Neutral Citation Number: [2024] UKUT 81 (LC)

Case No: LC-2023-379

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

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

FTT REF: BIR/00CN/LIS/2019/0025

8 April 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGE – RIGHT TO MANAGE – agreement or admission under section 27A(4) of the Landlord and Tenant Act 1985 – whether payment can constitute agreement – estoppel by convention

BETWEEN:

G & A GORRARA LTD (1)
PAOLA GORRARA (2)
ROBERTO GORRARA (3)

Appellants

-and-

KENILWORTH COURT BLOCK E RTM CO LTD

Respondent

Flat E3 Kenilworth Court,
Hagley Road,
Birmingham, B19 9NU

Upper Tribunal Judge Elizabeth Cooke
12 March 2024

Miss Amanda Gourlay for the appellants, instructed by Paola Gorrara, solicitor
Mr Thomas Walsh for the respondent, instructed by Realty Law Ltd

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The following cases are referred to in this decision:

Cain v London Borough of Islington [2015] UKUT 542 (LC)
Commissioners for HMRC v Tinkler [2021] UKSC
FirstPort Property Services Limited v Settlers Court RTM Co Limited [2022] UKSC 1
G & A Gorrara Ltd and others v Kenilworth Court Block E RTM Co Ltd [2022] UKUT 90 (LC).
Gala Unity v Ariadne Road RTM Co Limited [2012] EWCA Civ 137
Triplerose Ltd v Ninety Broomfield Road RTM Co Ltd [2015] EWCA Civ 282

Introduction

1. This is the second time that the Tribunal has had to determine an appeal in proceedings relating to service charges brought by the appellants in 2019. In March 2022 I decided an appeal from a decision of the FTT on two preliminary issues, in *G & A Gorrara Ltd and others v Kenilworth Court Block E RTM Co Ltd* [2022] UKUT 90 (LC). The present appeal is from the FTT's decision of 29 November 2022 on two further preliminary issues in the same proceedings.

2. The appellants were represented in the appeal by Ms Amanda Gourlay, and the respondent by Mr Thomas Walsh, both of counsel. I am grateful to them both.

The factual and legal context

3. This appeal engages two areas of law. The first is the provisions in the Commonhold and Leasehold Reform Act 2002 which give certain long leaseholders of flats the right to take over the management of their block from their landlord through a limited company known as an RTM company. This is a no-fault right; the leaseholders do not have to show that the landlord was not managing the block properly.

4. We do not need to go into a great deal of detail about the law relating to RTM companies, save to note the decision of the Court of Appeal in *Triplerose Ltd v Ninety Broomfield Road RTM Co Ltd* [2015] EWCA Civ 282, some years after the legislation came into force, that an RTM company can acquire the right to manage only a single self-contained block, together with appurtenant property. That appurtenant property extends only to property used solely by that block (*FirstPort Property Services Limited v Settlers Court RTM Co Limited* [2022] UKSC 1, overruling *Gala Unity v Ariadne Road RTM Co Limited* [2012] EWCA Civ 137). So where there is appurtenant property shared between blocks the landlord remains responsible for its management even where one or more RTM companies have taken over the management of their block or blocks.

5. Kenilworth Court is a development of five blocks of flats, A to E, with communal gardens. Blocks A, B, D and E contain 10 flats each, while Block C has 12. For many years, since at least 2003 (as the FTT found at paragraph 19 of the decision now appealed) the five blocks have been managed together as a single unit. The individual leases of the flats make provision (as the Tribunal found in the first appeal) for the leaseholder to pay by way of service charge a fraction of the landlord's expenditure on the whole estate, i.e. all five buildings and all the shared appurtenant land.

6. In 2006 the residents of Blocks A to D exercised their right to manage their block through a company, and those in Block E did the same in 2007. The five RTM companies together, through managing agents, continued to manage the estate together as a single unit from 2007 onwards. Doubtless many other RTM companies made similar arrangements in the years before *Triplerose* and before *Settlers Court*.

7. The second and third appellants, who are brother and sister, bought the long lease of Flat 3, Block E Kenilworth Court in 2004; in 2016 the first appellant purchased the flat from them. The second appellant, Ms Gorrara, is the first appellant's solicitor.

8. The second area of law relevant to the appeal is the regulation of variable service charges by the Landlord and Tenant Act 1985. Section 27A gives the FTT jurisdiction as follows:

"**27A Liability to pay service charges: jurisdiction**

(1) An application may be made to [the FTT] for a determination whether a service charge is payable and, if it is, as to—

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to [the FTT] for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—

(a) the person by whom it would be payable,

(b) the person to whom it would be payable,

(c) the amount which would be payable,

(d) the date at or by which it would be payable, and

(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which—

(a) has been agreed or admitted by the tenant,

…

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

9. It is worth noting that the FTTs jurisdiction is not limited to making determinations about service charges that have already been demanded. That is clear from sub-section (3), which enables the landlord or the tenant to ask the FTT whether, if costs were incurred for, say, repairing the roof, a service charge would be payable and if so how much would the charge be.

