UPPER TRIBUNAL (LANDS CHAMBER)

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**Location: Royal Courts of Justice, Strand,
London WC2A 2LL**

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – ADMINISTRATION CHARGES – burden of proof – scope of costs incurred "for the purpose of" the preparation and service of a notice under section 146 of the Law of Property Act 1925

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

BETWEEN:

ASSETHOLD LIMITED

Appellant

-and-

NELIO PATRICIO TEIXEIRA FRANCO

Respondent

**Re: 9 Oval Road South,
Dagenham,
Essex, RM10 9DP**

**Judge Elizabeth Cooke
Heard on: 27 October 2022
Decision Date:**

Mr Richard Granby for the appellant, instructed by Scott Cohen Solicitors Limited

The following cases are referred to in this decision:

Barrett v Robinson [2014] UKUT 322 (LC)
23 Dollis Avenue (1998) Ltd v Vejdani [2016] UKUT 365 (LC)

Introduction

1. This is an appeal by Assethold Limited, the freeholder of 9, Oval Road, Dagenham, against a decision of the First-tier Tribunal ("the FTT") about the reasonableness and payability of service and administration charges demanded from the respondent Mr Franco, as leaseholder of Flat A at 9, Oval Road.

2. The appellant was represented in the appeal by Mr Richard Granby of counsel, to whom I am grateful. Mr Franco did not file a respondent's notice and has taken no part in the appeal; however, he attended the hearing and Mr Granby helpfully made no objection to our having a brief discussion, of which I say more in the final paragraph below.

Factual background and procedural history

3. 9, Oval Road comprises three flats. Mr Franco holds a long lease of Flat A. The lease makes provision for the landlord to provide services and for the leaseholder to pay a variable service charge and administration charges. The appellant is the landlord, and it employs Eagerstates Ltd as its managing agents. Half yearly payments of both actual and estimated service charges are demanded on 24 June and 25 December each year.

4. The lease contains the following covenant by the leaseholder at clause 3(a)(v):

> "To pay all costs charges and expenses (including Solicitors' costs and Surveyors' fees) incurred by the Lessor for the purpose of or incidental to the preparation and service of a notice under Section 146 of the Law of Property Act 1925."

5. There have been previous legal proceedings between these parties. On In 2017 the appellant issued proceedings against the respondent in the county court at Romford (claim number D9QZ449J) claiming arrears of service and administration charges. Those proceedings were transferred to the FTT for a determination of the reasonableness and payability of the charges, and concluded on 27 April 2018 when the county court ordered the respondent to pay £5,282.09 t the appellant.

6. On 14 May 2018 Eagerstates Limited invoiced the appellant £3,600 for administration costs for its assistance with those county court proceedings, and on the same date that sum was demanded from the respondent by way of administration charge. On 1 June 2018 the appellant issued its regular service charge demand, which showed that sum as still unpaid.

7. On 3 June 2019 the appellant sent to the respondent a service charge demand requiring payment of actual charges for 2018/19. The total for the building was £5,329.88; the respondent's 1/3 share was £1,776.63 of which £781.19 had been received on account so £995.44 was demanded.

8. In the same letter the appellant demanded payment of estimated service charges for 2019/20, including £3,186.00 for works to be done on the meter cupboard; the respondent's 1/3 share was £2,417.43 so his half-yearly instalment was £1,208.72.

9. A service charge demand dated 13 August 2019 included a number of items labelled "notice of proceedings", "solicitors' costs" and "admin costs", amounting to £2,040. What they related to would not have been apparent to the respondent without an explanation, and I do no know whether any explanation was given, but it is now known that they were the pre-issue legal and administrative costs of proceedings commenced on 20 September 2019 against the respondent in the county court at Romford for arrears of ground rent, service charges and administration charges.

10. The total claimed in those proceedings was £9,000.38, together with £555 court fee and fixed costs. The £9,000.38 was made up of:

    a. £1776.63 service charges demanded in June 2019 (see paragraph 7 above);

    b. £1,208.72 estimated service charges demanded in June 2019 (see paragraph 8 above);

    c. The £3,600 administration costs demanded in respect of the earlier proceedings;

    d. £2,045 administration charges in respect of the current proceedings.

    e. Ground rent and interest.

11. By an order of 28 January 2020 the claim was allocated to the small claims track and listed for a preliminary hearing on 11 May 2021.

