UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – charges to be ascertained by a certificate signed by an auditor – no valid certificates produced – FTT determining that service charges were reasonable and payable subject to provision of valid certificates – whether notification given for purpose of s.20(B(2) within time – whether lessee entitled to reimbursement of service charges paid on account – section 20B, Landlord and Tenant Act 1985 – appeal allowed in part

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

BETWEEN:

KAMLESH PARMAR

Appellant

-and-

127 LADBROKE GROVE LIMITED

Respondent

Re: 127 Ladbroke Grove,
London W11

Martin Rodger QC, Deputy Chamber President

2 August 2022

The appellant in person
The respondent did not participate in the appeal

The following cases are referred to in this decision:

Brent London Borough Council v Shulem B Association Ltd [2011] EWHC 1663 (Ch), [2011] 1 WLR 3014

No. 1 West India Quay (Residential) Ltd v East Tower Apartments Ltd [2021] EWCA Civ 1119

Introduction

1. This appeal concerns the liability of the appellant, Mr Parmar, to pay service charges to the respondent, 127 Ladbroke Grove Limited, under the lease of a flat in a converted house in West London.

2. The appeal is against a decision of the First-tier Tribunal (Property Chamber) (the FTT) dated 27 September 2021. The FTT decided that, subject to proper certification in accordance with the terms of the lease, service charges which had been claimed in respect of the years from 2014 to 2018 were both reasonable and payable by the appellant. The FTT dismissed the appellant's argument that any process of certification which could now be undertaken would occur more than 18 months after the date on which the relevant expenditure had been incurred, and that the whole of the service charges were rendered irrecoverable by section 20B, Landlord and Tenant Act 1985.

3. The appellant's case is that the FTT was wrong to find that the requirements of section 20B had been satisfied and ought to have found that it was now too late for any of the charges to become payable. Additionally, he argues that because it is now too late for the respondent to serve valid certificates, sums previously paid by him on account of his final liability to pay for services for the years 2014 to 2016 should be repaid.

4. Permission to appeal was granted by the FTT. At the hearing Mr Parmar represented himself, as he had done before the FTT. The respondent chose not to participate in the appeal.

The lease

5. 127 Ladbroke Grove is a Victorian house converted into five separate flats. Mr Parmar is the lessee of flat 4, originally under a lease granted in 1983. In 2004 the lessees of all of the flats in the building exercised their collective right to enfranchise and acquired the freehold. On 17 January 2013 Mr Parmar was granted a new lease extending the original 99-year term until 3011. The terms of the new lease are the same as those of the original lease except for the term and the rent which was reduced to a peppercorn.

6. The original lease reserved a ground rent payable by equal quarterly instalments on the usual quarter days. By clause 3(2) the lessee covenanted to pay a service charge as further and additional rent. The machinery for ascertaining and collecting the service charge was explained in the rest of clause 3(2).

7. By clause 3(2)(a) it was provided that "the amount of the Service Charge shall be ascertained and certified by a Certificate (herein after called "the Certificate") signed by the Lessor's auditors acting as experts and not as arbitrators annually and so soon after the end of the Lessor's financial year as may be practicable."

8. By clause 3(2)(c) a copy of the certificate for each financial year was to be supplied by the Lessor to the Lessee. The content of the certificate was prescribed by clause 3(2)(d), as follows:

> "The Certificate shall contain a summary of the Lessor's said expenses and outgoings incurred by the Lessor during the Lessor's financial year to which it relates together with a summary of the relevant details and figures forming the basis of the Service Charge …"

9. The annual amount of the Service Charge payable by the Lessee is to be 20% of the total of the expenses and outgoings incurred by the Lessor as specified in the Certificate (clause 2(c)(e)).