10. One of the reasons why a service charge might not be payable is that it fails to meet the requirements of section 19 of the 1985 Act which provides:

"**19.— Limitation of service charges: reasonableness.**

(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.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise."

11. Many leases make provision for service charges to be paid in advance, before the relevant expenditure has occurred; such charges are subject to the test set out in sub-section (2), which is inevitably less stringent than the test in sub-section (1) for charges relating to costs actually incurred.

12. The lease of flat 3 defines the landlord's expenditure on the estate as the "Maintenance Expenses" and then provides as follows in Schedule 6:

> "1. The Lessee's Proportion means .75% per centum or such other percentage as the Lessor shall in the interests of good estate management deem to represent a fair proportion of the Maintenance Expenses attributable to the matters mentioned in the Fifth Schedule hereto
>
> PROVIDED ALWAYS as follows
> …
> 2. An Account of the Maintenance Expenses (distinguishing between actual expenditure and reserve for future expenditure) for the period ending the 24th day of March for each year during the term shall be prepared and the Lessor shall within three months of the date of each Account serve on the Lessee a copy thereof and of the said Certificate
>
> 3. The Lessee shall pay to the Lessor by way of further and additional rent the Lessees proportion of the Maintenance Expenses in manner following that is to say:-
>
>> 3.1 In advance on the 29th day of September and 25th day of March in every year through the term one half of the Lessees Proportion of the amount estimated by the Lessor or its managing or other agents as the Maintenance Expenses for the year ending on the next 24th day of March the first payment to be apportioned (if necessary) from the date hereof
>>
>> 3.2 within 21 days after the service on the Lessee of the copy of the Account and Certificate referred to in paragraph 2 of this Schedule for the period in question the Lessee shall pay to the Lessor or its managing agents [or] be entitled to receive or be credited with the balance by which the Lessee's proportion respectively exceeds or falls short of the total sums paid by the Lessee to the Lessor pursuant to paragraph 3.1 of this schedule during the said period"

13. Obviously the proportion set out in clause 1 is problematic; there are 52 flats at Kenilworth Court, and 0.75% x 52 = 39% so that proportion leaves the landlord with a serious shortfall. The RTM companies, in maintaining the estate together as a whole, have demanded service charges from the 52 lessees that are said to add up to 100% on the basis of rateable value, with Flat E3 being charged 1.7026% of the budgeted costs of managing the whole estate.

14. Aside from that difficulty, these are commonplace provisions which require that while payments are made in advance on account of service charges on the basis of estimates, there should be a reconciliation at the end of each year so that the leaseholders know what the actual service charge was, and a balancing exercise so that any shortfall is paid and any surplus re-paid. Nevertheless, it seems that for many years, perhaps since 2007, no reconciliation has been carried out. Estimated charges have been paid, on a monthly basis, and any surplus has been transferred to the reserve fund for the estate. Accounts have been provided to the leaseholders each year (as the FTT found at its paragraph 45); they are relatively brief, setting out what has been spent on the estate over the preceding year, with no break-down to show what has been spent on individual blocks.

15. In 2016 Ms Gorrara began to make enquiries of the managing agents about the service charges in recent years, expressing concern about the level of disrepair in Block E. In January 2017 she asked for an analysis showing the breakdown between the blocks. In May 2017 the first appellant stopped paying the monthly service charge payments.

16. On 24 June 2019 the appellants made an application to the FTT.

The application to the FTT

17. The appellants' application form stated that they wanted a determination for 6 past years, 2012/13 to 2017/18, and for 2018/19 (the year 2019/20 was later added by the FTT's direction).

18. The brief statement accompanying the application form in June 2019 said "It has not been possible to establish the amount in dispute" and "The entire service charge is in issue". At paragraph 18 the applicants listed a number of issues including "What the applicants have been charged for", "whether the work charged for has been done", "whether the standard of work done and complained of has been carried out to a reasonable standard" and "whether the applicants are entitled to set-off any claim for breach of covenant against the service charges demanded and if so how much".