12. At that hearing the appellant was represented by Eagerstates' employee Mr Ronni Gurvits, who handed up a schedule of the appellant's costs in Form N260 in the sum of £6,290, in the expectation that that would be the final hearing in the matter. However, the Deputy District Judge made an order which said "Transfer to First Tier Property Tribunal"; by that I understand that he transferred to the FTT that part of the claim that it had jurisdiction to determine, pursuant to section 176A of the Commonhold and Leasehold Reform Act 2002 which provides

> "(1) Where, in any proceedings before a court, there falls for determination a question which the First-tier Tribunal or the Upper Tribunal would have jurisdiction to determine under an enactment specified in subsection (2) on an appeal or application to the tribunal, the court—
>
> (a) may by order transfer to the First-tier Tribunal so much of the proceedings as relate to the determination of that question…"

13. The effect of that order was that the First-tier Tribunal would exercise its jurisdiction under section 27A of the Landlord and Tenant Act 1985 to determine whether the service charges comprised in the claim were reasonable and payable, and its jurisdiction under paragraph 5 of Schedule 11 to the Commonhold and Leasehold Reform Act2002 to determine whether the administration charges within the claim were reasonable and payable.

14. The county court's order of 11 May 2021 also said:

> "Matters falling exclusively within the jurisdiction of the County Courts are to be heard by the Tribunal Judge sitting as a Deputy District Judge".

15. That direction brought into play the deployment arrangements – often called "double hatting" – which enable the FTT judge also to sit as a judge of the county court and determine matters that fall outside the FTT's jurisdiction – essentially ground rent, interest, and county court costs – so that there is no need for the proceedings to bounce back to the county court once the reasonableness and payability of service and administration charges have been determined.

16. The FTT on 15 December 2021 directed the appellant to serve a Statement of Case by 1 October 2021, which it did, and the respondent to serve a Statement of Case by 15 October 2021 "setting out all items disputed with the reasons why they are disputed and, where applicable, any alternative sums offered by the Respondent". That was a standard direction in service and administration charge cases, where the leaseholder is not entitled simply to put the landlord to proof that the charges are reasonable but must first say why they are unreasonable (*Schilling v Canary Riverside Pte Limited* [2005] EWLands LRX 65 2005).

17. The respondent did not file a Statement of Case, despite the deadline being extended to 1 November 2021.

18. A hearing took place on 17 December 2021, and on 21 January 2022 a judgment was delivered setting out the decisions of the FTT made by a judge and member, and the decisions of the county court made by the same judge sitting as a judge of the county court. The FTT decided that the respondent had to pay service charges in the sum of £1,673.16 and costs of £2,000. On the same date the made an order in the county court requiring the respondent to pay the sums determined by the FTT to be reasonable and payable (£3,673.16), together with ground rent of £100 and costs of £555.

19. It will be apparent therefore that not all the sums claimed by the appellant were found to be payable. Four points in the FTT's decision are appealed, with permission from this Tribunal, and I take them one by one.

Ground 1: estimated service charges in respect of work on the meter cupboard

20. The FTT's figure of £1,673.16 was made up of the £995.44 due in respect of actual charges to June 2019 (see paragraph 7 above), plus £677.72 in respect of the estimated charges demanded at that date. That figure is the £1,208.72 demanded (see paragraph 8 above) for estimated charges less £531 for the estimated charge in respect of work to be done on the meter.

21. Of the estimated charge in respect of the meter cupboard works the FTT said (at its paragraph 15):

> "The tribunal finds these costs unsubstantiated. Reference was made to 'meter cupboard works as per section 20 notices' in the estimated service charge account June 2018/19 produced by the applicant. However, these notices were not provided to the tribunal, or any evidence of the works having been carried out with the actual service charge account for 2018/19 omitting this item. Therefore, the tribunal finds these sums are not reasonable or payable by the respondent in his 1/3 share [being half of one third of £3,186] i.e. £531."

22. The service charge demand of 1 June 2018 listed, among the items comprising the estimated charges, "Meter Cupboard works as per section 20 notices", although there is no mention of section 20 notices in the demand dated 3 June 2019. Mr Granby surmised that section 20 notices may have been prepared, at the point when the work was first planned. But there is no requirement for consultation under section 20 of the Landlord and Tenant Act 1985 in respect of estimated charges (*23 Dollis Avenue (1998) Ltd v Vejdani* [2016] UKUT 365 (LC))

23. The landlord appeals the decision that this charge was not reasonable or payable on the basis that the two reasons given for rejecting it were wrong in law. The fact that the cost is "unsubstantiated" is not relevant; it is for the leaseholder to challenge the reasonableness of the charge (see paragraph 15 above), and the respondent did not do so. And there is no need for a section 20 process to be followed in respect of estimated charges.

