UPPER TRIBUNAL (LANDS CHAMBER)



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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007
AN APPEAL FROM A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

LANDLORD AND TENANT – SERVICE CHARGES – consultation requirements – irrelevance of absence of prejudice to the tenants where there is no application for a dispensation – charges for the running of the landlord as a limited company not within the tenant's covenants in the lease

BETWEEN:

(1) ANDREW COLLINGWOOD
(2) SIMON NAISH
(3) NEIL BAKER

Appellants

-and-

CARILLON HOUSE EASTBOURNE LIMITED

Respondent

Re: Carillon House,
18 Eversfield Road,
Eastbourne,
East Sussex,
BN21 2AS

Upper Tribunal Judge Elizabeth Cooke
28 September 2021
Royal Courts of Justice

Mr Stan Gallagher for the appellants
Mr James Groves MRICS for the respondent

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The following cases are referred to in this decision:

Daejan Investments Limited v Benson [2013] UKSC 14
Wilson v Lesley Place (RTM) Company Limited [2010] UKUT 342 (LC)

Introduction

1. This is an appeal from a decision of the First-tier Tribunal ("the FTT") about the reasonableness and payability of service charges demanded of the appellant tenants by their landlord, Carillon House Eastbourne Limited. Two items are in issue, both of which the FTT determined were payable:

    a. The cost of external works to the building, to which the consultation requirements imposed by section 20 of the Landlord and Tenant Act 1985 applied; the appellants say that the requirements were not complied with and that therefore they are liable to pay only £250 each.

    b. The cost of running the landlord as a limited company, which the appellants say is not recoverable from them as a service charge under the terms of the lease.

2. I heard the appeal at the Royal Courts of Justice on 28 September 2021; the appellants were represented by Mr Stan Gallagher of counsel, and the respondent by Mr James Groves MRICS. I am grateful to them both.

The legal background

3. The effect of sections 19 to 20ZA of the Landlord and Tenant Act 1985 was summarised by Lord Neuberger at paragraph 42 of the Supreme Court's decision in *Daejan Investments Limited v Benson* [2013] UKSC 14:

> "sections 19 to 20ZA are directed towards ensuring that tenants of flats are not required (i) to pay for unnecessary services or services which are provided to a defective standard, and (ii) to pay more than they should for services which are necessary and are provided to an acceptable standard."

4. Section 19 states that service charges are not payable unless reasonably incurred, and incurred in the provision of works or services of a reasonable standard. Section 20 imposes a limit on the charges that can be demanded of tenants in respect of "qualifying works" unless the landlord undertakes a consultation process. "Qualifying works" are defined by the Service Charges (Consultation Requirements) (England) Regulations 2003 (SI 2003/1987) ("the Consultation Regulations") as work that results in the charge to a tenant being more than £250 (regulation 7), and section 20 provides that that is the maximum that can be demanded of the tenant unless the consultation requirements are complied with.

5. The schedules to the Consultation Regulations set out the relevant consultation requirements in different circumstances, and the provisions relevant to this appeal are those of Part 2 of Schedule 4, authoritatively summarised by the Supreme Court in *Daejan* at paragraph 12. I quote that summary, and have added in square brackets the corresponding paragraphs in Schedule 4 Part 2:

> "*Stage 1: Notice of intention to do the works*

Notice must be given to each tenant and any tenants' association, describing the works, or saying where and when a description may be inspected, stating the reasons for the works, specifying where and when observations and nominations for possible contractors should be sent, allowing at least 30 days [paragraph 1]. The landlord must have regard to those observations [paragraph 3].

Stage 2: Estimates

The landlord must seek estimates for the works, including from any nominee identified by any tenants or the association [paragraph 4].

Stage 3: Notices about Estimates

The landlord must issue a statement to tenants and the association, with two or more estimates, a summary of the observations, and its responses [paragraph 4(5)(b)]. Any nominee's estimate must be included [paragraph 4(8)]. The statement must say where and when estimates may be inspected, and where and by when observations can be sent, allowing at least 30 days [paragraph 4(10)]. The landlord must have regard to such observations [paragraph 5].