19. In the course of the hearing of the present appeal Ms Gourlay stated that what the appellants seek from the FTT is not a determination of whether the interim charges that they have paid were payable. The interim charges, said Ms Gourlay, are "water under the bridge". What they seek is a determination of what are the final service charges for the years in issue – which the appellants do not know because the balancing exercise prescribed by the lease has not been followed. Those charges are, necessarily, those payable only in respect of Block E (because of the decision in *Triplerose*). That the interim charges are not in issue came as a surprise to Mr Walsh (instructed only on the appeal) and to the respondents (whose individual directors are recently appointed and therefore new to these proceedings), and indeed to me during the appeal hearing. Ms Gourlay explained that the appellants' application is made under section 27A(1)(c), for a determination of "the amount which is payable" for the years in dispute. Whether that was clear to the FTT is uncertain, as we shall see, but I note from the transcript of the FTT hearing (page 309) that Ms Gourlay said to the panel "My clients are not challenging the on-account demands. My clients are challenging costs that have been incurred". Whether the panel took that on board, or considered what difference that made to what they had to decide on the two preliminary issues it was looking at, I do not know.

20. This is an unusual use of section 27A. Applicants usually challenge a specific charge demanded of them, on the basis that it is not payable either under the terms of the lease, or for failure to meet the requirement of section 19 of the 1985 Act. In such a case a leaseholder must produce enough evidence or argument to raise a prima facie case, which the landlord or management company then has to answer. But as we have seen the FTT can make a decision about charges not yet demanded in respect of expenses not yet incurred under sub-section (3); what is wanted here is a determination under sub-section (1) about charges, final not estimated, not yet demanded in respect of expenses already incurred.

21. From the pleadings in the FTT it is clear that, once provided with accounts in the course of disclosure, the applicants have taken issue with specific items of expenditure over the years

and regard the respondent as being in breach of covenant because of the disrepair in Block E, so if a prima facie case is necessary in these circumstances it has certainly been raised.

22. What will be the consequences of such a determination is not known at this stage; there remains the very considerable task of determining what the respondent has spent on Block E since 2012/13 and how much of that was reasonably incurred. Then there is the appellants' claim for set-off for breach of covenant, which may be evidentially very difficult because they will have to show what losses they have actually incurred as a result of any work that has not been done or has been done badly or late. It is not known whether final service charges will ever be demanded by the respondents. But the first appellant is now in considerable arrears with interim charges; it may be that what the appellants want is ultimately to force a balancing exercise, putting together the amounts paid by way of interim charges from 2012/13 to 2017, the amounts actually payable in respect of Block E during all the eight years in dispute, and any set-off for breaches of covenant during those years. On any reckoning that is not a risk-free strategy for the appellants and is going to cost them and the respondents dearly in terms of time and money.

23. But that is for the future. For now the proceedings are, if I may be forgiven for saying so, bogged down in preliminary issues, to which I now turn.

The decisions in the FTT so far

24. The FTT conducted a hearing on 17 June 2021 and decided that the following preliminary issues had to be determined:

> "a. how should the lease be interpreted (in terms of whether the leaseholder is to pay a proportion of expenditure on Block E only or on the whole estate);
> b. apportionment;
> c. impact of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act");
> d. were service charges for some years agreed or admitted, so that the Tribunal has no jurisdiction to consider them?;
> e. what service charges were reasonably incurred;
> f. the impact of statutory controls in the Landlord and Tenant Act 1985 ("the Act");
> g. set-off for breach of repairing covenants;
> h. costs."

25. The FTT also suggested that the respondents might introduce a ninth issue (and gave permission for them to do so), namely "whether the Applicants should be estopped (through the application of the principles of estoppel by convention) from claiming that for certain service charge years, the historic accounts, on which determinations on the payability of service charges would rely, were incorrect", and the respondent did so.

26. At the hearing on 17 June 2021 only two issues were determined, issues a and c above. Its decision was appealed to this Tribunal. In *G & A Gorrara Ltd and others v Kenilworth Court Block E RTM Co Ltd* [2022] UKUT 90 (LC) the Tribunal held that:

    a. The lease of Flat E3 obliged the Appellants to contribute to the cost of all the landlord's obligations to provide services to Kenilworth Court on an estate wide basis, but that

a. an RTM company takes on management functions in relation to one single building only, plus its own appurtenant property. It cannot enforce obligations in relation to other blocks.

27. The second issue followed simply from *Triplerose*, but had to be decided because of the FTT's construction of certain covenants in the lease and certain provisions of the statute. It is not necessary to read the Tribunal's 2022 decision in order to understand the present appeal; but it is important that the decision established that the freeholder's management of the estate as a single unit was in accordance with the terms of the lease, but that the RTM companies in continuing that practice had not acted in accordance with the provisions of the Commonhold and Leasehold Reform Act 2002. Moreover, the landlord remains responsible for management of appurtenant property shared by all five blocks, in particular the gardens.