10. Clause 3(2)(g) gave the Lessor the right to collect payments on account. It provided that:

> "The Lessee shall if required by the Lessor with every quarterly payment of rent firstly hereby reserved pay to the Lessor such sum in advance and on account of the Service Charge as the Lessor or its Auditors or Managing Agents (as the case may be) shall specify at its or their discretion as a fair and reasonable interim payment."

11. Clause 3(2)(h) required the Lessor "as soon as practicable after the signature of the Certificate" to "furnish to the Lessee an account of the Service Charge payable by the Lessee for the year in question, due credit being given for all interim payments made by the Lessee in respect of the said year". On that account being supplied and showing such adjustment as may be appropriate" the Lessee was to pay the Service Charge or any balance found payable, or alternatively there was to be "allowed by the Lessor to the Lessee any amount found to have been overpaid by the Lessee by way of interim payment as the case might require".

12. In summary, clause 3(2) envisaged a rather elaborate three-stage process for the ascertainment and payment of service charges. The first stage is the payment of a sum in advance and on account on each quarter day "if required by the Lessor". That sum does not require any prior certification (as Mr Parmar acknowledged during the hearing) but is to be such amount as the Lessor or its auditors or agents specify as a fair and reasonable interim payment.

13. The second stage involves the ascertainment of the amount of the service charge by the signature of the certificate. Certification is critical because it is the process by which the total amount payable by the individual lessee for the year in question is identified. In the absence of a certificate which complied with clauses 3(2)(a) and (d) the only sum payable would be the interim payment.

14. The certificate must be signed by the Lessor's auditors and contain certain information. It is required to contain a summary of the Lessor's expenses and outgoings during the year. It is also required to state the amount of the service charge payable by the Lessee. As defined by clause 3(2), the "Service Charge" means the sum payable as additional rent by the Lessee,

and not the total amount spent by the Lessor. Something more than just the annual accounts is required, and the certificate is to provide "a summary of the relevant details and figures forming the basis of the Service Charge". Those details and figures will be quite simple and will amount to no more than a statement of the total expenses and outgoings and the Lessee's 20% share.

15. The provision of the certificate does not trigger the Lessee's obligation to pay, which occurs only when the final step required by clause 3(2)(h) is taken. The Lessor must provide an account of the amount payable, giving credit for payments made on account, if any, and must furnish this account to the Lessee as soon as practicable after the signature of the certificate. The Lessee is only required to pay the final sum due "upon the furnishing of such account". If the Lessee has paid more by way of interim payments than the account shows is payable as the Service Charge, an allowance is to be made in the Lessee's favour (nothing is said about the form of this allowance but it could either be a repayment or a credit against future charges).

The facts

16. Having acquired the freehold of the building the leaseholders appear to have fallen out amongst themselves. After 2014 Mr Parmar stopped paying the interim service charges demanded by the company, and in December 2016 the company began proceedings against him in the county court. It claimed interim service charges from 2014 until 29 September 2016 totalling £7,411.86 together with interest.

17. The county court claim did not rely on the end of year service charges because it had not been the practice of the company to prepare service charge certificates or to have them signed by an auditor as required by the lease. In a witness statement prepared for the FTT by its solicitor, Mr Fleming, he explained that the accounts had been prepared and sent to the lessees by the managing agents but the accountants had not been asked to prepare any certificates. No balancing charges had been collected, nor any overpayments reimbursed, and any difference between the amount collected as the interim service charge and the total expenditure at the year-end was dealt with by a transfer either to or from reserves.

18. The 2016 proceedings included a claim for forfeiture of Mr Parmar's lease for non-payment of the interim service charge, but the company appears to have overlooked a proviso in the lease prohibiting forfeiture on the ground of non-payment of an interim service charge at any time before the certificate for the relevant year has been signed. Certificates were belatedly prepared by the company's accountants in August 2017. The Certificate covered the years 2014, 2015 and 2016 and comprised a simple statement by the accountant certifying that the service charge for each year were as shown in the annual accounts attached to the certificates.