Stage 4: Notification of reasons

Unless the chosen contractor is a nominee or submitted the lowest estimate, the landlord must, within 21 days of contracting, give a statement to each tenant and the association of its reasons, or specifying where and when such a statement may be inspected.[paragraph 6]"

6. Where a landlord has failed to comply with the consultation process it can apply to the FTT under section 20ZA of the Landlord and Tenant Act 1985 for a dispensation from those requirements so that it can recover the cost of the work from the tenants rather than just £250 from each, and *Daejan* sets out the considerations that are relevant to such an application. Central to those considerations is the question whether the tenant has suffered any prejudice as a result of the failure to consult. It is common ground that no application for dispensation has been made by the respondent to this appeal; its position is that it has complied with the consultation requirements and that the FTT so found, and that therefore no dispensation was required.

The factual background

7. Carillon House, 18 Eversfield Road, Eastbourne is a large house converted into seven flats, each let on a 125-year lease for a term from 28 November 1989; the leases are in similar or identical terms. The leases contain service charge provisions, to which I refer again in due course. The appellants are the leaseholders, respectively, of flats 1, 4 and 5. The respondent Carillon Estates (Eastbourne) Limited ("the landlord") is the freehold owner of the building and is the appellants' immediate landlord. The lessees of the four other flats in the building are shareholders in the landlord but the appellants are not.

8. On 13 November 2017 the respondent landlord's managing agents, Park Lane, sent to all seven leaseholders a notice setting out its intention to carry out external redecoration and repairs, inviting observations on the proposals and nominations of contractors from whom an estimate should be obtained. It is agreed that that notice complied with the requirements of paragraph 1 of part of Schedule 4 to the Consultation Regulations, described above as Stage 1 in the process.

9. On 21 November 2017 Mr Simon Naish replied nominating Affordable Roofing Eastbourne Limited ("AREL"). It is not in dispute that Mr Naish was the sole director of AREL.

10. On 19 June 2018 the landlord's managing agents, now Hunters, sent to the leaseholders a Notice of Estimates, in intended compliance with stage 3 of the process. It listed two estimates, one from CRB Contractors Limited (£31,015.00) and one from Ellis Builders (£48,277.92).

11. On 20 June 2018 Mr Naish wrote to Mr Newman at Hunters asking why AREL was not given the opportunity to quote. Mr Newman replied on the same day and explained that Hunters had taken over Park Lane in January 2018 and that the nomination of AREL had not been forwarded to Hunter's surveyor who was therefore not aware that he needed to approach AREL for a quote. Mr Naish replied, again the same day, asking Mr Newman how he proposed to proceed with the nomination.

12. As Mr Naish commented in his statement of case to the FTT, the landlord could at that point have started the consultation process again. Had it done so, and got it right, the present appeal could have been avoided.

13. Instead, Hunters invited AREL to quote for the work, which it did on 20 July 2018; it set out the work to be done and quoted £18,900, without any breakdown of the charge. Hunters responded asking AREL to complete a "Form of Tender" and a costed schedule of works.

14. On 14 August 2018 Hunters wrote to the leaseholders explaining that their surveyor had recommended CRB Contractors Limited, and that the lower quote from AREL was not recommended because AREL had not supplied the "price specification and other paperwork". In an email to the appellants on 18 September 2018 Mr Newman explained that the directors of the respondent had advised that CRB Contractors Limited was to do the work because the lower price from AREL was obtained "outside of the consultation process". There was then some further correspondence with all the leaseholders which resulted in another quote being obtained and the contract finally being awarded MR Roberts at a cost of £36,517.61. At the same time Mr Naish instructed another surveyor to assess the extent of the work done.

