UPPER TRIBUNAL (LANDS CHAMBER)

[2023] UKUT 219 (LC) **UTLC Case Number: LC-2023-008**
Royal Courts of Justice

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

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

LANDLORD AND TENANT – SERVICE CHARGES – order under section 20C of the Landlord and Tenant Act 1985 – relevant considerations

BETWEEN:

FIRSTPORT PROPERTY SERVCIES LIMITED

Appellant

-and-

VARIOUS LEASEHOLDERS OF SWITCH HOUSE

Respondents

Re: Switch House,
4 Blackhall Way,
London,
E14 9QS

Upper Tribunal Judge Elizabeth Cooke
Determination by written representations
Decision Date: 7 September 2023

Mr Tom Morris for the appellant instructed by JB Leitch Limited
Ms Amanda Gourlay for the respondents

The following cases are referred to in this decision:

Church Commissioners v Derdabi LRX/29/2011

Daejan Investments Limited v Benson [2013] UKSC 54

Daejan Properties Limited v Griffin [2014] UKUT 206 (LC)

Plantation Wharf Management Ltd v Fairman [2020] L. & T.R. 7

Schilling v Canary Riverside Development PTE Limited LRX/26/2005

Tenants of Langford Court v Doren Limited (LRX/37/2000)

1.

Introduction

1. This appeal arises from a decision of the First-tier Tribunal about the reasonableness and payability of service charges. Permission to appeal the decision that the charges were reasonable has been refused, but the appellant has permission to appeal the order made by the FTT under section 20C of the Landlord and Tenant Act 1985, preventing it from recovering the costs of the proceedings from the leaseholders through the service charge.

2. The appeal has been determined under the Tribunal's written representations procedure. The appellant has been represented by Mr Tom Morris and the respondents by Ms Amanda Gourlay, both of counsel.

The factual background

3. Switch House is a residential building of 60 flats on 9 floors, built in 2003. Leases were granted in 2003 for a term of 155 years. The appellant is the management company which is a party to all the leases; it is responsible for the maintenance and repair of the building and the leases require the leaseholders to pay a service charge to the appellant. The respondents are 14 of the lessees. In January 2021 they applied to the FTT for a determination of the reasonableness and payability of service charges demanded for the years 2018-19 and 2019-20 in the sum of £69,136.85 relating to major works for roof repairs.

4. This was not the first round of litigation about those charges. In December 2020 the appellant had applied to the FTT for dispensation from the consultation requirements for major works under section 20ZA of the Landlord and Tenant Act 1985.

5. The basis of the leaseholders' challenge both to the application for a dispensation and to the reasonableness of the charges was that the appellant should have recovered the cost of the roof works from the NHBC or from the builder, and that its failure to do so meant that the dispensation should not be granted or, if dispensation was granted, meant that the charges were not reasonable. The challenge to the dispensation application failed; following *Daejan Investments Limited v Benson* [2013] UKSC 54 the FTT held that the only relevant matter was whether the leaseholders had suffered any disadvantage from the failure to consult, and they had not. The challenge on this basis to the reasonableness of the service charges, in the present proceedings, also failed; following *Daejan Properties Limited v Griffin* [2014] UKUT 206 (LC) the FTT held that historic neglect or the failure to get something done earlier is not relevant to the reasonableness of charges for repairs.

6. However, the leaseholders succeeded in one limited respect; a charge of £5,520 in respect of work done by Ropetech (London) Limited was reduced by 50% to £2,760 on the basis that the work could have been done more cheaply by a different method that did not involve abseiling. A further reduction of £401.85 was ordered as a result of a reduction applied by the contractor. Accordingly the full charge of £69,136.85 was reduced by £3,161.85.

7. Having dealt with the reasonableness of the service charge, at its paragraphs 22 and 23 the FTT observed that the lease required the management company to keep its reserve fund in a separate trust account. It said:

> "23. Upon questioning from the Tribunal, Counsel for the respondent admitted at the hearing that this had not been done and that reserve funds were wrongly mixed up with all other funds paid as service charges. This is a breach of the lease and is in the view of the Tribunal an obvious example of bad management. The Tribunal would strongly urge the respondent to forthwith correct this error and create the trust account as required by the lease terms."

8. There is no appeal from the substantive decision about the reasonableness of the charge (an application for permission to appeal the decision about the RopeTech charge was refused). However, the appellant has permission to appeal the order made by the FTT under section 20C of the Landlord and Tenant Act 1985.

9. It is relevant, for reasons that will appear, to mention that the leaseholders sought permission from the Upper Tribunal to cross-appeal in respect of the FTT's decision to allow argument based on *Daejan Properties Limited v Griffin* [2014] UKUT 206 (LC) to be introduced very shortly before the hearing, but that application was refused.

The section 20C order

10. Section 20C(1) of the Landlord and Tenant Act 1985 provides:

> "(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 FTT]… , 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."

11. The FTT is not a costs-shifting jurisdiction and costs will only be awarded on an application for a determination of the reasonableness of service charges where one party has behaved unreasonably in bringing, conducting or defending the proceedings, or where there have been wasted costs (rule 13(1) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. Section 20C is aimed at the situation where a landlord, despite not being awarded its costs in the FTT, is nevertheless contractually entitled to recover them as a service charge under the terms of the lease. An order under section 20C is not made as a matter of course where leaseholders have been successful; careful thought has to be given to whether it is right to interfere with the landlord's contractual entitlement – or, as in this case, the management company's.

