IN THE UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT - SERVICE CHARGES – QUALIFYING LONG TERM AGREEMENT – DATE ON WHICH A CONTRACT COMES INTO EFFECT

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

BETWEEN:

MR ASHOK GHOSH

Appellant

- and -

(1) HANOVER GATE MANSIONS LIMITED
(2) HANOVER GATE MANSIONS (PARK ROAD) LIMITED **Respondents**

Re: 60A Hanover Gate Mansions,
Park Road,
London,
NW1 4SN

Elizabeth Cooke, Upper Tribunal Judge

Royal Court of Justice, Strand, London WC2A 2LL
on
20 September 2019

Introduction

1. This appeal, from a decision of the First-tier Tribunal about the payment of a service charge under the lease of a flat, turns upon the effect of a decision of the House of Lords about a contract for the supply of coal in the hey-day of the steam engine in the nineteenth century.

2. The appellant is the tenant of a one-bedroomed flat, which he holds under a long lease. He is one of 180 lessees at Hanover Gate Mansions, which consists of six purpose-built blocks of Victorian and Edwardian mansion flats opposite Regent's Park. The first respondent is the freeholder, and the second respondent is the management company owned by the landlord. From June 2017 management services have been provided in the blocks by Faraday Property Management Ltd ("Faraday"), and it is the service charge relating to Faraday's charges that the appellant disputes.

3. The lease makes the usual provision for an estimated service charge to be paid in advance, with over- or under-payment dealt with by later adjustment. The appellant has been charged £218.73 in 2017/18 in respect of the cost of employing Faraday's. He says that the contract between Faraday and the second respondent was a qualifying long-term agreement pursuant to sections 20 and 20ZA of the Landlord and Tenant Act 1985, and that because no consultation was carried out he is liable to pay only £100.

4. The First-tier Tribunal found against the appellant on the basis that the contract with Faraday was of less than one year's duration and therefore was not such an agreement.

5. I heard the appeal on 20 September 2019 at the Royal Courts of Justice. Mr Ghosh represented himself; he is a solicitor, and I am grateful to him for his clear and accurate account of the law and his helpful argument. The respondents chose not to participate in the appeal.

The factual background

6. I need to say a little more about the factual background. In doing so I make use of the findings of the FTT, and also of the pleadings and the skeleton argument of the respondents in the FTT, and the correspondence produced to the FTT, which the appellant was able to show me.

7. It appears that in April and May 2017 there was correspondence by email between Robert Apperley of Faraday and Michael Sultan, the director of both respondents. It is clear from that correspondence that the respondents had agreed to appoint Faraday to manage Hanover Gate Mansions. Faraday provided its standard terms; the respondents' solicitor suggested an amendment to the arrangements for insurance; the last email item was dated 18 May 2017, from Faraday to Mr Sultan, in which he attached a revised agreement incorporating the

suggested changes; he says "If you would confirm the start date I will have fair copies printed."

8. There was produced to the FTT an unsigned agreement between the second respondent and Faraday, which the appellant tells me was provided to him by the respondents' solicitors. Its first provision reads "This Agreement is made the twelfth day of June 2017."

9. Clause D says:

> "The Agent shall perform the services from 12th June 2017 to 11th June 2018. After this period, the Agreement shall continue on the terms set out, subject to termination under Clause 7."

10. Clause 7 says:

> "Either party may terminate this Agreement following expiry of 9 calendar months of the stated Management Period, by serving on the other not less than three months' notice in writing."

11. It appears from the FTT's decision that it was conceded by the respondents that if that contract had come into effect on 12 June it would have been a qualifying long term agreement (paragraph 30 of the FTT's decision). That must be correct; the contract was intended to last for at least 12 months, and could not be terminated before 12th June 2018. It was therefore for a term of more than twelve months and was therefore a qualifying long term agreement.

12. Moreover, the respondents' statement of case in the FTT confirmed that Faraday "commenced the provision of management services in relation to the Property and demanded service charges as the agent of R2 from on or about 12 June 2017".

13. It was the respondents' pleaded case that this was a trial period, and that at some point a form of contract on a periodic basis would have come into being on that trial basis. What the terms of that trial contract were was not explained. The FTT made no finding about the suggestion that there was a trial period; the only evidence to that effect was assertion by Mr Patel, the respondents' witness, who the FTT found was not involved in the appointment of Faraday. The FTT concluded at its paragraph 35:

> "The Tribunal accepts that no formal written contract with Faradays for property management services was entered into on or before 12 June 2017. Instead the Tribunal determines that an oral contract evidenced by the actions of supply and a subsequent payment was entered into on some date after 12 June 2017. That

contract if it incorporated the terms of the draft would have contained its provision for either party to serve 43 months prior notice of termination on any date after 9 months after 12 June 2017. Even if the start date had been 13 June and to the Tribunal 24 June appeared much more likely, then it would not have been a QLTA. It follows that no consultation was required and no service charge cap on this item for 2017/18 estimated service charge applies."

14. The date of 24 June 2017 derives from the submissions of counsel for the respondents as to when payment would have been made (paragraph 33 of the FTT's decision). He argued that an oral contract based on the draft could have taken effect only when payment was made, on the authority of *Brogden v Metropolitan Railway Company* (1876-77) LR 2 App Cas 666.

