

UPPER TRIBUNAL (LANDS CHAMBER)



UT Neutral citation number: [2020] UKUT 0131 (LC)
UTLC Case Number: LRX/134/2019

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – costs – section 20C Landlord and Tenant Act 1985 – whether costs of managing agents were incurred in connection with proceedings before FTT – if so, whether FTT in subsequent decision correct to allow those costs as relevant costs because they were reasonable in amount and would have been incurred regardless of proceedings – appeal allowed

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

BETWEEN:

JOHN SANDOZ AND MOIRA STEER
AND OTHER LESSEES, MEMBERS OF
POINT CURLEW TENANTS
ASSOCIATION

Appellants

and

(1) MR MARTIN FRANCIS
(2) MRS REBEKAH FRANCIS

Respondents

Re: Chalet Park,
Atlantic Bays Holiday Park,
St Merryn,
Padstow,
Cornwall PL28 8PY

A J Trott FRICS
Determination on written representations

© CROWN COPYRIGHT 2020

The following cases are referred to in this decision:

Francis & Anr v Phillips & Anr [2014] EWCA Civ 1395

Wright Hassell LLP v Morris [2012] EWCA Civ 1472

Introduction

1. The appellants are members of Point Curlew Tenants Association and lessees of lodges and chalets at Atlantic Bays Holiday Park, St Merryn, Cornwall, PL28 8PY.
2. The appeal is against a decision of the First-tier Tribunal (Property Chamber) (“FTT”) dated 30 July 2019. The FTT’s decision concerned the determination of services charges for 2013-2016 under section 27A of the Landlord and Tenant Act 1985 (“the 1985 Act”).
3. The same FTT panel had previously heard an application to determine the service charges for 2008-2012. The substantive issues in that application were determined on 9 March 2017. The FTT determined an application under section 20C of the 1985 Act separately on 18 October 2017 and concluded:

“5. In all the circumstances set out above the Tribunal determines to make an order under section 20C of the Act in respect of the proceedings relating to the service charges from 2008 to 2012 so that the landlord’s costs incurred in respect of those Tribunal proceedings may not be added to future service charges.”

4. In the 2019 FTT hearing the applicant lessees challenged an invoice dated 16 March 2015 from the landlords’ managing agent, Mr Armstrong of Envoy Property Management, in the sum of £8,100 including VAT.¹ The description of the services rendered which appeared on the invoice was:

“Reconciling [2010/2011/2012] Service Charge for 1st tier tribunal”.

The sum of £2,250 (net of VAT) was allocated to each year. The FTT recorded Mr Armstrong’s explanation of the invoice at paragraph 34 of its July 2019 decision:

“Mr Armstrong explained that although the work done on the figures was in order to present them to the Tribunal, the work should have been done in 2010-2012 and was required to be done anyway after they [Envoy] were instructed to act. The Francis’s [landlords] had previously managed the site themselves”.

5. The FTT gave its decision on this issue at paragraph 35:

“... the Tribunal finds the managing agents’ fees to be eminently reasonable as charged. The Tribunal accepted Mr Armstrong’s explanation of the need for the work covered by the disputed invoice to be done irrespective of the Tribunal proceedings and that it was a charge that the lessees would have incurred had it been done at the appropriate time. This charge is therefore allowed by the Tribunal.”

6. The FTT elaborated upon its decision when refusing to grant the lessees permission to appeal on this issue on 29 October 2019:

¹ The respondent landlords state that as they are registered for VAT the amount charged to the lessees in the service charge accounts would be £6,750 net of VAT. It is the net amount which is shown in the Scott Schedule.

“3. The Tribunal’s decision to allow that charge was because it accepted Mr Armstrong’s (the Managing Agent’s) evidence that the work done by his firm leading to this charge had to be done in addition to ordinary management in order to reconcile the accounts as, previously, the Landlords had been self-managing the holiday park. The costs therefore would have been incurred irrespective of the proceedings. Indeed, the work would have been necessary to achieve what the lessees have been pressing for over a long period of time, namely a reconciliation between what has been expended and what has been paid by the lessees in service charges since the landlords acquired the holiday park.”

7. The FTT did not consider that it had erred in law in finding that Envoy’s charges were reasonably incurred and payable and that they were not subject to the October 2017 section 20C order.
8. On 15 January 2020 the Tribunal, Judge Elizabeth Cooke, granted permission to appeal with the appeal to be a review of the FTT’s decision considered under the Tribunal’s written representations procedure. The only issue in dispute is whether the FTT were correct to allow Envoy’s managing agent’s fees as relevant costs notwithstanding their previous section 20C order.

