UPPER TRIBUNAL (LANDS CHAMBER)

[2023] UKUT 88 (LC) **UTLC Case Numbers: LC-2022-594**

Royal Courts of Justice

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

LANDLORD AND TENANT – BREACH OF COVENANT – orders under section 20C of the Landlord and Tenant Act 1985 and under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002

BETWEEN:

AVON GROUNDS RENTS LIMITED

Appellant

-and-

KIRSTIE WARD

Respondent

Re: 36 Amethyst House,
602 South Fifth Street,
MK9 2DG

A determination on written representations
Decision Date: 4 April 2023

Mr Justin Bates for the appellant, instructed by Scott Cohen Solicitors Limited
Mr Daniel Soar for the respondent, instructed by Clyde and Co LLP

The following case is referred to in this decision:

Bedford v Paragon Asra Housing Association Limited [2021] UKUT 266 (LC

Introduction

1. This is an appeal by Avon Ground Rents Limited, the freeholder of Amethyst House in Milton Keynes, where the respondent Ms Kirsty Ann Ward holds a long lease of a flat. The appeal is against the decision of the First-tier Tribunal ("the FTT") to makes orders that prevent the appellant from recovering, by way of service or administration charges, its costs of proceedings pursuant to section 168 of the Commonhold and Leasehold Reform Act 2002 in which it sought, and obtained, a determination that the respondent was in breach of covenants in her lease.

2. The appeal has been determined under the Tribunal's written representations procedure. Mr Justin Bates drafted the grounds of appeal and Mr Daniel Soar the respondent's grounds of opposition and I am grateful to them both.

The legal and factual background, and the FTT's decision

3. In October 2021 the respondent consulted Glenco Plumbing and Heating Limited about low water pressure in her shower, and in November 2021 one of their plumbers attended to replace some pipe work and the shower head. In the course of his work a pipe fractured, and water flooded the building and caused £30,000-worth of damage.

4. The respondent's lease requires her to keep her property in repair, and to give prior notice of any works to the landlord.

5. In December 2020 the appellant wrote to the respondent and said that it intended to commence forfeiture proceedings. A landlord cannot forfeit a lease for breach of covenant unless it first serves notice under section 146 of the Law of Property Act 1925, and section 168 of the Commonhold and Leasehold Reform Act 2002 provides that such a notice cannot be served unless either the breach of covenant is admitted or a court or tribunal has determined that the breach of covenant has occurred. An application can be made to the FTT under section 168(4) for such a determination, as the first step towards forfeiture and therefore also towards claiming in the county court any of the other remedies (in particular damages and/or an injunction) that are available as an alternative in proceedings in which forfeiture is the primary remedy (see *Bedford v Paragon Asra Housing Association Limited* [2021] UKUT 266 (LC)).

6. On 22 February 2022 the appellant demanded from the respondent service charges for the following quarter. From that point onwards the appellant could not forfeit for breaches, in November 2021, of the covenants to repair and to give notice of works, because the appellant’s acceptance of the continuation of the lease amounted to a waiver of the right to forfeit. There is no dispute now that that is the case, although there is no evidence that the appellant’s officers were aware in February and March 2022 that the right to forfeit had been waived.

7. In March 2022 the appellant applied to the FTT for a determination under section 168 of the 2002 Act that the respondent was in breach of covenants in her lease. The FTT found in the appellant's favour so far as the two covenants referred to above are concerned. It found that the pipes were within the respondent's demise, so that she was in breach of her covenant to keep her flat in repair. The FTT said at its paragraph 24 that it made that finding with reluctance because the respondent, having appointed a seemingly competent firm to do the work, was not at fault, but it accepted that the clear words of the lease put the lessee in breach of covenant when the pipe was fractured by the plumber. The FTT also found that the respondent was in breach of the covenant to give notice to the landlord when she was going to have works done, because she was unaware of her obligation to do so. The FTT found that the respondent was not in breach of two further covenants.