19. The certificate provided in August 2017 was later withdrawn by the accountants and was not relied on by the company in its evidence to the FTT. Mr Parmar suggested that this was because he had pointed out that the accountants who had prepared the certificate were not auditors, as clause 3(2)(a) required, but there no explanation was provided by the company.

20. In March 2018 the company obtained judgment against Mr Parmar in the county court for interim service charges and interest together totalling £8,610. There was no appeal against that judgment and Mr Parmar subsequently paid the sum he owed together with costs.

21. As Mr Fleming explained in his evidence to the FTT, once the county court proceedings commenced in December 2016 the company did not send demand any more interim service charges from Mr Parmar because of a concern not to waive the right to forfeit. Nor did it serve on him the account required by clause 3(2)(h) or demand an end of year balancing charge.

22. After obtaining judgment in the proceedings the company issued a further demand for service charges on 10 April 2018. The demand was for the actual service charges due up to 31 December 2016 and the interim charges from 25 March 2017 to 25 March 2018. The total sum demanded was £12,048 but this did not give credit for the sum of £7,411 for which it had already obtained judgment in the county court.

23. On 3 June 2019, after the company's accountants had withdrawn their 2017 service charge certificates, Mr Fleming issues revised certificates and sent out a new demand for £5,409.11 which included all the service charges then outstanding up to and including 31 December 2018. The revised certificate was in a similar form to the previous version, being single one page document certifying that the service charge years for each of the years from 2014 to 2018 were as shown in the accounts attached to the certificate. The certificate did not state the service charge payable by Mr Parmar, nor did the annual accounts show how much each leaseholder's contribution for the year was to be.

Mr Parmar's application and the FTT's decision

24. On 17 June 2019 Mr Parmar applied to the FTT under section 27A, Landlord and Tenant Act 1985 for a determination of the service charges payable by him for the years 2014 to 2018. In his application he took issue with all of the charges in each of the years in question. One of the challenges he identified in the application concerned the sufficiency of the certificates relied on by the company. He later came to rely additionally on section 20B, Landlord and Tenant Act 1985.

25. Section 20B imposes a statutory time limit on making demands for service charges, as follows:

> "20B. **Limitation of service charges: time limit on making demands**.
>
> (1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.
>
> (2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would

subsequently be required under the terms of his lease to contribute to them by the payment of a service charge."

26. Section 20B operates by imposing a time limit of 18 months in subsection (1), which begins to run from the date when the relevant costs taken into account in determining the amount of a service charge were incurred. If more than eighteen months have elapsed before a demand for payment of the service charge is served on the tenant, the tenant will not be liable to pay the charge to the extent that it reflects the relevant costs, unless the landlord can bring itself within the limited exception in subsection (2). That exception requires written notification to have been given to the tenant, within the same eighteen-month period, that the costs in question "had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge."

27. The respondent applied to the FTT to strike out the application so far as it related to the years covered by the county court judgment but in a preliminary decision the FTT decided that it still had jurisdiction to consider the final amount of the annual service charges for those years because the judgment dealt only with interim service charges.

28. Although the FTT began its final decision by recording that the application was brought to determine the amount of service charges payable by Mr Parmar in the years 2014 to 2018, nowhere in that decision did the FTT state what amount if any was payable for any of those years. In the first part it addressed arguments advanced by Mr Parmar about the effect of section 20B and the lease's requirement for certification. Its conclusions on those issues are opaque. In the second half of the decision the FTT considered a large number of individual items of expenditure incurred during the disputed years and, for the most part, found them to be both "reasonable and payable".

29. Further consideration of the earlier parts of the decision shows that the FTT cannot have meant to find that any amount was yet "payable".

