UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – whether demands validly served – standard of proof in the First-tier Tribunal

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

BETWEEN:

38/41 CHG RESIDENTS COMPANY LIMITED **Appellant**

and

MS IRIS HYSLOP **Respondent**

Re: 38 and 41 Craven Hill Gardens,
London, W2 3EA

Upper Tribunal Judge Elizabeth Cooke
16 January 2020
Royal Courts of Justice

Mr Alexander Bastin for the appellant, instructed by Dale and Dale Solicitors Limited
Mr Dirk van Heck for the respondent, instructed on a direct access basis.

The following cases are referred to in this decision:

Henry Smith's Charity Trustees v Kyriakou [1989] 2 EGLR 110

Kinch v Bullard [1999] 1 WLR 423

Introduction

1. The appellant, 38/41 CHG Residents Company Limited, is the freeholder of 39 and 41 Craven Hill Gardens. The respondent, Ms Hyslop, holds a long lease of Flat 5, 41 Craven Hill Gardens.

2. On 19 November 2018 the First-tier Tribunal ("the FTT") delivered its decision about the reasonableness of service charges for the two years ending 31 March 2015 and 31 March 2016, and their payability by the long leaseholders of flats in the building including the respondent. However, in respect of the respondent only it adjourned to another hearing the question whether the sums demanded for those two years were validly demanded from her; its decision on 19 November 2018 was that certain sums were payable by her if they had been validly demanded from her and, if they had not been, once validly demanded (if that was still possible in the light of section 20B of the Landlord and Tenant Act 1985).

3. After a further hearing on 20 March 2019 the FTT delivered a decision on 15 April 2019, that the service charge demands for those two years had not been received by the respondent. This is the appellant's appeal from that decision.

4. The appeal was a review, with a view to a re-hearing, of the FTT's decision. I heard the appeal at the Royal Courts of Justice on 16 January 2020. The appellant was represented by Mr Alexander Bastin and the respondent by Mr Dirk van Heck, both of counsel, to whom I am grateful.

The background

5. The respondent's lease is for a term of 99 years from 26 September 2017. It contains the usual arrangement for the lessee to pay service charges in advance, on the basis of a budget, and for an account to be furnished after 31 March each year and a balancing payment or credit to be made. It is the appellant's practice to send out service charge demands by post in March and September each year. The appellant says that demands for the two years in issue were first made in March and September 2014 (for the year ending 31 March 2015) and in March and September 2015 (for the year ending 31 March 2016); but for the purposes of the hearing before the FTT it relied upon delivery in July and September 2015 of demands for the service charges for those two years.

6. Clause 6(4) of the lease says:

> "For the purpose of service of all notices hereby or by statute authorised to be served the provisions as to service of notices contained in Section 196 of the Law of Property Act 1925 as amended by the Recorded Delivery Service Act 1962 shall be deemed to be incorporated herein."

7. The current text of section 196 of the Law of Property Act 1925 reads, so far as relevant:

> "(3) Any notice required or authorised by this Act to be served shall be sufficiently served if it is left at the last-known place of abode or business in the United Kingdom of the lessee, lessor, mortgagee, mortgagor, or other person to be served, or, in case of a notice required or authorised to be served on a lessee or mortgagor, is affixed or left for him on the land or any house or building comprised in the lease or mortgage….
>
> (4) Any notice required or authorised by this Act to be served shall also be sufficiently served, if it is sent by post in a registered letter addressed to the lessee, lessor, mortgagee, mortgagor, or other person to be served, by name, at the aforesaid place of abode or business, office, or counting-house, and if that letter is not returned [F1by the postal operator (within the meaning of [F2Part 3 of the Postal Services Act 2011]) concerned] undelivered; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered."

8. It is not in dispute that if demands for service charges were delivered either by putting them through the letterbox of 41 Craven Hill Gardens addressed to the respondent, or by pushing them under the door of her flat, or by their being addressed to the respondent and sent to her by ordinary post, the requirements of section 196 were met. That follows both from *Kinch v Bullard* [1999] 1 WLR 423 and *Henry Smith's Charity Trustees v Kyriakou* [1989] 2 EGLR 110.

