UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2022] UKUT 171 (LC)

UTLC Case Number: LC-2022-76

Written representations

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – service of demands – evidence – First-tier Tribunal deciding contested issues of fact without a hearing – appeal succeeded

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

BETWEEN:

LOUISE WEBB (1)
JAMES WEBB (2)

Appellants

-AND-

SUNLEY (FINDLAY CLOSE) RESIDENTS LTD

Respondent

Re: 10 Findlay Close,
Parkwood,
Gillingham,
Kent,
ME8 9HA

Judge Elizabeth Cooke

Decision Date: 1 July 2022

Introduction

1. This is an appeal from a decision of the First-tier Tribunal ("the FTT") that service charges were payable by the appellants in respect of their flat, 10 Findlay Close, for five years from 2016 to 2020. The appeal has been determined on written representations. Neither party had legal assistance.

The factual background

2. From 10 July 2015 to [ ] the appellants, Mr and Mrs Webb, held a long lease of 10 Findlay Close, Parkwood, Gillingham, Kent; it is one of 34 flats in a group of three buildings. The leases of the flats are in tripartite form between a freeholder, a residents' management company (the respondent), and the lessee; it is the company's responsibility to provide services and the lease makes provision for the lessee to pay ground rent to the freeholder and a service charge to the company.

3. The appellants have not lived at the flat but sub-let it throughout their ownership.

4. Until December 2020 the respondent employed a managing agent, AJP Maintenance Limited ("AJP"). Its director was a Mr A Potter, who was also a director of the respondent. In December 2020 the respondent terminated AJP's appointment on the grounds of financial mismanagement and took over management itself, through its directors Ms Hannah Barton and Mr Roland Pilcher (Mr Potter having resigned as director of the respondent).

5. In December 2020 Ms Barton made contact with the appellants about unpaid service charges for 2016, 2017, 2018, 2019 and 2020. The appellants said they never received demands for those service charges and have refused to pay them.

6. On 27 April 2021 the respondent made an application to the FTT for a determination under section 27A of the Landlord and Tenant Act 1985, which gives the FTT jurisdiction to determine the reasonableness and payability of service charges. There was no question in those proceedings about the reasonableness of the charges, but the appellants' case was the charges were not payable because they had never received demands for them.

The FTT's directions and decision

7. In the FTT the service charges in issue amounted to £2,846.06, made up of £246.06 for 2015-2016 (from the date of the appellants' purchase), £520 for each of the following four years, and £500 said to be an interest charge (but unexplained so far as the terms of the lease are concerned).

8. The FTT held a telephone case management hearing on 21 July 2021; it was attended by the appellants and by Ms Barton and Mr Pilcher. They were unable to produce accounts and service charge demands because, they explained, AJP had not passed any records on to them.

Ms Barton told the FTT (according to the FTT's account of the hearing at paragraph 4 of its directions) that she had never received any demands herself, as a resident leaseholder of one of the flats, although she continued to pay the regular monthly service charge. She asked the judge to direct AJP to produce the service charge demands sent to the appellants for the charges in question, which the judge did. In further directions given in October 2021 the judge required both parties to produce statements, verified with a statement of truth, setting out their cases.

9. The parties did so, Ms Barton providing accounts and copies of service charge demands which she said had been forwarded to her by Mr Potter, and which were addressed to Mr and Mrs Webb at 10 Findlay Close. She produced an email from Mr Potter which did not say in terms that they were served, but referred to information that "would have been" sent with the demands.

10. In response, Mr and Mrs Webb said that the demands, if they had indeed been sent to the flat, were incorrectly served because they did not live there. They said that the freeholder knew where they lived and that the management company's agent should therefore have used the correct address. In any event, they maintained that they never received them. They pointed out that the copy demands now provided appeared to have been freshly created. They pointed out that they had never been chased for service charges despite the length of time during which they were said to have been unpaid. They referred to conversations with Ms Barton in which, they said, she had said that demands had not been sent out by AJP, and to Ms Barton's statement to the FTT at the hearing on 21 July 2021 that she had never had any demands herself.

11. Those were the parties' cases. No other witness statements were filed.

12. On 5 January 2022 the FTT decided the matter on the papers. . It found, correctly, that since the appellants had not given the respondent an address for service for them other than their flat, the proper address for service upon them was their flat. But as to whether the demands had been served, the FTT went on to say:

> "30. Turning now to whether the demands produced in the bundle were actually served on the property I can only rely on the evidence before me. The Respondents were not resident at the property and are therefore unable to provide convincing evidence one way or the other. The Applicant can only rely on what they have been told by Mr Potter of AJP Maintenance Ltd.
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> 31The Respondents refer to conversations with Miss Barton in which deficiencies in the service provided by AJP were said to be acknowledged. Whilst this may be the case, I do not accept that this provides good evidence that there was a failure to deliver demands to Flat 10.
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> 32. The Respondents have raised doubts as to the veracity of the demands and refer to inconsistencies in the date of their production. Given the use of management software and the various electronic means of storing such information I am not persuaded that this provides convincing evidence that they cannot be relied upon.

> 33. Based on the above I am satisfied on the evidence before me that demands were properly made and that service charges of £2,846.14 are payable."

13. In giving permission to appeal, this Tribunal said:

> "Despite the existence of a dispute of fact, the FTT decided to determine the application without a hearing. And despite the absence of positive evidence of service, and despite what Ms Barton said to the FTT at the case management hearing to the effect that she and other residents had not received service charge demands from the previous manager, the FTT found that the demands had been served.
>
> It is arguable that the FTT reached a conclusion on the basis of an unfair procedure, in that it did not conduct a hearing so that oral evidence could be tested, and it is arguable that the FTT reached a conclusion that was not open to it on the evidence before it."

14. It will be apparent from what I have said that the appeal must succeed on those grounds. The FTT overlooked the fact that it was for the company to prove that service charge demands had been served, not for Mr and Mrs Webb to provide "good evidence that there was a failure to deliver demands to Flat 10". It did not it take into consideration the fact that Ms Barton could not give evidence of actual service. Nor did it give proper consideration to Ms Barton's own statement to the FTT that she herself had not received any demands, which was obviously relevant since it made it more likely that others had not been served either.

15. The only possible decision open to the FTT on the papers before it was that the demands had not been served; if it took the view that the company did have a case on that issue then it should have directed a hearing so that Mr and Mrs Webb had the opportunity to cross-examine Miss Barton.

Conclusion

16. The appeal succeeds. The FTT's decision was unfair because it made a decision on the papers when there was a dispute of fact, and because it reached a conclusion that was not open to it on the evidence before it. The matter is remitted to the FTT; if the respondent considers that it has evidence that the service charge demands were served it will need to ask the FTT to give directions, but on the basis of the proceedings so far the respondent should think carefully about whether it is possible for it to prove service of the demands on Mr and Mrs Webb.

Judge Elizabeth Cooke

1 July 2022

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is

received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.