UPPER TRIBUNAL (LANDS CHAMBER)

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Written representations

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – whether the tenants had conceded the reasonableness and payability of part of the sums disallowed by the First-tier Tribunal – adequacy of evidence to support a conclusion of fact

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

BETWEEN:

TRIPLEROSE LIMITED

Appellant

-AND-

MS HOLLY BOWLES AND OTHERS

Respondents

Re: Bridge Court,
Lea Bridge Road,
London
E10 7JS

Judge Elizabeth Cooke

Decision Date: 5 August 2022

Introduction

1. The appellant, Triplerose Limited, is the freeholder of Bridge Court, Lea Bridge Road. London E10. It has permission to appeal two aspects of the decision of the First-tier Tribunal ("the FTT") about the reasonableness of service charges payable by the 16 respondent leaseholders in respect of their flats in Bridge Court. The names of the leaseholders are set out in a Schedule to this decision.

2. The appeal has been decided under the Tribunal's written representations procedure. The grounds of appeal were written by Mr Justin Bates of counsel. Mrs Holly Bowles, one of the respondents, has provided written representations on behalf of the respondents. The appellant has provided a transcript of the hearing before the FTT and both parties have provided the Tribunal with a helpful note on the transcript drawing my attention to the relevant sections.

The legal background

3. The legal background is straightforward. Section 19 of the Landlord and Tenant Act 1985 provides:

> "(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—
>
> (a) only to the extent that they are reasonably incurred, and
>
> (b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;
>
> and the amount payable shall be limited accordingly.

4. Section 27A of the same statute gives the FTT to determine whether service charges are reasonable and payable; section 27A(4) provides that no application for such a determination may be made:

> "… in respect of a matter which—
> (a) has been agreed or admitted by the tenant…"

The application to the FTT

5. Lea Bridge consists of two buildings, each containing 24 flats. As I understand it the respondents are leaseholders in both blocks. Between the two blocks there used to be a communal garden; in 2010 the freeholder converted it into a car park, which is open for public use on payment to the freeholder. Unsurprisingly this has been a bone of contention between landlord and leaseholders.

6. The respondents' leases contain provisions for the payment of service charges to the freeholder.

7. In the FTT Ms Bowles applied for a determination of the reasonableness of service charges for the years 2014 to 2019 (the charges for 2019 being estimated), and 15 further leaseholders were joined in as applicants with her. A number of items in the service charges were challenged in each of the relevant years, and the hearing extended over four days. The leaseholderss had mixed success, some of the charges being upheld, some reduced, and some found not to be payable at all.

8. The appellant has permission to appeal on two points. One relates to charges made in each of the years in dispute for cleaning and management fees, the other relates to the charges for the CCTV used by the landlord in the car park.

Ground 1, cleaning and management: the FTT allowed less than the respondents had conceded

9. The FTT considered the reasonableness of the fees charged in each of the years in question for cleaning (£12,424 in 2014, rising to £14,046 in 2018 and estimated at £13,400 for 2019). The FTT accepted the leaseholders' evidence about the quality of the cleaning services. It therefore concluded that a reasonable charge for cleaning would have been no more than 50% of the charges for each year in dispute.

10. It reached the same conclusion for management fees (£15,000 in each of the years 2014 to 2016 then rising each year to £17,800 for 2019).

11. The appellant says that 50% of these two charges was not in dispute; only one-third of these two sets of charges were disputed, as set out in the Scott Schedule filed in accordance with the FTT's directions.

12. The Scott Schedule in the FTT bundle, which sets out the amounts challenged and the landlord's and leaseholders' comments on each item, is in familiar form. The years under challenge are set out separately. For 2014 the relevant entries, together with the very first entry which is not the subject of the appeal but is included for comparison, were as follows:

Item	**Cost/£**	**Challenged amount** **(Balance admitted)/£**	**Basis**	**Tenant's comments**	**Landlord's comments**
Accountancy	1200	1200	All	Not chargeable. Unreasonable in amount and	Reasonably incurred and necessary for

				standard in any case	management of the premises
Cleaning Common Areas	12242	4144	0.333	Unreasonable in amount and standard	The sum is £12,424. Reasonably incurred and reasonable in cost.
Management Fees	15000	5000	0.333	Unreasonable in amount and standard	The sum is £12,424. Reasonably incurred and reasonable in cost.