9. This appeal is one chapter in a very long story which includes challenges to several years of service charges, proceedings in the county court, an appeal to the high court, and a number of determinations by the FTT. It is not necessary, and would be an unhelpful distraction, to go through the whole history. The issue in the appeal is a narrow one; it is said that in deciding that the service charges for the years ending 31 March 2015 and 2016 were not received by the respondent the FTT:

    a. answered the wrong question, namely whether the demands had been received rather than whether they had been delivered;

    b. applied the wrong standard of proof, appearing to require certainty rather than making a finding on the balance of probabilities; and

    c. failed to take proper account of the evidence to an extent that amounts to an error of law.

10. I therefore have to consider the evidence that the appellant and the respondent presented to the FTT, and then to look at the terms of the FTT's decision.

The evidence before the FTT

11. At the hearing on 20 March 2019 the FTT had before it the appellant's statement of case, dated 7 January 2019, prepared solely for the purpose of that hearing, the respondent's

statement of case in reply dated 6 February 2019 (verified by her by a statement of truth), the appellant's reply dated 20 February 2019, and a witness statement of Mr Gream, a director of the appellant and the long leaseholder of flat 2, dated 9 January 2019.

12. The appellant's statement of case explained that normally service charge demands were sent by post by its managing agents. However, in January 2014 the appellant sent to the respondent a notice pursuant to section 48 of the Landlord and Tenant Act 1987 requiring her to communicate directly with it and not through the agents. It did so because of the level of dispute and litigation between them. There was thereafter considerable further dispute between the parties about whether the respondent had received communications by post from the appellant. As a result the appellant said that it did not rely, for the purpose of proving service of demands, on anything that happened before July 2015.

13. The statement of case went on to explain that in July 2015 it decided to endeavour to bring the respondent's account up to date. An email of 15 July 2015 from the managing agents, FW Gapp, was exhibited, which said that the "stop" on the respondent's account was to be removed (meaning that the respondent would receive correspondence from the agents like all the other tenants), that her account was to be brought up to date and that sums due were to be demanded. At paragraph 7d the statement of case says that the appellants' director, Mr Gream, personally delivered on 21 July a cover letter, a tenant statement and a demand for service charges up to March 2015. Mr Gream is said to have put them through the letter box in the front door of number 41 on 21 July 2015. He delivered further copies on 24 July 2015 by placing them under the door of flat 5. He delivered a reminder on 15 August 2015. The demand of September 2015 was sent by post to the respondent by the managing agents.

14. The statement of case was not verified by a statement of truth but Mr Gream in his witness statement said:

> "3. On 20 July 2015 I prepared and photographed … a set of documents to be delivered to the Respondent, including (a) a cover letter; (b) demands of payment of sums due; and (c) a tenant statement.
>
> 4. On 21 July I delivered that set of documents in an envelope with the Respondent's address into the front door mail slot of 41 Craven Hill Gardens London, and photographed that delivery.
>
> 5. On 24 July 2015, I reprinted and delivered that set of documents, without an envelope, directly under the internal door of Flat 5 41 Craven Hill Gardens London, and photographed that delivery.
>
> 6. On 15 August 2015, I hand delivered a reminder of payment to the Respondent, however I do not recall, nor have sufficient records to assist my recall, whether this was in an envelope or not, or whether to the front door or directly to the Respondent's door at Flat 5 41 Craven Hill Gardens London. I did not photograph that delivery.

> 7. In September 2015, I received by post at my premises, Flat 2 39 Craven Hill Gardens London, my demand for payment of service charge for the service charge year ending March 2016."

15. The witness statement exhibited the photographs to which Mr Gream referred. The first shows a letter comprising two sheets, an invoice, and a document headed "Tenant Statement"; the second shows a hand, an envelope addressed to the respondent, and a letterbox. The second shows a hand holding what appears to be a letter comprising two pages, and a door.