28. The FTT then conducted a hearing on 31 October and 1 and 2 November 2022. It was intended to be a final hearing but only two further preliminary issues were determined, namely issue d above, whether service charges had been agreed or admitted, and the estoppel argument raised by the respondent at the FTT's suggestion. The two issues were determined on the basis that they were relevant only to the four years 2012/13 to 2015/16.

29. As to admission or agreement, the FTT relied upon the Tribunal's decision in *Cain v London Borough of Islington* [2015] UKUT 542 (LC), which it took to mean that the effect of section 27A(5) of the 1985 Act (set out at paragraph 8 above) is limited to a single payment. It said:

> "106. Our conclusion on this issue is that by virtue of payments without protest or qualification if the service charges demanded in the years 2012/13 to 2015/16 (so up to 25 March 2016) the Applicants are deemed to have agree or admitted the service charges for those years, and in consequence the [FTT] has no jurisdiction to consider those service charge years."

30. As to estoppel by convention, the FTT noted that since it now had no jurisdiction to make any decisions about service charges in the first four of the years under challenge, the estoppel point was superfluous; nevertheless it decided that:

> "the Second and Third Applicant are estopped from alleging that the accounts and service charges due from the Second and Third Applicants for service charge years 2012/13 to 2015/16 inclusive were prepared on an incorrect basis, in so far as they are prepared on the basis that all lessees at Kenilworth Court share the service charge for all blocks."

31. I will say more about how the FTT came to those decisions in the context of the arguments in the appeal.

The grounds of appeal

32. The appellants appealed, with permission from this Tribunal, on six grounds. The first two related to findings of fact and the FTT's assessment of the credibility of one of the witnesses; they were wisely not pursued at the hearing.

33. Grounds 3 and 4 challenge the FTT's decision on admission or agreement; it is said that the FTT was wrong to find that the appellants (or rather the second and third appellants, in view

of the date of the first appellant's purchase) had admitted the service charges for 2012-16, and that the FTT had failed to give reasons why the lack of a balancing payment calculation was not material to that finding.

34. Grounds 5 and 6 relate to estoppel by convention; Ms Gourlay argued that it is not possible for an estoppel to undermine the provisions of the 2002 Act, and that in any event the FTT wrongly found that there was an estoppel by convention because (among other points) its finding that the appellants' conduct influenced the respondent was contrary to the evidence.

35. I am going to look at those two pairs of grounds together, first at the admission or agreement point and then at estoppel by convention.

The appeal on admission or agreement

The statutory provisions and the decision in Cain

36. In order to understand this issue we have to look again at section 27A(4) and (5) of the 1985 Act and at the decision of the Tribunal (HHJ Nigel Gerald) in *Cain*.

37. Section 27A(4)(a) and (5) provide:

> "(4) No application under subsection (1) or (3) may be made in respect of a matter which—
>
> (a) has been agreed or admitted by the tenant,
>
> …
>
> (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment."

38. In *Cain* the applicant applied to the FTT in 2014 to challenge service charges demanded and paid in the years 2002/3 to 2012/13. The FTT found that by paying the charges without protest for the years 2002/3 up to and including 2007/8 the applicant had admitted or agreed the charges and therefore it had no jurisdiction in respect of those years by virtue of section 27A(4), notwithstanding section 27A(5). The decision was appealed to the Tribunal, hence the decision in *Cain*. In the present appeal Ms Gourlay argued that *Cain* was not correctly decided, and as will be seen below I agree to some extent; I note that the Tribunal is not bound by its own decisions.

39. In *Cain,* the Tribunal upheld the FTT's decision. HHJ Gerald said this:

> "14. Before considering the facts of this case, it is necessary to consider the meaning and effect of section 27A(5). An agreement or admission may be express, or implied or inferred from the facts and circumstances. In either situation the agreement or admission must be clear, the finding being based upon the objectively ascertained intention of the tenant which may be express or implied or inferred from the conduct of the tenant – usually an act or a series of acts or inaction in the face of specific circumstances or even mere inaction over a long period of time or a combination of the two.
>
> 15. Absent sub-section (5) and depending upon the facts and circumstances, it would be open to the F-tT to imply or infer from the fact of a single payment of a specific sum demanded that the tenant had agreed or admitted that the amount

claimed and paid was the amount properly payable, a fortiori where there is a series of payments made without challenge or protest. Part of the reason for this is that people generally do not pay money without protest unless they accept that that which is demanded is properly due and owing, and certainly not regularly over a period of time. Whilst it would generally be inappropriate to make such an implication or inference from a single payment because it could not be said that the conduct of the tenant was sufficiently clear, where there have been repeated payments over a period of time of sums demanded, there may come a time when such an implication or inference is irresistible.