Statutory provisions

9. Section 20C of the 1985 Act states insofar as relevant:

“(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before ... the First-tier Tribunal..., are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.”

The case for the appellant

10. Mr Rawdon Crozier of counsel submitted written representations on behalf of the appellants².
11. The appellants said that the FTT had previously ordered under section 20C of the 1985 Act that no costs in relation to service charges from 2008-2012 should be added to future service charges. It was not disputed that Mr Armstrong’s fees related to the costs of preparing a report for use in the 2017 FTT proceedings, nor that such fees fell within the terms of the FTT’s section 20C order dated 18 October 2017.
12. The FTT’s decision to allow Mr Armstrong’s fees was said to be wrong in law because:
 - (i) It failed to take into account the extant unappealed section 20C order which prohibited those fees from being added to the service charge;

² The representations were the appellants’ application for permission to appeal which, by order of the Tribunal stood as the appellants’ notice and grounds of appeal.

- (ii) It allowed a collateral attack on the earlier unappealed section 20C order resulting in that order being in direct conflict with the FTT's determination in paragraph 35 of its decision dated 30 July 2019;
 - (iii) It allowed the landlord to advance an argument that could have been made with reasonable diligence, but was not, at the 2017 FTT hearing prior to the making of the section 20C order.
- 13. By accepting that Mr Armstrong's fees would have been incurred in any event, the FTT had taken into account an irrelevant consideration.
- 14. The FTT could not, as a matter of law, override or set aside its earlier order of 18 October 2017 in its decision dated 30 July 2019. To permit it to do so would undermine:
 - (i) The established principles of certainty and finality in litigation; and
 - (ii) Confidence in the administration of justice.

The case for the respondents

- 15. The respondent landlords, Mr Martin Francis and Mrs Rebekah Francis, submitted written representations in person.
- 16. The respondents said that Mr Armstrong's fees were for work done by him as the managing agent in reconciling the service charges for the years 2010-2012. This work would have been required regardless of the proceedings before the FTT. The fees were not legal or professional costs incurred as part of those proceedings. The appellant lessees had asked for such a reconciliation statement to be produced in order to identify the actual costs attributable to each lessee. Mr Armstrong had acted in his capacity as a managing agent in accordance with the obligations in the leases. The respondents said this reconciliation of the accounts would normally be done each year shortly after the year end but had not been possible for the years 2010-2012 because of delays caused by on-going legal proceedings. No managing agent was appointed in the years 2010-2012 because Mr and Mrs Francis were managing the site themselves at that time. The respondents said it was not until the Court of Appeal decision in *Francis & Anr v Phillips & Anr* [2014] EWCA Civ 1395 on 31 October 2014 that it was determined that Schedule 3 to the leases allowed the recovery through the service charge of managing agent's fees in relation to management and maintenance of the holiday park. The fact that it was not possible to undertake and complete the work until 2015 should not preclude the respondents from recovering the associated costs.
- 17. The respondents emphasised that the management fees charged by Envoy were reasonable and had been found to be so by the FTT. For instance, the actual total management fee charged for 2015 (£23,850 net of VAT) was considerably less than the estimate at the start of the year and the figure determined on account by the FTT. As such all the fees incurred in managing the site and dealing with the service charges should be fully recoverable.

Discussion

18. The FTT's section 20C order dated 18 October 2017 was made "in respect of the proceedings relating to the service charges from 2008 to 2012". Mr Crozier avers that it is not disputed by the respondents that the cost of Mr Armstrong's work as detailed in Envoy's invoice dated 16 March 2015 was incurred in connection with those proceedings before the FTT.

19. In their written representations the respondents state:

"The amount incurred as stated in evidence before the First Tier Tribunal was not a legal or professional fee incurred in relation to the legal costs of the proceedings but a stand-alone item of expenditure incurred with management of the estate by the managing agents in relation to reconciliation of the actual accounts. This is a procedure which would have had to be done regardless of any legal proceedings at all. ...The landlords and managing agents strongly dispute this was ever expenditure incurred as a legal cost of the proceedings."

It is clear from this statement that the respondents, contrary to Mr Crozier's submission, dispute whether Mr Armstrong's costs were incurred in connection with the 2017 FTT proceedings.

20. The fact that the disputed costs were not costs of legal services does not matter; no doubt an order under section 20C could be restricted to legal costs, but the order made by the FTT on 18 October 2017 applies provided that the costs, of whatever nature, were incurred, or to be incurred, by the landlord in "in respect of those Tribunal proceedings." (Section 20C itself refers to costs "in connection with" proceedings, but that slight difference in language makes no difference to the effect of the order.)

