Neutral Citation Number: [2024] UKUT 54 (LC)

Case No: LC-2023-374

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

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

FTT REF: MAN/32UH/LSC/2020/0010

24 February 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – striking out application – leaseholders' application for determination of service charges – whether FTT entitled to strike application out as frivolous or vexatious following determination of service charges payable by a different leaseholder – rule 9(3), Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 – appeal allowed

BETWEEN:

MICHAEL CONNELL (1)
DEBBIE LYNN (2)

Appellants

-and-

BEAL DEVELOPMENTS LIMITED (1)
EASTMAN SECURITIES LIMITED (2)
BURTON WATERS MANAGEMENT COMPANY (3)

Respondents

10 and 11 The Moorings,
Burton Waters,
Lincoln LN1 2WQ

Martin Rodger KC, Deputy Chamber President

Determination on written representations

No cases are referred to in this decision

Introduction

1. This appeal is against a decision of the First-tier Tribunal, Property Chamber (the FTT) first made on 19 October 2022 and confirmed following a review on 12 April 2023, by which it struck out applications brought by the appellants, Mr Connell and Ms Lynn, under section 27A, Landlord and Tenant Act 1985 for a determination of the service charges payable by them in respect of their properties at the Burton Waters Estate in Lincoln.

2. This Tribunal granted permission to appeal on 3 August 2023 and the matter was listed for hearing on 21 February 2024. In the event, the respondents, to whom the disputed service charges are payable, conceded that the FTT should not have struck out the application so far as it concerned the charges payable by the appellants (a third applicant whose application was also struck out has not sought to challenge the FTT's decision).

3. A concession by a respondent to an appeal is not a sufficient basis on which an appellate tribunal can conclude that a decision of a lower tribunal was wrong and should be set aside and the underlying matter remitted to it for reconsideration. Setting aside a decision of the FTT requires a judicial determination. As this is a straightforward case, the Tribunal suggested, and the parties agreed, that it should be determined without a hearing on the basis of the written material already provided.

4. I am grateful to both parties for their original submissions, and to the respondents for their sensible concession.

The proceedings

5. The Burton Waters Estate is a mixed residential and commercial estate in Lincoln which includes 361 houses and flats arranged around a marina and let on long leases. The appellants each hold leases of one of those properties. The three respondent companies are landlords of different parts of the Estate.

6. On 13 January 2020 the owners of ten properties on the Estate applied to the FTT under section 27A for a determination of the service charges payable by them in respect of the service charge years from 2013 to 2020. I will refer to these proceedings as "the 2020 application". Seven of the applicants subsequently discontinued their applications, leaving only the appellants and Mr Joshua Fernie who owns a leasehold flat at 34 The Quays, Burton Waters as applicants.

7. The 2020 application was not the first to be made to the FTT by Joshua Fernie. He had brought an application in 2018 concerning service charges for the years 2015, 2016, 2017 and part of 2018. In that application, which I will refer to as "the 2018 application", Mr Fernie was represented by his father, Mr Darren Fernie, and challenged 278 individual service charge items worth about £4,000. After a hearing lasting five days, the FTT issued a decision on 21 July 2021 in which it dismissed all but six of Mr Fernie's challenges and reduced his service charges by only £10.44. It subsequently ordered Mr Fernie to pay the respondents' costs of the 2018 applications, and later still it made an order for the payment

of wasted costs against Mr Darren Fernie because of the manner in which he had represented his son during the hearing.

8. Shortly after the commencement of the 2020 application the FTT directed that it be "stayed" (meaning delayed or put on hold) while Mr Fernie's 2018 application was determined. The 2020 application remained in its early procedural stages when the decision to strike it out, which is the subject of this appeal, was made by the FTT in October 2022. I understand the appellants had not yet filed statements of case.