16. The bundle before the FTT, and before me on the appeal, includes a copy of a two-page letter dated 15 July 2015 which says "You will find enclosed an up to date service charge demand as of March 2015 … You will also find enclosed a complete statement of account from 2009 until the present."

17. The bundle also includes an invoice dated 15 July 2015, and a document headed "Tenant Statement". The latter is dated 21 November 2017, and shows receipts and payments from August 2009; I take it that it is a version produced in 2017 rather than purporting to be what was delivered in July 2015, but that it is in the bundle to indicate what a tenant statement looks like.

18. The respondent's case before the FTT at the first hearing, about reasonableness and payability, was that no demands were issued. She said this repeatedly in her statement of case; at paragraph 19, for example, she said "No demands, valid or otherwise, were issued within the relevant period." In the statement of case she prepared for the hearing on the issue of delivery she said, of the first picture: "We do not know if the envelope contained anything. We do not know what doorway this was. We do not know if the envelope went under the door. This appears to have been staged for the photograph, and assumes a level of naivety."

The FTT's decision

19. The FTT in its decision of 19 November 2018 said that certain sums were payable by the respondent "if validly demanded from her" (paragraph 9 of the decision summary, page 5 of the decision). At paragraph 20 of the decision under appeal it said:

> "At the hearing Mr Gream, after taking advice from Mr Comport, conceded, correctly in our view, that when identifying if a valid demand had been made of Ms Hyslop, given her denial of receipt, the test to be applied is whether we are satisfied that a demand was *received*, not whether it was delivered to her."

20. The FTT went on to deal separately with the demands for the year ended 31 March 2015 and 31 March 2016. As to 2015, it said at its paragraphs 21 and 22 said that it was not satisfied that the respondent received demands in March or September 2014; I note that it was clear from the appellant's statement of case that it did not rely on delivery in 2014.

21. The FTT said at paragraph 23 that it accepted Mr Gream's evidence that he put documents through the letterbox at 41 Craven Hill Garden on 21 July. "We found his evidence credible and it is corroborated by the photograph that he took on 20 July 2014" (I interject that that must be a misprint for 2015) "of the documents to be delivered to her and the photograph of him about to insert an envelope addressed to Ms Hyslop through the front door."

22. The FTT went on to say at its paragraph 24 that "we cannot identify with any certainty *what* documents were included in that envelope". It noted that only one document looks like a demand, in the photograph, whereas Mr Gream said he delivered demands, in the plural. The covering letter refers only to a demand in the singular. "Nor" it added "can we be certain what the demand is." The FTT also expressed concern that the letter was put through the communal letterbox. It accepted the respondent's evidence that post is sometimes placed by residents in the wrong pigeonhole. In view of her denial that she received the documents the FTT concluded that she did not receive them.

23. At paragraph 26 the FTT accepted Mr Gream's evidence that he attended the building again on 24 July, corroborated by the photograph. It said that if the applicant could establish that the documents pushed under the door included the demands of March and September 2014, "or a demand that sought payment of all the service charges due for the 2014/15 year" then "it would in our view have a persuasive case that, on the balance of probabilities, Ms Hyslop received such documents." It found that that was not established because Mr Gream in cross-examination said that he could not recall if all the documents he delivered on 24 July were the same as those delivered on 24th. Accordingly the FTT said that it was not satisfied that the demands of March and September 2014 were pushed under the respondent's door on 24 July 2015.

24. Turning to the year ended 31 March 2016, the FTT noted the appellant's case that the demand for March 2015 was hand delivered by Mr Gream on 21 and 24 July. It said that it rejected that "for the reasons stated above" and concluded that Ms Hyslop did not receive it. The September demand was said to have been posted by the managing agents, FW Gapp, but the FTT noted that it had no copy of the demand in the bundle and no witness statement giving evidence that the demand was sent. It made reference to an email from FW Gapp to Mr Gream on 24 August 2015 confirming that a demand and reminder had been issued (which I note could not have referred to the demand of 29 September 2015). The FTT said that Mr Gream's witness statement was silent on this point. In the light of the respondent's denial of receipt it said that it was not satisfied that the demand for the second instalment for 2015/16 was received by her,

25. The FTT then went on to discuss whether it was now going to be possible for the appellant to send a valid demand for those two years in the light of the provisions of section 20B of the Landlord and Tenant Act 1958, which I need not go into.