30. As far as section 20B was concerned the FTT said this in paragraph 25:

> "The Brent case [*Brent London Borough Council v Shulem B Association Ltd* [2011] EWHC 1663 (Ch)] held that section 20B(2) required that the Lessee was notified in writing that cost had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by payment of a service charge and that this required clear and unequivocal statements to that effect. While no letters had been provided to us with a statement in that precise form the Tribunal is in no doubt that for the purposes of section 20B(2) the Applicant had been notified in writing that the charges had been incurred and that he would be required to pay a service charge."

The FTT therefore dismissed Mr Parmar's case based on section 20B.

31. The FTT then dealt with certification, referring to clause 3(2)(a) of the lease. It had previously referred to the fact that the county court had dealt with the case as a claim for interim charges "and that final certificates had not been provided at an appropriate time". It dismissed a suggestion (not made by Mr Parmar in his written material) that the June 2019 certificates were invalid because they had not been "prepared by an auditor", saying that

they had to be signed by the auditor, but need not have been prepared by the auditor. It made no finding that the certificates had in fact been signed by an auditor and did not mention that they had been signed by Mr Fleming, who is the company's solicitor. Mr Fleming had made a witness statement explaining why, in his view, he was sufficiently experienced to be able to provide the certificates, but the FTT did not say what it made of that evidence.

32. Nor did the FTT mention other arguments Mr Parmar had raised about the validity of the certificate, but it appears to have found some of them at least to be persuasive. After making its comment that the certificate did not need to be "prepared by an auditor" it went on at paragraphs 29 and 30:

> "29. However, the tribunal in its [preliminary] decision … held that the tribunal was entitled to consider the reasonableness and payability of the service charges once certification has taken place.
>
> 30. The Tribunal considers it is reasonable for the company to delay finalisation of accounts and their certification due to the number of items in dispute and the long and convoluted history of this matter. However, the Tribunal sets out below its decision on the reasonableness and payability of the various amounts and it should therefore be possible to complete the accounts and have them certified."

33. I read paragraphs 29 and 30, coupled with the earlier reference to final certificates not having been provided to the county court, as an acceptance of Mr Parmar's argument that valid service charge certificates had not yet been issued. It did not mention the certificates of August 2017 (later withdrawn) or June 2019 or consider why they might be invalid, and it appears to have dismissed the only one of Mr Parmar's arguments which it mentioned. Nevertheless, Mr Parmar seems to me have correctly to have understood the FTT's conclusion as being that no service charges were yet payable because of the absence of certification. It nevertheless proceeded to deal with numerous disputed charges in the remainder of its quite lengthy decision and its statement that "it should therefore be possible to complete the accounts and have them certified" demonstrates that it considered they were still capable of being recovered once properly certified. Confusion could have been avoided if that intention had been spelt out more clearly and if the FTT had not referred to the individual charges as both reasonable and "payable". They were not yet payable, because the FTT had accepted that they had not been properly certified, and its decision on payability was conditional on certification taking place at a later date.

The appeal

34. Mr Parmar filed quite a lengthy application for permission to appeal and was granted permission by the FTT on "the section 20B and certification points", without further definition. At the hearing, he explained that he was quite happy with the FTT's finding that there had been no proper certification of the charges for the years 2014 to 2018. There can be no doubt that proper certificates had not been supplied. The only document relied on (the June 2019 certificate) was not signed by the company's auditor and did not state the amount that was payable by Mr Parmar, nor how it had been calculated, as required by clauses 3(2)(a) and (d). It was not a valid certificate and no service charge was ascertained as a result of the certificate being given. Nor was any account, in the form required by clause

3(2)(h) given to Mr Parmar, setting out the balancing calculation and triggering a liability to pay or an obligation to give credit or repay any excess.

35. His appeal raised two substantive issues about section 20B.

36. The first issue concerned the FTT's finding in paragraph 25 of its decision that, although "no letters had been provided" which contained "a statement in that precise form" i.e. a statement sufficient to satisfy the requirement of section 20B(2), it was nevertheless "in no doubt that for the purposes of section 20B(2) the Applicant had been notified in writing that the charges had been incurred and that he would be required to pay a service charge." Mr Parmar submitted that the FTT should have found that no notice satisfying section 20B had ever been given and that, as a result, it was now too late for a valid demand to be served for any of the years in issue.