9. Once Mr Fernie's 2018 application had been concluded, and his applications for permission to appeal had been dismissed, the FTT turned its attention to the appellants' and Mr Fernie's 2020 application, which covered some of the same years as had already been thoroughly investigated as well as periods before and after those years. On 6 July 2022 the FTT struck out those aspects of the 2020 application by Mr Fernie which had already been determined against him in its decision on his 2018 application. The FTT also struck out the challenges by all three applicants to the charges for the years 2013 and 2014 because it decided that those had previously been the subject of agreement and could no longer be challenged.

10. By its order of 6 July 2022 the FTT also then notice that it was minded to strike out the remaining issues in the 2020 application pursuant to rule 9(3)(d) of the FTT's procedural Rules. That rule allows the FTT to strike out the whole or part of proceedings if it considers the proceedings, or the manner in which they are being conducted, to be "frivolous or vexatious or otherwise an abuse of the process of the tribunal".

11. The FTT proposed to strike out the appellants' case so far as it concerned the years 2015, 2016, 2017 and the first part of 2018, which it referred to as "the 2015 to 2018 repeat challenge" under rule 9(3)(d) and invited them to make representations if they considered it should not do so. It explained that, in its view, for the appellants to continue to challenge the charges for these service charge years "would amount to conducting an appeal against [the FTT's decision in the 2018 application] and as such would be frivolous and vexatious".

12. The FTT stated that it was minded to strike out the applications by all three applicants so far as they concerned the years which post-dated those disputed in the 2018 application (which it referred to as the "2018 to 2020 Challenge"). It explained that any consideration of those years "would result in the determinations made in [the 2018 application] being applied to the later years" and "proportionality must be considered so that is not fair and just to permit this part of the case to continue, it being frivolous and vexatious".

The FTT's decision

13. The appellants and Mr Fernie responded jointly to the FTT's invitation to make submissions, but their representations were unsuccessful. On 19 October 2022 the FTT did as it had threatened and struck out the remainder of the 2020 application.

14. In its decision the FTT determined that the 2020 application was being pursued at the behest of Darren Fernie for an improper purpose:

> "[…] on the balance of probability it is fair and just to decide that Messrs Fernie are running this present case not purely to challenge service charges, but also for the vexatious reasons of attempting to conduct an audit of the site's finances in the hope of establishing a management wide fraud (that does not exist), to change the whole management structure of the site and to seek to appeal against [the decision in the 2018 application], when all appeal procedures have been exhausted. The Tribunal will Order that this part of the case be struck out, as being vexatious, or otherwise an abuse of the process of the Tribunal, pursuant to rule 9(3)(d) of the Rules."

15. The 2015 to 2018 Repeat Challenge and the 2018 to 2020 Challenge were struck out pursuant to rule 9(3)(d). The FTT had already struck out Mr Fernie's application in respect of the years 2015 to 2018 as a repeat of his 2018 application; it explained its reasons for striking out the appellants' case for that period as follows:

> "The Tribunal has given notice that it intends to strike out the same period of claim made by the other Applicants in this case because it would be vexatious to permit them to (in effect) raise an appeal against the decisions in [the 2018 application], after all appeals have been exhausted. The Tribunal is asked to note that the present application to challenge service charges is more restricted than the previous challenge, being limited to security costs, pressure washers, key fobs and the apportionment of service charges within the site as already considered. The Tribunal is fully aware of this, however the 2018 application] dealt with security costs, pressure washers and key fobs at great length. The Tribunal will strike out this part of the claim because it would be frivolous and vexatious or otherwise an abuse of the process of the Tribunal, to permit this part of the claim to proceed, rule 9(3)(d) of the Rules."

16. As for the years 2018 to 2020, which had not yet been the subject of any determination, the FTT said this:

> "The Tribunal takes the view that it is vexatious and disproportionate in the costs that would be expended in such a claim to continue with this part of the case in view of the determinations already made in [the 2018 application]. The Tribunal has already considered in detail 277 different areas of service charges at this site."