24. The appellant's two points are obviously right and the appeal succeeds on this point. The Tribunal substitutes its own decision that the estimated service charges demanded in June 2019 are reasonable and payable in the sum of £1,208.72.

25. At the hearing Mr Franco explained that he did not understand why the estimated charge for the work on the meter cupboard has appeared in successive service charge demands; this was not an issue in the appeal but I asked Mr Granby to ask his client to provide an explanation for Mr Franco.

Ground 2: the administration charge of £2,045 in respect of the costs of the FTT proceedings up to the date of issue.

26. One of the items in the appellant's claim in the county court was and administration charge £2,045, being the fees charged to it by Eagerstates Limited for the management of the claim and the fixed costs charged by its solicitors up until the issue of the proceedings in the county court on 20 September 2019 (see paragraph 9 above). The sum was explained in the appellant's Statement of Case in the FTT as being made up of a number of standard sums for sending notice of proceedings, for preparing the file for solicitors and assisting the solicitors, the solicitors' own fees for preparing and issuing the claim, as set out in the service charge demand of 13 August 2019. The figures in that demand add up to £2,040, as do the figures in the Statement of Case, and I take it that the additional £5 claimed is an error on the part of the appellant.

27. Of this item the FTT said at its paragraph 16:

> "The tribunal finds the lease makes no provision for the payments of such charges and therefore determines these sums are not payable by the respondent."

28. For the appellant Mr Granby points out that the lease contains a "section 146 clause" in standard form, set out at paragraph 4 above (and to which the FTT referred later in its decision, as we shall see under ground 4) which enables the landlord to recover costs incurred "for the purpose of or incidental to the preparation and service of a notice under Section 146 of the Law of Property Act 1925".

29. Paragraph 2 of the appellant's particulars of claim in the county court stated "The claimant has brought this claim as they require a determination of the outstanding sums for the purposes of section 81 of the 1996 Housing Act pursuant to an intention to serve a notice under section 146 of the Law of Property Act1925." A section 146 notice is an essential precursor to forfeiture of the lease for breach of covenant; section 81 of the Housing Act 1996 provides:

> "(1) A landlord may not, in relation to premises let as a dwelling, exercise a right of re-entry or forfeiture for failure [by a tenant to pay a service charge or administration charge unless
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> (a) it is finally determined by (or on appeal from) [the appropriate tribunal]2 or by a court, or by an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, that the amount of the service charge or administration charge is payable by him, or
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> (b) the tenant has admitted that it is so payable."

30. Therefore a landlord who wants to serve a notice under section 146 of the Law of Property Act 1925 in order to forfeit the lease for non-payment of service charges must first obtain a determination that they are payable.

31. It is well-established that a "section 146 clause" of the kind included in the respondent's lease will enable the landlord to recover as an administration charge under the lease the costs of county court and FTT proceedings brought as a precursor to forfeiture, being "for the purpose of" the preparation and service of a section 146 notice, provided that he can show that the costs were indeed incurred for that purpose: *Barrett v Robinson* [2014] UKUT 322 (LC).

32. Accordingly the FTT's explanation of why the charges were not payable was incorrect and is set aside. No challenge has been made to the reasonableness of the sums claimed in respect of the pre-issue legal and administrative costs of the current proceedings. The Tribunal substitutes its own decision that the sum of £2,040 is reasonable and payable.

Ground 3: the administration charge in respect of the costs of the previous proceedings

33. As we have seen, the appellant brought county court proceedings against the respondent in 2017, and later demanded (see paragraph 6 above) an administration charge of £3,600 in respect of its managing agents' work in respect of those proceedings. That administration charge was claimed, as being in arrears, in the present county court proceedings. The FTT said this about it:

> "The tribunal finds these sums are not payable. If the applicant had wished to recover the costs of those proceedings, they should have sought the same in Claim no D9QZ449J1."

34. It appears that the judge and member in the FTT thought they were being asked to make a costs order, either in respect of county court costs in the previous proceedings (as to which the FTT had no jurisdiction) or in respect of the costs incurred in the FTT in the previous proceedings. The FTT's jurisdiction in relation to service charges is essentially a no-costs jurisdiction, and no suggestion was made that there were grounds to make an order under rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 where a person has behaved unreasonably in bringing or defending the proceedings. So it is difficult to see how the FTT could have supposed that it was being asked to make an order in respect of those FTT costs.

35. But the FTT was not being asked to exercise either of those jurisdictions. It was asked to assess the reasonableness and payability of this administration charge under Schedule 11 to the 2002 Act, and on the basis that the charges were payable under the section 146 clause as explained under ground 2 above.