16. Taking matters one step further, it would be open to the F-tT to make such a finding even where there had been no payment at all but there were other facts and circumstances clearly indicating that the tenant had agreed or admitted the amounts claimed. What is required is some conduct which gives rise to the clear implication or inference that that which is demanded is agreed or admitted by the tenant. The relevant question, therefore, is: are there any facts or circumstances from which it can properly be inferred or implied that the tenant has agreed or admitted the amount of service charge which is now claimed against him?

17. The effect of sub-section (5), however, is to preclude any such finding "by reason *only* of [the tenant] having made *any payment*" (italics supplied). The reference to the making of "any payment", and "only" such payment, indicates that whilst the making of a single payment on its own, or without more, will never be sufficient to found the finding of agreement or admission, the making of multiple payments even of different amounts necessarily over a period of time (because that is how service charges work) may suffice. Putting it another way, the making of a single payment on its own, or without more, will never be sufficient; there must always be other circumstances from which agreement or admission can be implied or inferred. And those circumstances may be a series of unqualified payments over a period of time which, depending upon the circumstances, could be quite short, it always being a question of fact and degree in every case.

18. Looking at the reasoning behind this provision, no doubt the reason why the making of a single payment on its own, or without more, would never suffice is that such will often be insufficiently clear but also, in the peculiar area of landlord and tenant, it is common enough for tenants to pay (even expressly disputed) service charges so as to avoid the risk of forfeiture and preserve their home and the value of their lease. But the reason why a series of unqualified payments may, depending on the circumstances, suffice is because the natural implication or inference from a series of unqualified payments of demanded service charges is that the tenant agrees or admits that which is being demanded. Putting it another way, it would offend commonsense for a tenant who without qualification or protest has been paying a series of demanded service charges over a period of time to be able to turn around and deny that he has ever agreed or admitted to that which he has previously paid without qualification or protest. Self-evidently, the longer the period over which payments have been made the more readily the court or tribunal will be to hold that the tenant has agreed or admitted that which has been demanded and paid. It is the absence of protest or qualification which provides the

> additional evidence from which agreement or admission can be implied or inferred."

40. The judge then looked at the facts of the case, and noted that some at least of the charges Mr Cain was challenging were matters that he could easily have found out about during the years that passed before he applied to the FTT. He only had to look out of his window to see whether the garden was being maintained, for example. So it was not as if he had no idea that there was anything wrong. The judge continued:

> "25. The question is whether there are any facts and circumstances from which the F-tT could properly have found that the appellant had agreed or admitted the service charge items in respect of the 2001/02 to 2006/07 period he now seeks to challenge. In my judgment, the F-tT was entitled to so find based purely upon the series of payment in respect of the demanded service charge throughout this six year period, and subsequently, without reservation, qualification or other challenge or protest. That of itself is sufficient. The is, however, reinforced by the sheer length of time which has elapsed before challenge was first made – between eight years in respect of the 2006/07 service charge and 12 years for the 2001/02 service charge. Whilst distinctions can be made between the nature of the different service charge items being challenged, the F-tT is entitled to look at matters in the round and find that where there has been substantial delay in making any challenges to the items now in dispute, and most if not all of which have long-since been paid, that the tenant has agreed or admitted the amounts claimed which, after all, have long-since lain dormant without challenge."

41. Within the paragraphs quoted above are a number of statements of principle, and it is useful to tease them out to see exactly what is being said.

42. First, it is said in paragraph 17 that the effect of section 27A(5) is that a single payment can never amount to agreement within section 27A(4). That is obviously correct.

43. Second, however, paragraph 17 also says that section 27A(5) refers only to a single payment, because of the words "only" and "any payment". Mr Walsh supported that interpretation. Ms Gourlay argued that that is not right, and I agree. I think it is obvious that the word "only" in section 27A(5) means "absent any other circumstances". And I do not think the words "any payment" mean "any single payment" or "any one payment".

44. The judge went on in paragraph 18 to say "a series of unqualified payments may, depending on the circumstances, suffice" and that is obviously correct. A series of unqualified payments *only* does not indicate agreement, but it *may* do so, *depending on the circumstances*. Imagine a tenant who has paid the service charge without protest for twenty years until 2020. In 2022 she discovers - and could not have known before - that the heating system has not been serviced since 2015, despite the fact that the landlord has paid for the annual servicing and the service charge includes a sum in respect of that payment. She is of course entitled to challenge the charge, because she did not know and could not have found out about the problem.

45. The point of section 27A(4) is that payment *alone* does not convey enough information to enable the inference of agreement; it all depends. In circumstances where the tenant delayed before challenging the charge or charges, and had the information during that time to raise a challenge, then the payments *in those circumstances* may indicate agreement.