After recalling that it had previously criticised Darren Fernie because he "did not do a very good job of representing Joshua Fernie" during the hearing of the 2018 application, the FTT then discounted a suggestion that his performance may have been adversely affected by a recently diagnosed illness. It reminded itself that the respondents had incurred expenditure of nearly £140,000 in proceedings which had resulted in a service charge refund of £10.44 in the 2018 application. It concluded:

> "The Tribunal conducted a very thorough examination of service charge costs over approximately three and a half service charge years. The decisions made in that case have been considered by all possible appellate Tribunals and Courts. It is perfectly reasonable, fair and just for the Tribunal to use the

> decisions in [the 2018 application] as a reliable start point for any future consideration of the same areas of service charge costs. It is vexatious of the Applicants in this present case to attempt to undertake a further examination of service charges in the same areas of costs in the following 2 and a half years. The Tribunal determines that it will strike out the part of this application dealing with the second-half of 2018, 2019 and 2020 as being vexatious, or otherwise an abuse of the process of the Tribunal to permit this to proceed, Rule 9(3)(d) of the Rules."

The appeal

17. There is no challenge to the FTT's decision to strike out the 2020 application by Mr Fernie. Nor have the appellants been given permission to challenge the dismissal of their own application so far as it related to the years before 2015. The only issues are whether the FTT was entitled to strike out the appellants' 2020 application so far as it related to the years already considered in Mr Fernie's 2018 application, and in respect of the subsequent years which had not been the subject of any consideration.

18. Section 27A(1), Landlord and Tenant Act 1985 gives leaseholders (and others) the right to apply to the FTT for a determination whether a service charge is payable and, if it is, as to the person by whom it is payable, the amount which is payable, and the date at which it is payable. That entitlement is extended by section 27A(3) to cover charges in respect of future expenditure. No such application may be made in respect of a matter which has already been agreed or admitted by the leaseholder, referred to arbitration, or been the subject of determination by a court or an arbitrator (section 27A(4)).

19. Although the application by Mr Fernie in respect of the years 2015 to 2018 was not prohibited by section 27A(4), the FTT was entitled to strike it out because Mr Fernie's challenge for those years had already been considered and determined in the 2018 application. It is a general principle of public policy that once any court or tribunal has given a decision, no party to that decision can raise the same dispute for a second time in different proceedings. That general principle is reflected in the FTT's rule 9(3)(c), which allows it to strike out proceedings if: "the proceedings or case are between the same parties and arise out of facts which are similar or substantially the same as those contained in a proceedings or case which has already been decided by the Tribunal".

20. But rule 9(3)(c) did not apply to the appellants' application for a determination of the service charges payable by them for the years 2015 to 2018. The appellants were not parties to the 2018 application. The FTT obviously appreciated that distinction and it did not rely on rule 9(3)(c) when it struck out the appellants' 2020 application in respect of those years. It relied instead on rule 9(3)(d), and on the proposition that it would be "frivolous or vexatious or otherwise an abuse of the process of the Tribunal" for the appellants to require the FTT and the respondents to investigate once again the matters which had already been considered in the 2018 application.

21. The short answer to the FTT's approach is that every leaseholder is entitled to a determination by the FTT of the service charges that they are liable to pay. That right cannot be removed from them by a decision made by the FTT about the service charge

payable by someone else, whether or not the expenditure on which both service charges are based was the same. That right is conferred by section 27A, and it is protected both by the common law right to a fair hearing and by Article 6(1) of the ECHR, which states: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

22. The FTT considered that the appellants' 2020 application would "(in effect) raise an appeal" against its determination of Mr Fernie's 2018 application. But the remaining issues to be determined in the 2020 application are different from those in the 2018 application, in that they concern the sums payable by the appellants rather than by Mr Fernie, and the appellants had the right to rely on evidence which they would produce, which might be different to the evidence considered by the FTT in the 2018 application. Even if the material put forward by the appellants turned out to be the same as the material previously relied on by Mr Fernie, that would not deprive them of the right to have their own application determined.