The grounds of appeal

Did the FTT answer the wrong question?

26. First, it is said that the FTT answered the wrong question. It decided whether Ms Hyslop had received the demands rather than whether they had been delivered in accordance with the provisions of clause 6(4) of the lease.

27. I quoted above the concession made by Mr Gream. He appeared in person, representing the appellant, at the hearing before the FTT. His solicitor Mr Comport was present in connection with another matter but did not represent the appellant at that hearing. Mr Bastin argues that the suggestion that the test was receipt rather than delivery appears to have come from the FTT. Why it was made is unknown, and it is clearly incorrect in view of the provision of clause 6(4) of the lease (quoted above at my paragraph 6.)

28. Mr van Heck helpfully concedes that in the light of the authorities on the withdrawal of concessions, there is no objection to the withdrawal of the concession.

29. But he also says that what the FTT actually decided was delivery, not receipt.

30. That is right, in the sense that all the evidence that the FTT assessed was of delivery. Nothing was said in the evidence about receipt, apart from the repetition of the respondent's assertion that she did not receive the demands for the two years in issue.

31. However, the formal paragraphs at the beginning of the decision and the conclusion at paragraph 32, as well as several paragraphs within the decision, all say that the respondent did not receive the demands. In the light of the agreed withdrawal of the appellant's concession, that was clearly the wrong question.

32. If that were the only ground of appeal it is not clear that it would avail the appellant, since the FTT seems to have found as a matter of fact that the demands were not delivered. I do not need to explore that further since the other two grounds of appeal also succeed.

Did the FTT apply the wrong standard of proof?

33. Second, it is said that the FTT applied the wrong standard of proof. At its paragraph 24 it said that it could not say "with any certainty" what was in the envelope on 21 March. It went on to say that although there seemed to be one demand in the photograph "nor can we be certain" which demand that is. However, at the end of paragraph 26, looking at what happened on 24 July, the FTT did refer to the balance of probabilities (see my paragraph 23 above).

34. The FTT's references to certainty are troubling. The mere use of those words does not necessarily mean that the FTT was applying a standard of proof more strict than the balance of probabilities. As Mr van Heck says, the word "any" is important; to say "I do not have any certainty about x" might mean "I am wholly in the dark about x" and does not mean the same as "I am not certain about x". But in context, the two references to certainty are consistent with what the FTT was actually doing. The FTT appeared to be looking for proof of receipt at a level higher than the balance of probabilities. It had no criticism to make of Mr Gream's credibility and it accepted his evidence that he delivered documents by hand on 21 and 24 July. But it seemed to need something more than Mr Gream's statement that he made that delivery, despite having no doubts as to his credibility, and seems to have regarded corroboration as necessary. It laid weight on the fact that Mr Gream "could not be certain" what he delivered on 24 July 2015. It appeared to require to be made certain itself. Mr van Heck says that it is inconceivable that a judge in a property tribunal would apply the wrong standard of proof. Nevertheless that is what I find happened here, although I do not suggest that it was a deliberate or conscious choice of the wrong standard.

35. Mr van Heck argues that even if the FTT did apply the wrong standard of proof, that would have made no difference to the outcome because it would not in any event have found that the demands were delivered, on the balance of probabilities. I disagree. The FTT had before it evidence which weighted the balance of probabilities heavily in the appellant's favour and yet failed to make a finding in accordance with that. That of course is the substance of the third ground of appeal.

36. Accordingly I find that the FTT applied the wrong standard of proof, and that that was why it failed to find that the demands had been received. On that basis the decision must be set aside.

Was the FTT entitled to reach the conclusion it reached on the evidence before it?

37. The third ground of appeal is that the FTT failed to take into account the relevant evidence and reached a conclusion that was not open to it on the evidence before it.