13. The schedule for 2014 thus states that what is challenged is 0.333 of the cleaning and management fees. The landlord's figure for the total charged is £12,424 and I take that as correct rather than the leaseholders' £12,242 because £4,144 is one third of £12,424. In all the subsequent years one third of the cleaning charge is challenged.

14. In 2015 again one third of the management fee of £15,000 is challenged; in subsequent years the challenge to the management charge is said to be "1/3 + increase", and so the figure challenged is greater than one third of the charge: in 2016 the charge is £15,500 and the challenge is to £5,500, and in 2017 the charge is £16,200 and the challenge is to £6,200 and so on..

15. All the other entries in the schedule– of which the one relating to accountancy fees is given above as an example – state that the whole sum is challenged, with two exceptions; one is that half of the General Maintenance Charge was challenged, and of the general insurance charge only the increase above inflation is said to be challenged.

16. In light of the provision of section 27A(4) of the 1985 Act (see paragraph 4 above) the appellant says that the FTT had jurisdiction only as to the two-thirds of both the cleaning charge and the management charge, the rest being admitted in the Scott Schedule.

17. Ms Bowles in her written representations for the respondents says that "The schedule that contains the words "the balance is admitted" was downloaded as a template without attached advice or instructions. " She says that she understood that the FTT would consider the appropriate level of charges in the round, using its discretion, and that the idea of the schedule was to give a "ball-park figure" of what the claimants thought reasonable to challenge at the time "not a cap on the sum that might be challenged."

18. She goes on to say that in the absence of receipts and other documents the respondents had either to challenge every amount in its entirety, or to make "a rough, and necessarily blind, guess at what might be reasonable given the evidence". She expected the FTT to apply its own expertise in reaching a fair determination.

19. I have to consider what in fact was the leaseholders' case about these fees, and I consider cleaning and management separately. In the course of looking at the leaseholders' statement of case and at what was said at the hearing I have to refer to the transcript, which was not paginated continuously; numbering re-starts on each of the four days of the hearing, which took place on 14 and 15 July 2021 and 13 and 14 September 2021. I have included references to the page in the bundle for the parties' assistance.

The charges for cleaning

20. The respondents' statement of case in the FTT at paragraph 19(e) states, with regard to the cleaning charges, "… we admit the balance of 2/3 of the cost". The paragraph goes on to express some reluctance about this: "we did not see 2/3 of the benefit of a reasonable cleaning regime. The building was filthy 95% of the time, truly disgusting 50% of the time, and potentially injurious to health … 25% of the time. We admit the balance because to have no cleaning at all would have resulted in complete and utter dereliction…".

21. At the hearing Mr Bowles (Ms Bowles' husband who represented the leaseholders) said "… the total we challenge on cleaning is one-third of the cleaning costs" (page 46 of day 1, line 34 to page 47 line 1, page 118 in the bundle), and again "In our estimation, a generous conclusion that we accept that we got about two-thirds of the benefit of a reasonable cleaning regime."

22. Shortly afterwards the judge asked Mr Bowles why he was conceding any of the fees if he thought the cleaning was wholly ineffective. Mr Bowles said (page 49, from line 25) that the leaseholders were challenging the fee in respect of the cleaning of the car park and went on:

> "So it is in that sense a narrow portion of the cleaning that we're challenging. We would like to make the case … I'm not sure that we can now, but we would happily make the case that the effect of the cleaning was nil and we should be responsible for nothing, but that is a greater claim than the one we've made in our statement." And as long as it's clear that the basis of the challenge of one-third is based on the respondent's use of the communal garden as a public car park …; we put that at one-third. The remaining two-thirds, it was fairly useless but that we haven't claimed in our statement, we leave it to the Tribunal to make the judgment as to whether…"

23. At page 37 of the transcript for day 2 (page 205 of the bundle), Mrs Bowles in cross examination was asked if it was her position that she accepted two thirds of the cleaning, and she said it was.

24. At page 65 of the transcript for day 4 (page 476 of the bundle) counsel for the landlord presented her case about the cleaning fees and reminded the FTT that it had jurisdiction only

over the one-third of the charge that was challenged, and the judge (at line 1 of page 66) said "Yes."