23. The FTT also considered that the 2020 application was being orchestrated by Darren Fernie "not purely to challenge service charges, but also for the vexatious reasons of attempting to conduct an audit of the site's finances in the hope of establishing a management wide fraud". It is difficult to see how that motive would be advanced by an investigation restricted to "security costs, pressure washers and key fobs", but even assuming it to be the case, Darren Fernie is not a party to the 2020 application and his motives in offering assistance to the appellants cannot be attributed to the appellants themselves; they denied that they were acting as "nominees" of Darren Fernie and the FTT found that one of the appellants, Ms Lynn, had no knowledge of the other cases involving Mr Fernie and his son. The FTT did not find that the appellants had an improper motive in bringing their application and in my judgment it was wrong to rely on its view of the Fernies' motives to justify striking out their case.

24. The FTT struck out the application so far as it related to the years 2018 to 2020 on the grounds of proportionality. Whether it was entitled to take that course in the case of Mr Fernie is not for consideration in this appeal, but it clearly was not entitled to do so in the appellants' case. There had been no previous consideration of the later years and the FTT's determination of Mr Fernie's service charges in the 2018 application could not answer the section 27A questions for Mr Fernie or anyone else for different years. The excessive time and expense which had been devoted by the FTT and by the respondents to investigating 2015 to 2018 can provide no justification for depriving the appellants of a determination of their own liability for 2018 to 2020.

Disposal

25. For the reasons I have given the FTT was wrong to strike out the appellants' 2020 application, and its decision must be set aside and remitted to a differently constituted panel for case management and determination. In the circumstances of this case it would not be fair to the appellants for the application to continue to be managed or determined by the same panel as has already struck the application out.

26. In considering what directions are required for the future conduct of the proceedings, the FTT should have regard to two of its procedural rules in particular.

27. First, in the highly unusual circumstances of these proceedings, the FTT should draw the appellants' attention to its power under rule 13(1)(b) to make an order in respect of costs if it is satisfied that a party has behaved unreasonably in bringing or conducting proceedings. The appellants have not yet been directed to file a statement of case, so it is not known which aspects of the service charges for 2015 to 2018, or 2018 to 2020, they are concerned about. The FTT's decision in the 2018 application should be provided to them, and they should bear its contents in mind when preparing their own case. If the answers to their questions are already apparent from the earlier decision, and if the conclusions reached by the FTT when it decides the 2020 application are not materially different, then those matters may be taken into account in determining whether it was reasonable of the appellants to bring or continue the 2020 application at least so far as 2015 to 2018 are concerned. In other words, Mr Connell and Ms Lynn should appreciate that they risk being liable for some or all of the respondents' costs of the proceedings in relation to the years 2015 to 2018 if the outcome of their application is not materially different from the outcome of Mr Fernie's 2018 application. Fairness to them requires that that risk should be spelled out clearly, and they should be given the opportunity to consider whether they wish to withdraw that part of their application that relates to the years 2015 to 2018.

28. Secondly, rule 14 is concerned with representation. A party is entitled to appoint a representative to represent them in tribunal proceedings but notice of the name and address of that representative must be given to the tribunal and to the other parties (rules 14(1)-(2)). It is important that representatives be properly identified because the tribunal will then communicate with them and not with their appointing party, and because a representative who acts negligently or improperly may be made the subject of an order under section 29(4), Tribunals, Courts and Enforcement Act 2007 for the payment of wasted costs. It should be noted, however, that a party has no automatic right to be represented by a person of their choosing at a hearing; rule 6(1) allows the FTT to regulate its own procedure and rule 14(5) allows someone who is not a party to act as a representative at a hearing only with the permission of the FTT. If previous experience causes the FTT to considers that a particular individual is unsuitable to act as a representative, it should indicate at an early stage that they will not be permitted to participate in the hearing (other than as an observer). In this appeal I directed that neither Darren nor Joshua Fernie would be permitted to represent the appellants at the hearing. Given the previous costs orders made against the Fernies because of their conduct of the 2018 application, the FTT should consider whether a similar prohibition should also apply to the 2020 application.

Martin Rodger KC,

Deputy Chamber President

21 February 2024

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.