21. The argument that these costs would have been incurred regardless of the 2017 proceedings does not mean they were not, in fact, incurred in connection with, or in respect of, those proceedings. The FTT recorded Mr Armstrong's evidence to the 2019 hearing about the 2015 Envoy invoice at paragraph 34 of its July 2019 decision where it noted that he had explained "the work done on the figures was in order to present them to the Tribunal" (see paragraph 4 above). Mr Armstrong thus acknowledged that these were costs incurred in connection with proceedings before the FTT. This is stated on the face of the invoice itself which refers to reconciling the service charges "for 1st tier tribunal."

22. Whether the work covered by the Envoy invoice would have been done regardless of any FTT proceedings is not relevant; the evidence points clearly to the fact that the work was done in connection with such proceedings and the cost of such work was therefore incurred in connection with them. It is not necessary to speculate about whether the same work would have been done in different circumstances; the only fact of significance is that the work was done to enable the respondents to present their case to the original FTT.

23. The decision in *Francis* is not relevant to the issue in dispute. It concerned whether, under paragraph 6 of Schedule 3 to the leases, the sum of £95,000 as wages paid to Mr and Mrs Francis by the management company, Francis Leisure Ltd, which was wholly owned and controlled by them, was properly included in the service charges for 2008 and 2009, as well as a separate 5% management charge under paragraph 8 of Schedule 3. The Court of Appeal held that the only charge recoverable by a lessor who is an individual (such as Mr

and Mrs Francis) was under paragraph 8. That led to the appointment of Mr Armstrong as the managing agent whose costs could be recovered under paragraph 6. Although this may explain why Mr Armstrong was appointed when he was, it has no bearing on whether his costs were incurred in connection with the 2017 FTT proceedings.

24. The respondents also rely upon the FTT's finding that Mr Armstrong's fees were "eminently reasonable as charged" (paragraph 35) but again that misses the point. It is not the reasonableness of the charge which is disputed but the purpose for which it was incurred.
25. I am satisfied that the costs of the disputed invoice were incurred in connection with the 2017 FTT proceedings and are therefore subject to the section 20C order made by the FTT in October 2017. That should be the end of the matter, because the FTT had already decided in 2017 that such costs were not to be included in future service charges, and its decision had not been appealed.
26. The question then is whether it was open to the FTT (the same panel) to allow those costs as part of the 2015 service charge in its subsequent decision dated 30 July 2019.
27. The 2017 section 20C order was not appealed and no new evidence concerning the disputed Envoy invoice has come to light subsequently. The respondents' evidence about the invoice which was produced to the 2019 FTT could have been produced to the 2017 FTT when considering the section 20C order and could have been the subject of an appeal which was never brought. A request could have been made at that stage for the cost of reconciling the accounts to be excluded from the scope of any section 20C order, but that was not done. For the respondents to try and re-open the point by giving evidence to the 2019 FTT that was previously available to it was to re-litigate in 2019 that which had already been decided against them in 2017. Mr Crozier submitted that what the respondents sought to achieve before the 2019 FTT was not the addition of evidence that had been omitted previously but a re-litigation of the case on the basis of the same material as was, or could have been, before the 2017 FTT.
28. Mr Crozier submitted, correctly, that a point already decided in litigation may not in general be re-litigated between the same parties in later hearings; see *Wright Hassell LLP v Morris* [2012] EWCA Civ 1472 per Treacy LJ at [23]. This is known as "cause of action estoppel". But with respect to Mr Crozier, it does not seem to me to have much to do with the present case. Contrary to his submission, the respondents' case before the FTT, which persuaded it, did not involve a collateral attack on the FTT's original decision to impose a section 20C order. On the contrary, they presented a perfectly proper (though mistaken) argument that the costs did not fall within the scope of the section 20C order. In my judgment the only issue in this case is whether the costs referred to in the Envoy invoices were costs incurred in connection with the 2017 FTT proceedings. If they were, as I am satisfied is the case, they are irrecoverable because that is the effect of the 2017 order, not because the respondents are prohibited by any rule of law from arguing to the contrary.
29. In my judgment the costs described in the invoice from Envoy dated 16 March 2015 were incurred in connection with proceedings before the FTT, and following the FTT's section 20C order dated 18 October 2017, which was not challenged and remains in force, they are

not to be regarded as relevant costs which can be taken into account in determining the amount of the service charge payable by the tenants.

30. I therefore allow the appeal.

A handwritten signature in black ink, appearing to read 'A J Trott', with a large, sweeping flourish above it.

Dated: 21 April 2020

A J Trott FRICS

Member Upper Tribunal (Lands

Chamber)