8. Paragraph 18 of Schedule 3 to the respondent's lease requires her to pay the costs incurred by the lessor:

> "under or in contemplation of any proceedings in respect of the Property under Sections 146 and 147 of the Law of Property Act 1925 or in preparation or service of any notice thereunder notwithstanding that forfeiture is avoided otherwise than by relief granted by the court".

9. The respondent applied to the FTT for orders under section 20C of the Landlord and Tenant Act 1985 and under paragraph 5A of Schedule 11 to the 2002 Act so as to prevent the appellant from exercising that contractual right to recover the costs of the proceedings in the FTT by way of service or administration charges.

10. In response to that application and after considering the parties' submissions the FTT noted that the respondent was in breach of covenant but had not been negligent, and also that it had not been shown that if she had given notice of the works any action would have been taken that would have prevented the flood and the damage. It observed that the right to forfeit the respondent's lease had been waived by the demand from service charges in February 2022, before the application to the FTT was made. Furthermore, it found that the appellant would be unlikely to be able to recover any damages for the breaches of covenant because of the limits imposed by the Leasehold Property Repairs Act 1938 and by 18(1) of the Landlord and Tenant Act 1985 (which together reduce the possible damages for breach of a covenant in a long lease to the amount by which the value of the lessor's reversion has been diminished). And although paragraph 27 of Schedule 3 to the respondent's lease requires her to pay the costs of repairing the building where the repair is necessitated by her act or default the FTT observed that the proceedings under section 168 were not a necessary prelude to the landlord's enforcing that obligation.

11. The FTT concluded that "the proceedings were misguided and the costs unreasonably incurred" and made the orders sought. Against those orders the appellant appeals.

The appellant's arguments in the appeal

12. The appellant has two grounds of appeal.

13. First, Mr Bates argues that the FTT was wrong to regard the proceedings as pointless. There can be a number of outcomes to forfeiture proceedings: there may be forfeiture, there may be an injunction, there may be damages, as the Tribunal stated in *Bedford v Paragon Asra* (see paragraph 5 above).

14. Moreover, the determination under section 168 was needed in order to enable the appellant to enforce its rights under paragraph 27 of Schedule 3 to the lease, because the breaches of covenant are now proved. Once one understands the range of remedies unlocked by the proceedings, it can be seen that they were not pointless, and indeed Mr Bates says that the appellant "had no choice" but to bring them in the absence of an admission of breach of covenant by the respondent and an offer to cover the costs.

15. Second, it is said that the fact that the damage was caused by the plumber and not by the respondent was irrelevant. The respondent was in breach of covenant. The only relevance of the plumber was that the respondent might have a cause of action against him, but the appellant is not concerned with the plumber. The FTT in its refusal of permission to appeal stated that the proceedings should have been brought in the county court so that the plumber could have been added as a third party, but that was something only the tenant could do and was irrelevant to the appellant.

16. On both these grounds it is said that the FTT took into account an irrelevant consideration, and should not have made the orders sought.

The arguments for the respondent

17. Mr Soar in the respondents' grounds of opposition makes three points in response to the first ground.

18. First, he argues that it is simply not correct in the present case to say that forfeiture proceedings might have outcomes other than forfeiture. The waiver is admitted, there is no need for or possibility of an injunction, and the FTT has found that damages would not be available. As to the landlord's rights under paragraph 27 of Schedule 3 to the lease, they are simply a further contractual right, and nothing to do with forfeiture proceedings; the right to enforce that obligation is not a product of the section 168 proceedings. Indeed, the respondent is not in breach of the paragraph 27 obligations, as no demand has been made of her. The section 168 proceedings are a precursor to forfeiture and not relevant to the paragraph 27 right; the landlord can demand payment under paragraph 27 and then enforce that right in the county court; it is not appropriate to use the section 168 proceedings to make the enforcement of paragraph 27 easier in later proceedings.