25. In the light of the way the leaseholders' case was put in the FTT, and of what Mr and Mrs Bowles said at the hearing, I do not accept that the Scott Schedule was drawn up without regard to the meaning of the term "Balance accepted" in the column heading. The leaseholders clearly made a deliberate choice at that stage to challenge the whole of most items and only one third of the cleaning. It was the leaseholders' case that one third of the charge was challenged and two thirds was admitted. At the hearing the judge expressed some surprise about this and pushed Mr Bowles as to whether he really intended to challenge the whole, and Mr Bowles saw the attraction of what was being said but did not seek to amend the leaseholders' case. And when Miss Helmore for the landlord presented her case on the basis that only one third of the charge was challenged, the judge did not contradict her.

26. Because of the provisions of section 27A(4) of the 1985 Act this is a matter of jurisdiction. The FTT did not have a discretion to go beyond the leaseholders' choice and make a determination about the reasonableness of any more than one-third of the fee.

27. As to cleaning costs, therefore, the FTT's decision that only 50% of the charge was reasonable is set aside. Since the FTT found on the facts that half the charge was not reasonable, its assessment of the third that was in dispute is obvious, and there is no point in sending the matter back for re-determination; the Tribunal substitutes its own decision that two-thirds of the cleaning charges were payable for all the years in question. I use the figures in the Scott Schedule to calculate what is payable:

	Charge	Deduction	Payable
2014:	£12,424	£4,144	£8,280
2015:	£12,222	£4,074	£8,148
2016:	£13,302	£4,434	£8,868
2017:	£12,870	£4290	£8,580
2018:	£14,046	£4,682	£9,364
2019:	£4,458	£1,486	£2,972

The management fees

28. Turning to the management fees, at paragraph 25 of the statement of case the leaseholders explained why management was sub-standard and asked for charges to be reduced, and stated "We challenge one-third of the fees."

29. At page 67 of the transcript of day 1 of the hearing (139 in the bundle) Mr Bowles said: "We think the fees charged by the respondent are average for a block of its sort in the area. Nonetheless, the quality of the management and the results of the management were considerably lower than what could reasonably be expected, and therefore we think that the fees should be about a third of what was charged." So there was an inconsistency between what was in issue so far as the Scott Schedule was concerned (only one third was challenged) and what Mr Bowles said at the hearing (only one third was accepted).

30. The confusion was sorted out during the cross-examination of Mrs Bowles. At page 101 of the transcript for day 2 (269 of the bundle), she was asked if the position was that the leaseholders wanted the fees "reduced to a third". She then checked what counsel had said to her. At page 103 of the transcript (271 of the bundle) the cross-examination continued as follows:

> (Page 103, line 19) Miss Helmore: … your case .. is that they should be reduced to one-third, yes? So two-thirds should come off, that's your case?
>
> Mrs Bowles: In the statement of case we've written "We challenge a third of the fees".
>
> Miss Helmore: Right, well, it's your case so you tell me.
>
> Mrs Bowles: We challenge a third of the fees, so, in the Scott Schedule, it says challenged amount and it's £6,200 which isn't – which is neither a third or two thirds … But we have said in our statement of case that we challenge one-third of the fees and in the challenged amount column we've put £6,200 which isn't two-thirds of the fees.
>
> Judge (line 32) Well, it's closer to one-third than two-thirds.

31. A few moments later Miss Helmore continued (page 104):

> Miss Helmore: "Let's be absolutely clear because this is important, your case is that they should be two-thirds of the figures charged.
>
> Mrs Bowles: Yes
>
> Miss Helmore: Is that right?
>
> Mrs Bowles: yes, that's absolutely right, thank you.
>
> Miss Helmore: So, at some point you're going to need to update the figures in the disputed schedule, they are not correct?
>
> Mrs Bowles: No, of course, of course

> Judge: We do not need anyone to carry out that mathematical exercise, we can divide by three ourselves, thank you."

32. So Mrs Bowles at the hearing very conscientiously made it clear that she stood by the challenge as set out in the Statement of Case.

33. Her figures were not wrong; she had forgotten, during a long cross-examination, that the leaseholders were challenging one-third of the original fee of £15,000 plus the increase for each year, which is why the £6,200 for 2017 (apparently taken at random by counsel) is more than one third of the charge of £16,200; see paragraph 14 above.