15. The work was done by MR Roberts, and the leaseholders were each required to pay £5,342.53 being 14.63% of the £36,517.61. In May 2020 the appellants made an application to the FTT for a determination of the reasonableness and payability of service charges in the years 2018 and 2019. In dispute were, first, the sum demanded of the tenants for the external work, and, second, sums included in the 2018 and 2019 service charge in relation to the costs incurred by the landlord's managing agent in managing the landlord itself as a limited company (being £180 for 2018 and £340 in 2019).

16. The application to the FTT set out a list of breaches of the consultation procedure required by section 20 of the Landlord and Tenant Act 1985 in respect of the external work. The significant points in their case were (and are on appeal) that the landlord failed to obtain a quotation from Mr Naish's nominee at Stage 2 of the process, and therefore failed to give a correct notice of estimates at Stage 3 in accordance with paragraph 4 of Schedule 4 part 2.

17. Further issues, irrelevant to the appeal, were raised about the scope of the work and about the nature of the work permitted under the lease.

18. The FTT made its decision on 30 November 2020. It set out the facts and said at paragraph 13:

> "Whilst there may have been some issues regarding the consultation process and the timescales over which it was conducted, the Tribunal notes nevertheless, that the landlord had endeavoured to carry out some consultation and evidently when some resistance was expressed by the lessees regarding the amount of the estimates, the landlord did obtain further quotes. Similarly, the landlord did at least consider the lower quote provided by Affordable Roofing, although rejected it on the basis that it had not in its view, made allowances for all of the items listed in the specification.
>
> …16. On the basis that the work carried out is accepted as not being wholly excessive, and in the absence of any specific challenge by the Applicants to the actual costs, The Tribunal finds no evidence that the interests of the Applicants may have been materially prejudiced by any shortcomings which may have occurred through the Section 20 consultation process. In regard to the challenge raised concerning the managing agent's fees, it does not follow as the Applicants suggest, that these should not be recoverable, and it is standard practice for surveyors to charge their fees based on a percentage of the final contract price.
>
> …18 Accordingly, the decision of the Tribunal is that the costs of £36,517.61 for major works in the year 2018/19, were reasonably incurred and are payable by the lessees."

19. The Tribunal granted permission to appeal on the following issues:

    a. Whether the FTT's decision dealt adequately with the question of compliance with the statutory consultation requirements and whether, in view of any failure of compliance found to have occurred the leaseholders' liability should have been restricted to £250.

    b. Whether, in the absence of an application under section 20ZA, Landlord and Tenant Act 1985 for dispensation from the consultation requirements the FTT was entitled when determining what was payable by way of service charges, to have regard to whether prejudice had been caused to the leaseholders by any failures of consideration.

c. Whether any fees charged by the managing agents in connection with the running of the respondent company were properly included in the service charge.

The external works

20. I deal with the first and second grounds of appeal which both relate to the external works.

The arguments for the appellant

21. Mr Gallagher for the appellants went through the process set out in part 2 of Schedule 4 to the Consultation Regulations. He submitted that it is a sequential process. Paragraph 3 does not say in so many words that the time when the landlord must try to get an estimate from any contractor nominated by the tenant is before giving its notice of estimates; but that was obviously the intention because otherwise it would not be possible for the landlord to include in the notice of estimates (required by paragraph 4) any quotation provided by a tenant's nominee. It would make no sense for the landlord to be able to avoid the requirements of paragraph 4 by not asking a nominee for an estimate.

22. Accordingly, although the landlord did in June 2018 request an estimate from AREL, that did not mend the process because it was by then too late. The only identifiable notice of estimates that purported to comply with paragraph 4 was the notice sent on 19 June 2019, and the landlord failed to comply with the requirements because it sent that notice without asking AREL for a quotation and therefore could not include AREL's quotation in the notice.

23. The quote that AREL did supply after that was rejected by the landlord, and was not passed on to the tenants, because it did not comply with the landlord's requirements. The Consultation Regulations say nothing about the form that an estimate must take and it does not give the landlord the option to refuse to pass on an estimate to the tenants, in its notice of estimates, because it does not provide an acceptable breakdown or for any other reason. But in any event the consultation process was already flawed before the estimate was sought, and the only correct response by the landlord to Mr Naish's email of 20 June 2018, alerting it to the failure to contact AREL, would have been to start again.