37. The second issue concerned the consequences of the finding Mr Parmar invited me to make that it is now too late to make any further demand. He argued that the result should be a determination that no service charge was payable at all for any of the years in dispute, and that the respondent should be ordered to repay the sum of £8,610 which he had paid to satisfy the county court judgment relating to the interim service charges for 2014 to 2016.

The first issue

38. The requirements of section 20B are clear and have been the subject of relatively recent consideration by the Court of Appeal in *No. 1 West India Quay (Residential) Ltd v East Tower Apartments Ltd* [2021] EWCA Civ 1119. The Court of Appeal approved, for the second time, the approach to section 20B(1) taken by Morgan J in *Brent v Schulem B*, that "The reference to a demand in section 20B(1) presupposes that there had been a valid demand for payment of the service charge under the relevant contractual provisions." In the absence of a valid contractual demand within 18 months of a relevant cost being incurred, a landlord would only be able to recover a service charge based on that costs if it could bring itself within the limited exception in subsection (2).

39. That limited exception requires that the landlord inform the tenant within the relevant 18-month period that costs have been incurred and that the tenant will subsequently be required to contribute to them by the payment of a service charge.

40. Because only a contractually valid demand will suffice for the purpose of section 20B(1), the FTT's implicit finding that the service charges for 2014 to 2018 had never been certified in the manner required by the lease inevitably meant that the requirement of section 20B(1) had not been satisfied for any of the disputed charges. The only question for the FTT was therefore whether sufficient notice had been given to Mr Parmar within the 18 month period to satisfy the exception in section 20B(2) and to stop time running.

41. The FTT identified no document which satisfied section 20B(2) and found specifically that nothing had been provided by the respondent containing a statement in the precise form required by section 20B(2). It nevertheless felt able to say that it was in no doubt that Mr

Parmar had been notified that the charges had been incurred and that he would be required to pay a service charge. It did not say why it was in no doubt.

42. Notification for the purpose of section 20B(2) is required to be in writing. In the evidence of Mr Fleming, the respondent's solicitor, he had referred to a number of different demands based on various iterations of the service charge accounts but it was not clear which he was inviting the FTT to find was sufficient for the purpose of section 20B(2). The FTT's finding that it had been shown no letters which met the requirements of the subsection suggests that it did not find any of the material referred to by Mr Fleming to be sufficient. Even if it had been satisfied by the certificate provided in June 2019 it is clear that that could not save charges incurred before December 2017.

43. The FTT was not entitled to find that some unspecified document or documents must have been sufficient to provide the required notification. At the very least it was essential that the documents it had in mind should be identified so that the parties and this Tribunal could consider whether they contained the necessary information. It could not simply assume that the necessary documents existed, or that some combination of documents could be read together as conveying that information. There was no evidence to support such a finding. The FTT's decision that section 20B(2) was satisfied must therefore be set aside.

44. If the respondent wishes to demand further service charges after proper certificates have been issued, it will be for it to demonstrate how it falls within section 20B(2).

The second issue

45. The FTT's conclusion that no proper certificates were provided for the disputed years should have enabled it to determine Mr Parmar's application under section 27A. The only determination which was necessary was that no further service charges were payable in respect of any of the years 2014 to 2018. But Mr Parmar wanted more than that; he wanted a determination that money which he had paid in respect of interim charges for the period from 2014 to September 2016 should be repaid to him.

46. Mr Parmar's liability to pay the interim service charges was definitively resolved by the judgment of the county court in March 2018. Initially he sought to argue that the charges were not "a fair and proper amount", as clause 3(2)(i) suggested they needed to be, but that argument is no longer available to him. Instead he argued that the accounting process required by clause 3(2)(h), which involves comparing the charges paid on account with the amount of the service charge certified by the auditor leading to a balancing charge or credit, could now only result in a credit equal to the whole amount of the county court judgment.

