJ explained at [82]:

> "In my judgment there is no justification for implying any restriction into the entirely general words of section 27A of the 1985 Act. In some cases, one may suppose, the applicant for a determination under that section as to the proper amount of service charge payable will be the party who is liable to pay the service charge, the subject of the challenge, and the respondent to the application will be the party who is seeking to levy it on the applicant; but there is no reason why this will inevitably be the case. … As to possible abuses of process the leasehold valuation tribunal has ample powers to regulate its own procedures, including power to strike out vexatious or abusive applications."

34. Mr Allison submitted that the facts in *Ruddy* could be distinguished from the current situation on a number of grounds. On the facts, it concerned the right of a sub-tenant to challenge the charges levied by a head landlord on the sub-tenant's immediate landlord, and Mr Ruddy, the sub-tenant, was the person ultimately responsible for paying those sums, and whom Parliament must have intended ought to have the right to bring a s27A application. Mr Ruddy's status as a sub-tenant meant that he was a tenant for the purpose of the 1985 Act, since section 30 gave an extended meaning to the expression "tenant". In contrast, Mr Allison submitted, Mrs McKenzie had never been a tenant in respect of the years she sought to put in issue, she had no legal liability to pay service charges in respect of those periods, and the charges had been paid by her father.

35. The decision of the Court of Appeal in *Ruddy* on the issue of jurisdiction was that there was no justification for implying *any* restriction into the entirely general words of section 27A(1). I agree, and in any event I am bound by that conclusion. I do not accept that the decision can be distinguished in any of the ways suggested by Mr Allison. In particular, the Court of Appeal did not say that Mr Ruddy's entitlement to apply under section 27 depended on his status as a sub-tenant, and did not refer to the extended definition of tenant in section 30 (in any event, the word "tenant" does not appear in section 27A(1)). Moreover, I do not accept that Mr Ruddy was liable to pay the same service charge as his immediate landlord; the two liabilities were legally and factually distinct, although both were referable to the provision of the same service (see *Westmark (Lettings) Ltd v Peddle* [2017] UKUT 0449 (LC)).

36. Mr Allison also referred to a decision of the Lands Tribunal (Mr N J Rose FRICS) in *Barton v Accent Property Solutions Ltd* LRX/22/2008 in which a leaseholder had brought an application under section 27A against his freeholder, a management company which was party to his lease, and a firm of managing agents. In paragraph 27 of its decision the Tribunal said that the application against the Managing agent had been an abuse of process and was rightly dismissed; in the same paragraph it said that the first-tier tribunal had had no statutory jurisdiction to determine the application against the agent. I do not find that decision helpful since it proceeded on two inconsistent bases and provides no reasoned justification for either. If the original tribunal had no jurisdiction it was not necessary to resort to the concept of abuse of process to justify dismissing the application. I consider the first-tier tribunal was right to say

that the claim against the managing agent ought to have been dismissed, but on the simple basis that its involvement was entirely unnecessary to enable a determination to be made of the amount payable as a service charge or the persons to whom and by whom it was payable. The agent had made no application of its own under section 27A and the decision does not shed any light on its scope.

37. I therefore do not accept Mr Allison's submission that the opportunity to apply to the FTT under section 27A for a determination concerning a service charge is restricted by the statute to those entitled to receive or obliged to pay the service charge in question. The words of the statute are unrestricted. The answer to the question of principle posed at the start of this decision is that a residential leaseholder may apply to the first-tier tribunal under section 27A for a determination in respect of service charges paid by her predecessor before she acquired her lease.

38. I do however, agree with Mr Allison's submission that the outcome of the FTT's determination in relation to the years before she acquired her father's lease can be of no practical benefit to Mrs McKenzie. The service charges she has challenged were paid by her father, and neither she nor her father's estate have any continuing liability concerning them. The lease in this case provides for half yearly payments on account with a balancing charge or credit if the sum paid during the year exceeds the service charge finally shown to be due (see paragraph 4.5, of the Sixth Schedule to the lease). The lease requires that "the landlord shall give credit for such overpayment" which presumably means the sum overpaid must be credited to the account of the tenant who paid it. In respect of the sum found by the FTT to have been overpaid, that tenant was not Mrs McKenzie and I do not see how she could now claim to be entitled to receive the overpayment. Her father's executors may have a claim to recover it, but Mrs McKenzie herself is not an executor and she would have to await the recovery and distribution of the funds by them.

39. It is of course possible, on the assignment of a lease, for terms to be agreed between the outgoing and incoming leaseholders for any overpayment of service charges from earlier years to be credited to the curent leaseholder, but there is no evidence in this case of any such arrangement. The FTT therefore seems to me to have been incorrect when it suggested Mrs McKenzie might have her contribution towards the cost of the section 20 works reduced by sums which ought to have been credited to her father's service charge account.

40. It follows that the FTT was wrong, as a matter of case management rather than jurisdiction, to permit Mrs McKenzie to add to the scope of her original application under section 27A by introducing criticisms of the years 2011 to 2015 during which she had not been the leaseholder. She had no legitimate interest in relation to the years which pre-dated her ownership. The FTT was of course entitled to investigate those years on the basis of Mr Greenfield's application, but not Mrs McKenzie's.

Disposal

41. The proper way to give effect to this conclusion is to leave the FTT's decision unaltered so far as it applies to Mr Greenfield, but to substitute for the determination in paragraph 192 a finding that the service charge payable by Mrs McKenzie in 2016 (other than for the section 20

works) was £1161.20. No determination is required of sums payable by Mrs McKenzie in earlier years because she had no liability to pay before the lease became vested in her.

42. The appeal in Mrs McKenzie's case is allowed to that extent.

43. As for the order made by the FTT under section 20C, 1985 Act, the only variation I would make to it is to extend its scope to all leaseholders of flats at Charles Willow Court as the applicants, Mrs McKenzie and Mr Greenfield, had originally requested. The FTT was entitled to consider the whole of the period from 2011 to 2016 on Mr Greenfield's application, and it reduced the sum payable in each year. Its decision is a very substantial document only a small part of which concerns Mrs McKenzie alone. In due course, if they choose to do so, her father's executors will be entitled to refer to the decision on the earlier years to demonstrate a *prima facie* case that they are entitled to reimbursement of the sums assessed to have been overpaid by him. In those circumstances, although the appellant has been successful in securing a small adjustment to the FTT's determination, it is of little practical significance and I do not consider it would be just and equitable that Mrs McKenzie should be liable to contribute to its costs incurred before the FTT through her service charge. Nor do I consider that it would be just and equitable for other leaseholders to be required to do so.

44. As for the appeal, it has been abandoned against Mr Greenfield and it would not therefore be just for him to be required to contribute to the costs incurred in pursuing it through his service charge. The appeal has, however, succeeded against Mrs McKenzie and it either does not directly concern the position of other leaseholders or (in the case of two who are said to be in the same position as Mrs McKenzie as having acquired their leases since 2011) it produces the outcome sought by the appellant. In those circumstances it would not be just and equitable to vary the contractual position agreed by the parties. The only order I make under section 20C in respect of the costs of the appeal is therefore one in favour of Mr Greenfield alone.

Martin Rodger QC,
Deputy Chamber President
12 November 2018