24. Nothing in the further correspondence leading to the appointment of MR Roberts mended the process, Mr Gallagher argued, and none of the further letters in 2019 were notices in pursuance of the requirements of the Consultation Regulations.

25. Mr Gallagher turned to the FTT's decision, and observed that it was difficult to understand what was meant by the observation that there had "been some issues regarding the consultation process and the timescales over which it was conducted". Was that a finding that there had been breaches, or that there had not? The FTT's observation that there was "no evidence that the interests of the Applicants may have been materially prejudiced by any shortcomings which may have occurred through the Section 20 consultation process" might mean that because of the absence of prejudice there had been no failure in the consultation process, or it might be a finding that there had been a failure to comply with the process but that the FTT granted a dispensation. Prejudice to the tenants is relevant to the question whether a dispensation could be granted, but there had been no application

for a dispensation and therefore the FTT had no jurisdiction to grant one; alternatively if it had jurisdiction, it was unfair to grant a dispensation without giving the tenants the opportunity to respond on the issue of prejudice. If the FTT was not purporting to grant a dispensation, then prejudice was not relevant at all.

26. In short, Mr Gallagher argued that either the FTT found that there had been a failure to comply with the consultation requirements but granted a dispensation when it had no jurisdiction to do so (and could not fairly have done so), or it failed to deal with the question of compliance with the consultation requirements.

The arguments for the respondent

27. Mr Groves is a chartered surveyor and did not claim any legal expertise. He presented the landlord's argument very clearly. Managing agents, he said, have to process the law. Whatever the legal arguments about the wording and the detail, it is left to managing agents to apply it. Section 20 requires a consultation process but, he argued, it is not prescriptive about the way that consultation is carried out. The statute just requires a consultation, and the landlord complied with that requirement. The process set out by the Consultation Regulations is woolly; it requires the tenants to be given a rough idea about the works, and it requires 30 days' consultation. It does not say that if the landlord has missed a nomination it has to go back and start again.

28. In this case, Mr Groves continued, a nomination was missed. AREL was eventually asked to tender, but it did not comply with the landlord's process and did not provide the detail that the other contactors had supplied. The landlord reported back to the tenants about this. The appellants, out of sour grapes as Mr Groves put it, then tried to derail the process. But the law simply says the landlord must consult, and the landlord did, and indeed went beyond the legal requirements by getting a further quote from MR Roberts.

29. Mr Groves also pointed out that AREL had no assets and did not appear to have been trading, and has now been dissolved.

30. Mr Groves accepted that no application had been made for a dispensation under section 20ZA, and regarded the discussion that section as a red herring; no dispensation was needed because the landlord had complied with the consultation requirements, and that was what the FTT found.

Decision

31. The requirements of the Consultation Regulations are both strict and sequential. There is no room in the clear wording of the provisions for flexibility in their interpretation, and no legal precedent for a flexible interpretation. They are anything but woolly.

32. Whilst paragraph 3 of Schedule 4, Part 2 of the Consultation Regulations does not specify a time when the landlord must try to obtain an estimate from the tenant's nominee, it is clear that the nominee's estimate if provided must be included in the notice of estimates. That means that a notice of estimates cannot be given until the landlord has tried to obtain

a quote, and the notice of estimates in this case did not comply with paragraph 4 because the landlord had not complied with paragraph 3. Moreover, the landlord did obtain an estimate from AREL; it was therefore obliged (whatever its own view about the shortcomings of that estimate) to include the quote in a notice of estimates. It was not of course obliged to accept that quote, and its reasons for refusing to do so might well have included AREL's assets and its trading record, and the lack of detail in its estimate; but none of those factors entitled the landlord to disregard the consultation process. Whichever way round one looks at the process followed in this case, on the undisputed facts it did not comply with the consultation requirements.