47. Mr Parmar's logic was that clause 3(2)(h) required an account of the service charge payable by the lessee. Because it was now too late for notification to be given under section 20B(2) the amount payable for the relevant period was nil. The clause also required credit to be given for interim payments and an allowance for any overpayment. Because the service charge was nil, all of the interim payments were overpayments, and the full amount ought to be repaid.

48. I do not accept Mr Parmar's argument.

49. One difficulty with the argument is that it is premature. Clause 3(2)(h) requires the account and balancing calculation to be carried out "as soon as practicable after the signature of the Certificate". No valid certificate has yet been signed, so the time to carry out the balancing calculation has not yet arrived. Whether there is any document, or combination of documents, which satisfy section 20B(2), is not a question which arises until after certification.

50. A second difficulty is that Mr Parmar's argument appears inappropriately to combine the contractual machinery for identifying the amount that is payable or re-payable with the statutory limitation which is applied to prevent recovery of charges incurred more than 18 months before the demand.

51. The contractual position between the parties is that Mr Parmar is liable to pay the balance or entitled to receive credit for any overpayment as between the certified expenditure incurred by the lessor and the sums paid on account by the lessee.

52. A number of statutory limitations must then be applied to find the amount which is actually payable, which may be less than the contractual amount.

53. The relevant limitation in the case of sums paid on account is provided by section 19(2), 1985 Act, which provides that where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is payable, and after the relevant costs have been incurred any necessary adjustment is to be made by repayment, reduction of subsequent charges or otherwise. It is established by the decision of the county court that the interim charges were reasonable so section 19(2) does not result in any adjustment being necessary.

54. Section 19(1) could result in an adjustment to the service charge if it was shown that costs taken into account in the certificate were not reasonably incurred or were incurred for services or works which were not of a reasonable standard. For the most part, however, the FTT was satisfied that the costs incurred were reasonable.

55. If it had been had been the case either that the interim charge was for more than was reasonable as a payment in advance, or that recovery of the costs actually incurred was limited to a lower sum by section 19(1), then the calculation required by clause 3(2)(h) would need to reflect that.

56. But in my judgment section 20B does not interfere with the calculation required by clause 3(2)(h) in the way suggested by Mr Parmar. In particular, it does not require it to be assumed that costs which were in fact incurred were never incurred. Instead, it relieves the tenant of liability to pay so much of a service charge as reflects costs incurred more than 18 months before a proper contractual demand. But having identified that lesser sum, there is nothing in section 20B which provides for repayment of any resulting balance in the lessee's favour. Section 20B only has the effect of limiting the recovery of sums for which the lessee would otherwise be liable and does not interfere with the contractual machinery for identifying

those sums. Nor does section 19(2) entitle the lessee to reimbursement based on the sum capped by section 20B.

57. The FTT did not have jurisdiction to order repayment of the interim service charges which had been the subject of the county court judgment. It was prevented by the county court judgment, and by section 27A(4)(b), 1985 Act, from considering the recoverability of the interim charges at all. It was also prevented by the absence of proper certification from considering what balancing charge was payable under clause 3(2)(h). It follows that Mr Parmar is not entitled to an order for reimbursement of the sum paid to meet the county court judgment.

Disposal

58. The only part of the FTT's decision which it is necessary to set aside is its finding that notification had been given for the purpose of section 20(b). I allow the appeal and set the decision aside to that extent. In answer to the question posed by Mr Parmar's original application I also determine that for the years 2014 to 2018 no service charges were payable by him other than the interim service charges which were demanded for the years 2014 to 2016 and which were the subject of the county court judgment of March 2018.

Martin Rodger QC,

Deputy Chamber President

4 August 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.