15. It was the appellant's case on appeal that as a result of concessions before the FTT and of the decision of the FTT it is no longer in dispute that

    a. there was a contract between the second respondent and Faraday,

    b. that that contract was in the terms of the unsigned contract, and

    c. that services were provided from 12 June onwards,

    and that the appeal turns only on the date on which the contract with Faraday's came into effect.

16. I have given considerable thought to whether the appellant is right to say that this is the only issue now in dispute; the failure of the respondent to participate in the appeal has of course not assisted me. It is clear that points (a) and (c) were conceded by the respondents before the FTT. It is not entirely clear that the FTT made a finding of fact in the terms of point (b), namely that the contract was in substantially the terms of the draft contract rather than just an informal trial arrangement. Paragraph 35 of the FTT's decision is vague about this because it is focused on the start date. But it is clear that there was no finding of fact that the parties contracted on a trial basis, and the only alternative was that there was a contract in substantially the same terms as the draft.

17. It is difficult to see how any other finding could have been open to the FTT. There is no correspondence before the FTT evidencing a trial basis, and Mr Patel confirmed that there was no correspondence that the FTT had not seen (paragraph 27 of the FTT's decision). On the contrary, the correspondence indicates that the contract was satisfactory to all and lacked only a start date; at some point that start date was filled in, so that the draft took the form in which it was supplied to the appellant and placed before the FTT'; that start date was 12 June 2017; that was the date on which the work commenced. It is unlikely that Faraday would have worked on any other than its standard terms, subject to any negotiated changes.

The draft was satisfactory to all and appears to have been accepted by performance. I take paragraph 35 of the FTT's decision to be an acceptance that the contract that took effect by performance was in the terms of the draft, but that it started too late to be a qualifying long term agreement. I therefore proceed on the basis argued by the appellant, that the only point now in issue is the start date of the contract.

18. It appears that the FTT misconstrued the effect of the decision in *Brogden.*

The law

19. Towards the end of 1871 the Metropolitan Railway Company negotiated a contract with Brogden & Co, the owners of a colliery in Wales, in order to regularise their informal arrangements with the colliery for the supply of coal.

20. A draft agreement was drawn up in December 1871, but was put in the drawer where the railway company kept its contracts and was not signed. The effect of the contract was that the colliery owners were to supply between 200 and 350 tons of coal each week from 1 January 1872, the railway company being able to specify how much it wanted. Coal was supplied in accordance with the terms of the contract from the beginning of January. No-one had cause to refer to the contract until the supply arrangements broke down and the colliery owners claimed that there was no contract.

21. The House of Lords found that there was indeed a contract. Lord Cairns LC said at p. 680 that the terms of the contract were accepted "when the [railway] company commenced a course of dealing which is referable in my mind only to the contract, and when that course of dealing was accepted and acted upon by Messrs Brogden & Co in the supply of coals."

22. Lord Blackburn said at p.693: "If the parties have by their conduct said, that they act upon the draft which has been approved of by Mr Brogden, and which if not quite approved of by the railway company, has been exceedingly near it, if they indicate by their conduct that they accept it, the contract is binding."

23. The precise point at which the contract came into effect was not in issue, but the case is regarded as authority for the proposition that the contract came into effect when coal was supplied in accordance with the terms of the agreement. That the supply was in accordance with the terms of the new arrangement was clear from the correspondence in January when the railway company specified the amount of coal it wanted in the way that the contract provided.

24. The decision of the House of Lords in *Brogden* is not authority for the proposition that a contract takes effect in these circumstances only when goods or services are paid for. Lord Hatherly did say, at page 686, "the agreement was complete when the first coals, the 300

tons of coal supplied in January, were invoiced at the differing price, and when that differing price was accepted and paid." I do not understand that to mean that there was no contract when the goods were supplied and that there would, following supply, have been no obligation to pay for them; I take it as a description of the performance of the contract, which was complete once payment was made. Lord Hatherly's opinion is not regarded as a dissent. *Chitty on Contracts* paragraph 2-030 puts it like this:

> " …in *Brogden v Metropolitan Ry* a railway company submitted to a merchant a draft agreement for the supply of coal. The merchant returned it marked "approved" but also made a number of alterations to it, to which the railway company did not expressly assent; but the company accepted deliveries of coal under the draft agreement for two years. It was held that once the company began to accept these deliveries there was a contract on the terms of the draft agreement.

Conclusion

25. It appears that the First-tier Tribunal misconstrued the House of Lords' decision in *Brogden*. The members took it to be authority for the proposition that a contract taking effect by performance in the terms of a draft takes effect only when goods and services are paid for. That is not the case. If there was a contract between Faraday and the second respondent in the terms of the draft, and if that contract took effect by performance, in June 2017, then it took effect when performance commenced on 12 June.

26. Accordingly the appeal is allowed and I reverse the FTT's decision; the agreement with Faraday was a qualifying long term agreement; consultation should have taken place; it is agreed that it did not, and therefore the appellant's liability for that element of the 2017/18 service charge is limited to £100.

Elizabeth Cooke
Upper Tribunal Judge

23 September 2019