12. In the present case an order under section 20C was made despite the leaseholders' very limited success. This is what the FTT said:

> "24. It is the tribunal's view that it is both just and equitable to make an order pursuant to S. 20C of the Landlord and Tenant Act 1985. Having considered the conduct of the parties, their written submissions and taking into account the

determination set out in the decision above, the tribunal determines that it is just and equitable in the circumstances that there be an order made under section 20C of the 1985 Act. As such these costs may not be included as a service charge expense.

25. With regard to the decision relating to s.20C, the Tribunal relied upon the guidance made by HHJ Rich in *Tenants of Langford Court v Doren Limited* (LRX/37/2000) in that it was decided that the decision to be taken was to be just and equitable in all the circumstances. The tribunal thought it would be just not to allow the right to claim all the costs as part of the service charge. The s.20C decision in this dispute gave the tribunal an opportunity to ensure fair treatment as between landlord and tenant in circumstances where costs have been incurred by the landlord and that it would be just that the tenant should not have to pay them.

26. As was clarified in *The Church Commissioners v Derdabi* LRX/29/2011 the tribunal took a robust, broad-brush approach based upon the material before it. The tribunal took into account all relevant factors and circumstances including the complexity of the matters in issue and all the evidence presented. The Tribunal also took into account all oral and written submissions before it at the time of the hearing.

27. It was apparent to the tribunal that the failure by the respondent to honour the lease terms by not creating a separate reserve fund with its own accounts was a cause for suspicion on the part of the applicant with regard to the conduct of the respondent. It is understandable that the applicants would be concerned about what the respondent was doing when it failed to comply with its lease obligations and consequently failed to provide reserve fund trust accounts. When supplying accounts every year, the respondent repeatedly failed to include any accounts for a reserve fund, from which it says the repairs were mostly funded. This failure alone would be enough to persuade the Tribunal that this s20c order should be made.

13. After the FTT's decision was sent out to the parties Mr Hodder wrote to the FTT to ask whether the section 20C order was made in favour of all the leaseholders, and not just the 14 who had applied to the FTT; he was told that it was.

14. The first ground of appeal from the section 20C order is that the no-one except the 14 leaseholders was "specified in the application" as required by section 20C(1). Therefore, following the Tribunal's decision in *Plantation Wharf Management Ltd v Fairman* [2020] L. & T.R. 7 the FTT was not in a position to make an order in favour of all the lessees in the absence of consent or authority given by the non-party lessees to the making of an application on their behalf. That is clearly correct and the respondents have helpfully conceded this ground.

15. Turning to the order made under section 20C, which can only operate in favour of the 14 appellants themselves, the decision whether to make such an order is a discretionary one

and the Tribunal will not interfere with the FTT's judgment unless there has been an error of law or some other irrationality.

16. For the appellant Mr Morris argues that the section 20C order cannot be used in order to punish the appellant for a breach that was nothing to do with the proceedings. Even if it was relevant, this is a minor breach of the lease and can have caused the respondents no loss, and therefore it should have caried no weight when set against the failure of the leaseholders' application on all points except the RopeTech point where they were partially succesful. As Judge Rich QC said in *Schilling v Canary Riverside Development PTE Limited* LRX/26/2005, "so far as an unsuccessful tenant is concerned, it requires some unusual circumstances to justify an order under s20C in his favour".

17. For the leaseholders Ms Gourlay argues that there were ample reasons before the FTT to justify a section 20C order. First, the failure to keep the reserve fund in a separate account which he argues was a serious breach of the terms of the lease. She agrees with the FTT's statement that that alone would be enough to justify a section 20C order. She argues that this was the only way the leaseholders could hold the management company to account.

18. I disagree. The breach of covenant relating to the reserve fund had not the slightest relevance to the reasonableness of the service charges. It was not appropriate for the FTTs to seize upon the section 20C order as a fortuitous means to punish the breach of covenant; even had that been a relevant consideration, in the absence of any evidence that the breach caused any loss to the leaseholders the section 20C order was a disproportionate response. As for this being the only way to hold the management company to account, it is not; if the leaseholders can show that they have suffered loss because of a breach of covenant then the forum for recovery of that loss is the county court.

19. Next Ms Gourlay says that the order was also justified by the appellant's conduct in arousing the leaseholders' suspicions when it failed to set up a separate account for the reserve fund when asked to do so. She cites a number of additional matters not mentioned by the FTT as reasons for the section 20C order including what questions that she says are raised by the audited accounts as well as the appellant's conduct in introducing a new point of law (*Daejan Properties Limited v Griffiths,* see paragraph 9 above) on the eve of the hearing, the RopeTech point, the late disclosure of a reduction to certain costs and the impossibility of identifying the costs of the works from the accounts.

20. In my judgment the section 20C order has to be set aside. It was made for two reasons, namely the RopeTech decision and the failure to keep the reserve fund in a separate account. The latter point was irrelevant and should not have been taken into consideration. The RopeTech point alone gave rise to a trivial reduction in the cost of the major works and cannot justify the imposition of a section 20C order. I am not persuaded that the order can be justified by any of the other points raised by Ms Gourlay because none of them was relevant to whether the service charge was reasonable.

Conclusion

21. The appeal succeeds and the order made by the FTT under section 20C of the Landlord and Tenant Act 1985 is set aside.

Upper Tribunal Judge Elizabeth Cooke

7 September 2023

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.