36. Accordingly the FTT made an error of law and its decision is set aside.

37. However, there is no evidence that the 2017 county court proceedings were brought for the purpose of initiating forfeiture proceedings by preparing and serving a section 146 notice. The appellant's statement of case in the FTT in the present proceedings says that this was the appellant's purpose in bring both the present proceedings and the 2017 proceedings, but so far as the 2017 proceedings are concerned that is a self-serving statement made after the event and in the absence of any contemporaneous indication that that was the landlord's purpose in 2017 those charges are not payable. Mr Granby in written submissions invited by me after the hearing (because this point was not explored properly at the hearing) said that he was "specifically instructed that had Mr Gurvitz been asked by the FTT whether the Appellant initiated the previous set of proceedings pursuant to an intention to service a s.146 notice and (if the breach was unremedied) proceed to forfeit the lease then Mr Gurvitz would have confirmed that that had been the intention". But he was not asked, and that evidence was not given. Accordingly the Tribunal substitutes its own decision that the charge of £3,600 is not payable by the respondent.

Ground 4: costs in the sum of £6,290

38. It will be recalled that at the preliminary hearing in the county court Mr Gurvits handed up a costs schedule in Form N260 claiming £6,290 for post-issue costs in the county court (paragraph 12 above).

39. That sum was obviously not one of the items making up the claim itself in the county court, and therefore, correctly, did not feature in the appellant's statement of case in the FTT. Nevertheless it appears that the schedule was produced at the FTT hearing and the FTT was asked (by Mr Gurvits, who is not legally qualified) to make an order in respect of it. The FTT said this:

> "18. The tribunal was provided with a Summary Statement of Costs totalling £6,290.00 as of May 2021. The tribunal finds that clause 3(A)(v) of the lease makes provision for the payment of costs for the purpose of or incidental to the preparation of notices required for forfeiture. The tribunal finds that by a letter dated 14 August 2019 to the respondent from the applicant's solicitors Scott Cohen, reference was made to obtaining a determination of the alleged debt with a view to initiating forfeiture proceedings. At the hearing further costs were claimed of £1,300 (plus VAT) for the solicitor's costs of preparing the hearing bundle and £1,080 (inclusive of VAT) for Mr Gurvits costs although he is not legally qualified or produced any proof of loss.
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> 19. The tribunal finds the costs claimed are out of all proportion to the sums initially claimed and to the sums recovered. Therefore, the tribunal limits the costs to £2,000 representing approximately 20% and the extent of the respondent's successful challenges to the £9,000 originally claimed."

40. Curiously, therefore, the FTT at this point woke up to the section 146 clause, and took the view that the £6,290 comprised an administration charge demanded pursuant to that clause of which it was to assess the reasonableness and payability. It then proceeded to apply a test of proportionality, which the appellant says was not the correct test. In other words the FTT purported to exercise, in respect of this sum, its jurisdiction under Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

41. But that jurisdiction was not engaged. There had been no demand for this sum as an administration charge.

42. This was simply the claim for costs in the county court – as the form on which it was set out, and the heading "In the Romford County Court" made clear - which Mr Gurvits would have made on 11 May 2021 had that turned out to be a final hearing. He tried again to claim those costs at the hearing in the FTT, and cannot be criticised for not knowing that the FTT had no jurisdiction to make an order for costs in the county court.

43. The order made at the FTT's paragraph 9 is set aside. The costs claimed were incurred in the county court proceedings and the FTT had no jurisdiction to make an order in respect of them and therefore there is no reason to remit this point to the FTT.

Conclusion

44. The result of this appeal means that the county court order dated 21 January 2022 has to be amended, by adding £531 (the outcome of ground 1) and £2,040 (ground 2) but subtracting £2,000 (ground 4) from the sum payable. As I understand it there is also an appeal pending

in the county court against the orders made by the judge sitting as a Deputy District Judge in the county court, and so other adjustments may have to be made and therefore it is not appropriate for me to make any comment at this point about the final terms of that order.

45. I mentioned above that the respondent Mr Franco attended the appeal hearing although he had not participated in the proceedings. In the course of the hearing it became clear that Mr Franco had not understood the reasons why certain sums were being demanded. It was not possible to provide him with all the details he needed on this occasion, since his queries related in part to items demanded in previous years, but I suggested, first, that he takes advice on the terms of his lease and, second, that it would be immensely helpful if the appellant's managing agent could take some time to provide him with the explanations he needs.

Upper Tribunal Judge Elizabeth Cooke

7 November 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.