33. That is easy to see, but it is more difficult to discern what the FTT made of it. I agree with Mr Gallagher that in the absence of an application for dispensation the FTT could not give one, and I agree with Mr Groves that the FTT did not in fact purport to give one. My reading of the FTT's decision is that it found there was no breach of the consultation requirements, which it could not rationally have done on the evidence before it, and that it did so because it felt the failings were minor (describing them as "shortcomings") and did not prejudice the tenants – which was irrelevant. The FTT appears to have taken the view that the landlord did its best and that its efforts were good enough; but that finding was not open to it in the context of clear rules which leave no scope for any doctrine of substantial compliance.

34. The appeal therefore succeeds on the first two grounds and the FTT's decision about the sum of £36, 517.61 is set aside because it was not open to the FTT on the evidence before it to find that there was no breach of the consultation requirements, and because in making its decision the FTT took into account an irrelevant consideration namely the absence of prejudice to the tenant.

35. Mr Gallagher and Mr Groves agreed at the hearing that in the event of a successful appeal the Tribunal should substitute its own decision. It follows from what I have already said that the Tribunal's decision is that the consultation requirements were not complied with and that as things stand, in the absence of an application for dispensation, the tenants are liable to pay £250 each in respect of the external works instead of the £5,342.53 that they were each charged.

The managing agent's fees in respect of the management of the landlord

36. It will be apparent from my quotation of the FTT's decision that the FTT did not determine the reasonableness and payability of the sums of £180 and £340 charged by the managing agents for running the landlord as a limited company. It appears to have misunderstood the point; the closing words of its paragraph 18 refer to the managing agent's fees in respect of the works to the building, which had been the subject of argument before it (because the appellants felt that the managing agents had a motivation for accepting a higher quotation, so as to be able to charge a higher fee themselves by reference to the contract price).

37. But this issue was not about the external works at all. The managing agents' statement of account to the tenants for the years 2018 to 2019 included sums in each year for "Company

management charges", and it is common ground this was Hunters' charge for running the landlord company, filing its accounts and annual return and so on.

38. Because it is clear that the FTT made no decision about this issue, the appeal succeeds on ground 3 and the Tribunal will, again, substitute its own decision.

39. Clauses 6 and 7 of Schedule 4 to the appellants' leases contain tenants' covenants to pay the following:

> "6. All other proper expenses (if any) incurred by the Lessor in and about the maintenance and proper and convenient management and running of the property.
>
> 7. The fees and disbursements paid to any Managing Agents Accountants and Auditors appointed by the Lessor in respect of the property…"

40. The appellants' argument is that the charge for running the landlord company does not fall within either of these clauses. They take the view that as they are not members of the company they should not have to pay for its management. Mr Gallagher referred to *Wilson v Lesley Place (RTM) Company Limited* [2010] UKUT 342 (LC), in which the Tribunal (the President, George Bartlett QC) observed that similar covenants did not make the leaseholders liable to pay for the costs of running the RTM company.

41. The respondents' case is that Clause 7 of the Fourth Schedule to the lease allowed this charge, because the charges listed there include the expenses of accountants and auditors and so encompass the company's annual returns and accounts. Mr Groves argues that because the landlord's only asset is this property, the charge is covered by the clause, although he conceded that it would not be covered if the landlord owned multiple properties.

42. Clause 7 is a covenant to pay fees and disbursements incurred in the management of the property, and not in the management of the landlord company. I do not see that it is possible to construe the clause as Mr Groves argues and accordingly I find that the appellants are not liable to pay the managing agents' fees for running the landlord company. The fees of £180 and £340 for 2018 and 2019 are not payable by them.

Conclusion

43. The appeal succeeds. The appellants are each required to pay £250 in respect of the works that were the subject of the £36,517.61. The sums of £180 in 2018 and of £340 in 2019 are not payable by the appellants under the terms of the lease.

Upper Tribunal Judge Elizabeth Cooke

4 October 2021