46. That is exactly what happened in *Cain*. I respectfully disagree with HHJ Gerald's analysis at his paragraph 25 that:

> "the F-tT was entitled to [find agreement] based purely upon the series of payment in respect of the demanded service charge throughout this six year period, and subsequently, without reservation, qualification or other challenge or protest. That of itself is sufficient."

47. That is not what the FTT did. What made it possible to infer agreement from a series of payments from 202/3 to 2007/8 was that the applicant had then left it another six years before challenging the charges, and had the information he needed to raise a challenge in the meantime.

48. To summarise, insofar as the Tribunal in *Cain* decided that a series of payments made without protest may, absent any other factors, indicate admission or agreement pursuant to section 27A(4), I take the view that that is a misconstruction of section 27A(5). The effect of section 27A(5) is not limited to single payments.

49. However, it is clearly correct that, as the judge put it at paragraph 25 of *Cain*,

> "the F-tT is entitled to look at matters in the round and find that where there has been substantial delay in making any challenges to the items now in dispute, and most if not all of which have long-since been paid, that the tenant has agreed or admitted the amounts claimed which, after all, have long-since lain dormant without challenge".

50. Delay is not the only relevant factor. The availability of information may be another. But unqualified payment or payments alone do not meet the requirements of section 27A(4)(a), as is clear when one thinks through practical possibilities and as section 27A(5) expressly provides.

51. With that in mind I turn to the FTT's decision in this case.

The FTT's decision in the present appeal

52. The FTT set out paragraphs 14 to 18 of the decision in *Cain*. It recorded the respondent's argument:

> "It is said that by attending meetings at which challenges could be raised, and otherwise failing to raise any challenge to the service charges demanded from their purchase and occupation in 2004 until late in 2016, and paying the service charges without qualification or protest, the Second and Third Applicants should be considered to have agreed or admitted the charges were payable."

53. The FTT found that the appellants had had the service charge accounts each year and were aware – or should have been if they had given it any thought at all - that the interim service charge was calculated on an estate-wide basis. The respondent argued that "the end of year procedure had been settled for many years and was or should not be a bar to a finding that the service charge process had been agreed for many years, evidenced by the unqualified payment of demands."

54. The FTT decided that it should "apply *Cain*". It said at paragraph 102:

> "… every year for around 12 years, two interim demands were made, each of which was paid without protest or qualification. It seems to us that these payments meet the test Judge Gerald set out in *Cain*, namely that they evidence an acceptance /agreement that the payments were due, even though the Applicants did not know everything they wished, later, to know about the rationale for and calculation of the payments.
> 103. In is clear to us that though there were some things the Second and Third Applicants did not know when making payment, there was a great deal they did know. As we found above, they knew how the leases were set up; they knew how much was spent in each year on Kenilworth Court from the accounts; they knew that the accounts were for the whole of the Estate; they knew how much they were being asked to pay by way of interim charge; they knew they were entitled to information about the outturn for the year, and that they did not receive it. In our view, that was adequate information for them to assess whether they wished to pay what was demanded."

55. Going back to Cain, the FTT expressed the view that section 27A(5) was limited in its effect, to a single payment, and that it was therefore not constrained by section 27A(5). Hence its conclusion at its paragraph 106, quoted above at paragraph 29, that it had no jurisdiction in respect of the charges from 2012/13 to 2015/16.

The arguments in the appeal

56. In the appeal Ms Gourlay argued for the appellants that they could not have agreed or admitted the service charges in dispute when they did not know, and still do not know, the amount of actual expenditure attributable to their block because there has never been the reconciliation or balancing exercise prescribed by the lease nor any statement or demand for final charges. She also argued that the FTT was wrong to take into account payments in the years preceding 2012, when those years were not in issue; earlier payments could have no bearing on later liability in the context of section 27A(5).

57. Mr Walsh relied upon the decision in *Cain.* He argued that once a leaseholder has made regular payments for some time, it is in effect prevented from challenging service charges unless they do so immediately – before the next payment, even if payments are made monthly as in the present appeal. As he put it, once there is a long enough period of undisputed payments the leaseholder moves into a regime where he or she has to protest fast if they want to dispute anything.

Conclusions on this point

58. It will be clear from what I said above about *Cain* that I do not accept Mr Walsh's argument. Indeed, in view of the facts in *Cain* it is not realistic to draw from it the proposition that the more faithfully and regularly the leaseholder pays service charges the less opportunity he or she has to seek a determination under section 27A. But insofar as Cain did decide that a series of payments is sufficient without more to indicate agreement I take the view that it was wrongly decided and Mr Walsh's argument cannot succeed.