19. Second, the conduct of the parties is highly relevant to the FTT's decision. The appellant knew, or had the means to know, by the time it brought the section 168 proceedings that forfeiture would be impossible, yet it persisted in proceedings for the purpose of enabling forfeiture.

20. Third, the right to recover costs under the lease is only for proceedings brought "under or in contemplation of any proceedings in respect of the Property under Sections 146 and 147 of

the Law of Property Act 1925". These proceedings could not possibly result in forfeiture n it was therefore arguable that the appellant's costs are not recoverable under the lease. Accordingly it is said that the FTT was correct to find that the proceedings did not engage the appellant's contractual entitlement to costs.

21. As to the second ground and the relevance of the fact that the respondent did not herself cause the damage, Mr Soar argues that the parties' conduct was highly relevant to the justice and equity of the orders the respondent sought in relation to the landlord's costs.

Discussion and conclusion

22. I approach this appeal with great caution because costs are in the discretion of the FTT and the Upper Tribunal will not interfere with the decision unless it fell outside the range of decisions open to the FTT in the exercise of that discretion.

23. That said, it is unusual for orders under section 20C and paragraph 5A to be made where the landlord has been successful in the proceedings. Such orders are not costs orders that follow the event. They are an interference with the landlord's contractual right under the lease, to which the parties have signed up, and very careful thought has to be given to preventing the landlord from exercising its rights under the lease even where it has been unsuccessful.

24. The appellant's case rests primarily on *Bedford v Paragon Asra*, which was not about orders under section 20C and paragraph 5A. The question there was whether proceedings under section 168 of the 2002 Act should be struck out because the right to forfeiture had been waived; the Tribunal held that the FTT had correctly decided that the proceedings were not abusive and should be struck out, because other remedies remained available to the landlord.

25. In the present appeal the question is whether having brought proceedings under section 168(4) the landlord should be able to exercise its contractual right to recover its costs as service or administration charges. I do not agree with the respondent that the FTT decided that the contractual right was not engaged. It did not say so, and I do not think the point was argued on that basis. Rather, the FTT made a discretionary decision that the landlord should be prevented from exercising its right because the proceedings were, the FTT said, "misguided" and the costs unreasonably incurred. The appellant was not going to obtain any benefit from the service of a section 146 notice or from forfeiture proceedings, and the section 168 application is not a necessary precursor to the enforcement of the covenant at paragraph 27 of the lease.

26. I agree with the FTT that those were relevant considerations. I might take issue with the term "misguided" because the landlord was entitled to bring the section 168 application on the pragmatic basis that success would make the paragraph 27 costs easier to enforce, if enforcement were to become necessary. But as Mr Soar has pointed out, the bringing of a section 168 application for that purpose does not entitle the landlord to its costs under the lease. The landlord's success in that regard cannot be a reason that makes it just and equitable for the appellant to exercise contractual rights given to it for a quite different purpose. Once that is put to one side it is easy to see why the FTT was entitled to take the

view that insofar as the proceedings were taken in contemplation of the service of a section 146 notice they were pointless and it was therefore not fair for the respondent to have to pay the appellant's costs, despite its contractual right.

27. The conduct of the parties was equally relevant – both the appellant's insistence that it intended to take forfeiture proceedings at a time when it had waived the right to do so, which is unmeritorious conduct even if the appellant's officers were not aware of the waiver, and the fact that the respondent had done nothing wrong because the fault lay with the plumber.

28. The FTT's mention of county court proceedings in its refusal of permission to appeal was not one of the reasons for the decision now appealed. The comment was made in response to the claim that the appellant "had no choice" but to make the section 168 application with a view to enforcing the covenant at paragraph 27 of Schedule 3 to the lease, to get the respondent to cover the costs of repairs. That is clearly incorrect and the FTT was simply making the point that there was another way to achieve the same outcome. That does not cast any doubt on its original decision.

29. For those reasons the appeal fails.

Judge Elizabeth Cooke

4 April 2023

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.