38. At paragraph 21 above I set out what the FTT said about Mr Gream's evidence. By that finding the FTT rejected the respondent's allegation, quoted at my paragraph 18 above, that the photograph was "staged." In my judgment the FTT was right to reject such an obviously unsubstantiated accusation of serious bad faith.

39. So the only reason why Mr Gream's evidence was not found to prove that the documents were delivered on 21 July was the fact that he referred to "demands" and the letter referred to – and the photograph showed – one demand. Yet the letter and the photograph are consistent, and the letter refers to an "up to date service charge demand" which must mean one demand taking in everything due to date, like the account statement that accompanies it. The copy statement in the bundle is not the same one that was sent, but it shows how the tenant statement would have been set out, starting in 2009 and setting out receipts and payments to date. It appears that Mr Gream made an error in his witness statement and thought that he had enclosed more than one demand – he may have thought, at that

distance from events, that he might have sent copies of the three latest service charge demands, which seems to have been what the FTT was looking for. But the evidence is perfectly clear – sufficient to tip the balance of probabilities and more – that the appellant delivered to the respondent's place of abode – as section 196 of the Law of Property Act 1925 requires – a demand for the outstanding service charges on 21 July 2015.

40. Mr Gream's evidence about 24 July in his witness statement is equally clear. He professed some uncertainty about what exactly he delivered, and I take that as his endeavour to be honest and conscientious, no doubt in the face of cross-examination about the number of documents delivered, the discrepancy in his statement about 21 July, and the fact that the photograph shows only the letter. His witness statement shows that he took similar care to be cautious about the reminder he says he sent on 15 August 2015.

41. The fact that he could not now be certain what he delivered on 24 July should not have been allowed to obscure the fact that the evidence pointed strongly to the probability of his having delivered an up to date demand and statement of account on both 21 and 24 July. It is not in dispute that if he did so the requirements of section 196 were satisfied. Mr Gream's evidence and the evidence supplied by the copy letter and the photograph, taken together, are far more likely to be true than the respondent's implausible accusation of bad faith and her blanket denial of receipt.

42. It is worth noting that the respondent denied receipt of demands for the preceding service charge years in county court proceedings, but her evidence was not accepted.

43. It is the appellant's case that the September 2015 demand was sent out by post on 29 September. The email of 15 July 2015 from FW Gapp indicates that the "stop" on her account had been lifted, so that she would get demands from the agents like everyone else. Mr Gream received his – it is not the case, as the FTT said in its paragraph 31, that his statement was silent about the September demand. There is no other evidence about this delivery, but what there was outweighed the respondent's bare denial. It was probable that the September 2015 service charge demand was delivered to the respondent by post as it was to the other lessees.

44. I find that the FTT's assessment of the evidence about the delivery of the service charge demands for the two years in issue was irrational because it was not open to the FTT to make that finding on the evidence before it.

45. Accordingly the appeal succeeds on all three grounds and the FTT's decision is set aside.

Conclusion

46. In giving permission to appeal the Tribunal said that the appeal would be a review, and a rehearing if it decided to set aside the FTT's decision. At the hearing counsel for both parties agreed that I would first hear submissions on the appeal and then indicate whether or not it was allowed (reserving my reasons for my written decision), before proceeding to a re-hearing if that proved to be necessary.

47. Upon my indicating that the appeal was allowed, Mr van Heck conceded that there could be no justification for any new evidence to be produced. It was agreed that the Tribunal should substitute its own view as to whether the service charges for the two years in issue were validly demanded of the respondent, on the basis of the evidence as given to the FTT and taking into account what the FTT said had transpired in cross-examination. It was also agreed that in the light of my findings about the third ground of appeal, the only conclusion that the Tribunal could reach was that the service charges for the two years in issue were validly demanded of the respondent.

48. Accordingly, rather than remitting this matter to the FTT, I substitute the Tribunal's own finding that the service charges that the FTT found were payable by the respondent for the years ended 31 March 2015 and 31 March 2016 were validly demanded of her.

Judge Elizabeth Cooke

24 January 2020