59. However, I remain unclear what the FTT decided that the appellants had agreed. If it thought that the appellants had agreed liability for the interim charges, or that they had agreed not to challenge the demanding of interim charges on an estate-wide basis, then it would be difficult to disagree, at least for the first three years in question (2012/13 to 2014/15; Ms

Gorrara started to express disquiet during 2016, and made clear early in 2017 so the position is not the same as regards the charge for 2015/16). The FTT's decision begins in paragraph 1 with the following statement:

> "This case concerns a challenge to service charges **levied** upon the Applicants for service charge years 2012/13, 2013/14, 2014/15, 2015/16/ 2016/17, 2017/18, 2018/19, and 2019/20" (emphasis added)

That might indicate that the FTT thought the challenge was to liability for the interim charges.

60. But if that is what the FTT decided then it was unnecessary, since Ms Gourlay said at the FTT hearing and has confirmed on appeal that the interim charges are not in dispute. If that was what the FTT decided that leaves the appellants free to challenge the final charges for those four years.

61. If on the other hand the FTT intended to decide that the appellants had admitted or agreed the final charges – not yet demanded – from 2012/13 to 2015/16 then the FTT was clearly in error. It is not possible to understand, and the FTT has not explained, how agreement that interim charges are payable means agreement also to the final charges based on costs actually incurred. The appellants do not know what costs were incurred for Block E. They cannot be said to have delayed in challenging them because none have yet been demanded.

62. Accordingly the appeal succeeds on this ground; if the FTT decided that the appellants have agreed or admitted the final service charges for the years 2012/13 to 2015/16 that finding is set aside.

Estoppel by convention

What did the FTT decide?

63. The FTT itself suggested that the respondent might argue that the appellants (or rather, again, the second and third appellants) were estopped by convention from challenging the estate-wide basis on which the interim charges were imposed in the years 2012/13 to 2015/16.

64. Having made its finding that it had no jurisdiction in respect of those years, the FTT noted that any finding of estoppel by convention would have no practical effect. I have set aside its finding on section 27A(4) and therefore I have to look at the effect of its finding about estoppel.

65. What exactly was the convention that was said to estop the appellants? The FTT at its paragraph 83 explained that the respondent's case:

> "is based on the fact that the accounting arrangements for Kenilworth Court, namely that accounting is on an estate wide basis, have been in place for a very long time without objection."

66. At its paragraph 107 the FTT set out the estoppel alleged in the respondent's own words:

> "The Respondent adopts a fairly narrow formulation. As it is the party alleging the estoppel, we adopt its formulation. It is that "the strict terms of the lease applied

and were not affected by the exercise of the right to manage by the individual blocks in 2006 and 2007." As a result, the Respondent continued to account to all lessees at Kenilworth Court on an estate basis, not a block basis, and the Respondent asks that the Applicants should be estopped from arguing that this assumption was incorrect."

67. The FTT set out the law relating to estoppel by convention, as confirmed by the Supreme Court in *Commissioners for HMRC v Tinkler* [2021] UKSC 39:

    a. The common assumption must have been shared between the parties.

    b. The person alleged to be estopped must have conveyed to the other party that he expected him to rely upon the common assumption.

    c. The person alleging the estoppel must in fact have relied upon the common assumption.

    d. The reliance must have occurred in subsequent mutual dealing with the parties.

    e. Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit conferred upon the person estopped, so that it is unjust or unconscionable for the latter to assert the true legal or factual position."

68. The FTT found that the respondent and the second and third appellants shared a common assumption that the RTM companies were correctly managing the estate as a single unit; that by paying the service charges the appellants communicated that assumption to the respondent; that the respondent would have been influenced by that and that the appellants in failing to challenge the common assumption accepted that the respondent would rely on it. Mutual dealings followed on that basis. Whilst the appellants would suffer some detriment if estopped from asserting the correct basis of accounting, the respondents would suffer a greater detriment if they now had to unpick decisions made long ago on an estate-wide basis. In conclusion:

> "139 … in our view it would be unconscionable to put the Respondent into an uncertain and potentially chaotic position, as would be the case if the Applicants were permitted to require the accounts for 2012/13 to 2015/16 to be assessed on the true basis now.
> 140. Our decision is that the Second and Third Applicant are estopped from alleging that the accounts and service charges due from the Second and Third Applicants for service charge years 2012/13 to 2015/16 inclusive were prepared on an incorrect basis, in so far as they are prepared on the basis that all lessees at Kenilworth Court share the service charge costs for all blocks."