34. In its decision the FTT set out its views about the evidence as to the standard of management, its preference for the leaseholders' evidence, and its conclusion that management had been unsatisfactory during the years in dispute. It determined that the management fees should be reduced by 50%. Again, and without explanation, the FTT reduced the charge beyond the amount that the leaseholders were challenging and, for the reasons explained in the context of the cleaning fees, above, it did not have jurisdiction to do so. Its decision is set aside. In light of the FTT's conclusion on the facts, again the Tribunal substitutes its own decision that the reduction in the fees charged for management for each of the years in dispute should be the amount challenged by the leaseholders. Again I can calculate the figures from the Scott Schedule:

	Charge	Deduction	Payable
2014:	£15,000	£5,000	£10,000
2015:	£15,000	£5,000	£10,000
2016:	£15,500	£5,500	£10,000
2017:	£16,200	£6,200	£10,000
2018:	£17,280	£7,280	£10,000
2019:	£17,856	£7,856	£10,000.

Ground 2: the FTT's finding about the CCTV was not explained

35. As I have already noted, the car park at Bridge Court has been a source of a lot of trouble because it is open to the public. One of the steps taken by the freeholder to try to control the area was to install CCTV in the car park, and the cost of this was part of the service charge. The sum demanded for 2014 was £835, rising to £1,262 in 2018. The leaseholders challenged these sums, in whole, because they said the CCTV was rarely used and was not fulfilling its function.

36. The FTT allowed only 50% of the charges for CCTV. It said at its paragraph 49: "… it would have been easy for the Respondent to produce evidence of when and how often the CCTV was used. The absence of such evidence compels the conclusion that it was not working or being used for at least substantial periods of time." The appellant says that there was evidence, and the FTT has not explained why it rejected it.

37. Mr Yaron Hazan, an employee of the appellant's managing agent Y&Y Management Limited, gave evidence on this point in his witness statement and in cross-examination. In its grounds of appeal the appellant drew attention to a passage from his cross-examination in which he explained how he used the CCTV. He would look at it every time he logged on to his computer, and had been able to observe residents dumping mattresses or people from the shops; and there was an instance where one of the residents broke into the cupboard where the CCTV was kept and disconnected it in order to use the internet connection for his own flat.

38. It is clear to me from the transcript, and from other references in the FTT's decision, that what referred to in its paragraph 49 was that there was a lack of specific evidence that demonstrated the frequency of use of the CCTV. Mr Hazan referred to occasions when residents had been caught fly-tipping, but could not point to any correspondence in which such incidents were followed up. During cross-examination Mr Hazan was asked about his use of CCTV footage in correspondence with the police about security incidents; he claimed to have made repeated use of the CCTV in this way, but the email correspondence he was able to produce referred only to four or five occasions over six or seven years – none of which, said the FTT at its paragraph 28, involved any useful CCTV. He was asked about the occasion when a resident disconnected the CCTV, but could point to no correspondence with that resident, no enforcement action, and no charge being made for the internet use that resident had had. The FTT commented at paragraph 30 of its decision that this was a serious incident "yet there was not a shred of evidence that [Mr Hazan] took any action whatsoever".

39. The FTT allowed 50% of the charge for CCTV. The explanation for that is clear from paragraphs 28 to 30 of the decision taken together with paragraph 49. It was not a case of the FTT ignoring, or rejecting without explanation, the evidence that Mr Hazan gave. What it was saying was that in the absence of specific evidence that the CCTV was working frequently and good use was made of it, 50% was disallowed. I regard that as an adequate explanation and the appeal fails on this point.

Summary

40. The FTT's decision as to the reasonableness of the cleaning and management fees for the years in dispute is set aside. The amount payable by the leaseholders for cleaning in the years in dispute is as set out in paragraph 27 above, and for management it is as set out in paragraph 34. The appeal fails so far as the charges for the CCTV are concerned.

Judge Elizabeth Cooke

5 August 2022

Schedule: the respondents

K Downing (Flat 5)
M Webb (Flat 8)
B Budding (Flat 14)
N Watson (Flat 16)
C Lobo (Flat 17)
G Phillips (Flat 19)
T Newick (Flat 22)
A Martin (Flat 23)
J Love (Flat 24)
L Taylor (Flat 29)
B Edwards (Flat 30)
H Bowles (Flat 32)
Y Jin (Flat 33)
M Hynes (Flat 34)
B Dalbaen (Flat 42)
M Giudice (Flat 43)

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.