The relevance of estoppel by convention to service charge disputes

69. As we can see from the summary of the principles seen in *Tinkler*, estoppel by convention is a technical doctrine. It is useful in the contexts in which it was developed, namely commercial disputes where parties have adopted a conventional reading of, for example, a lease or a contract. Its requirements are demanding; the mere sharing of a common

assumption is not enough, there has to be communication and there has to be an intention that the person alleging the estoppel was to rely upon the communicated assumption.

70. As we shall see in the present case, those requirements are going to be difficult to satisfy in a service charge dispute where arrangements can drift on for years without there being any communication about them. The Landlord and Tenant Act 1985 is intended to provide a workable code for landlords and tenants in the resolution of disputes about service charges. In a service charge case where the leaseholder has behaved in such a way that it is unfair to allow them to change tune now, it is tempting to explore estoppel because the situation, put like that, feels estoppel-ish. But there is no need to give in to that temptation; section 27A(4)(a) should be used instead. Its effect is that for the leaseholder to be prevented from changing its position and challenging something that it had previously gone along with, all that is needed is admission or agreement; there is no need to prove estoppel.

Estoppel by convention in the present appeal

71. However, in the present case the FTT prompted the respondent to rely on estoppel by convention, and the argument succeeded. Again we face the difficulty that it is not clear whether the FTT decided that the appellants were estopped from contesting the basis of calculation of the interim service charges on an estate-wide basis, or whether the FTT found that the appellants are estopped from ever requiring final charges to be calculated for Block E. In light of what the FTT said at its paragraphs 139 and 140 (see paragraph 68 above) it rather looks as if the FTT thought that the respondent should never have to unpick the estate-wide calculations.

72. If the FTT's finding on estoppel related only to the interim charges then it was unnecessary; the interim charges are not in dispute. It would in any event have to be set aside for the reasons I give below.

73. Insofar as the FTT's finding was that the appellants are estopped by convention from ever requiring that final service charges be calculated for Block E separately, in line with the statutory powers of the respondent under the 2002 legislation, it is set aside, for the following reasons.

74. First, the "convention" or common assumption does not correctly describe what the respondent was doing. The estoppel that it claimed was, as set out in paragraph 66 above, "that the strict terms of the lease applied and were not affected by the exercise of the right to manage by the individual blocks in 2006 and 2007". But the respondent never managed the estate in accordance with the strict terms of the lease; it never reconciled the interim and actual service charges nor balanced the under- and over-payments.

75. Second, even if the assumption is re-characterised as an assumption that the estate was to be managed as a single unit and not block by block, estoppel by convention cannot succeed because of the evidence of Mr Hodgkins, who was the director of the respondent at the material time, which the FTT accepted. He said that he did not rely upon any common assumption communicated to him by the appellants. He said (I quote from the transcript, set out in the grounds of appeal):

> "… it was just never an issue. We never talked about it because we just thought it was the right thing to do. I didn't raise the subject with anyone about how the estate should be managed. You know, it's just how it was. It had always been managed

> that way. … it never entered anyone's head to discuss how the estate should be managed. It just carried on as before and before I was involved."

76. Mr Walsh for the respondent argued that the FTT's finding of reliance was correct, but did not say why this evidence did not make it clear that there was no reliance by the respondent on anything communicated by the appellants.

77. Further grounds of appeal rely on the argument that it was only after 2016 that the appellants realised that the estate was being managed as a single unit and not block by block and that therefore they cannot have had the relevant common assumption in 2012. The FTT found as a fact that Ms and Mr Gorrara knew, or would have known if they had thought about it, that the estate was being managed as a single unit on the basis of what they were told in the service charge accounts. Again we run into the confusion as to whether the estoppel is supposed to be about the interim charges or the final charges; as to the interim charges the FTT's finding of fact is clearly correct, the appellants knew or should have known of the basis on which interim charges were calculated. If the appellants accepted that, and communicated their acceptance to the respondent, then that might satisfy the requirement for a common assumption about the interim charges (which are in any event admitted) to be made and communicated; but again there could be no estoppel because of the absence of reliance.

78. As to the final charges, the FTT did not explain how an acceptance that the interim charges were calculated on an estate-wide basis could be the basis of an estoppel by convention relating to the final service charges. Nor did it say how such an assumption could have been communicated; I do not see how the payment of interim charges could communicate a common assumption about the final charges. Nor did the FTT say in what sense any such assumption could have been relied upon, since the respondent has never done anything about the final service charges.

79. Insofar as the FTT found that the appellants were estopped from going back on a common assumption that final charges would be calculated on an estate-wide basis, that finding is set aside because any such finding is unexplained and could have no basis in the evidence.

80. I add two further points.

81. The first is that so far as the interim charges are concerned, there could be no estoppel by convention because of the absence of reliance. Yet I found above (paragraph 59) that the appellants could have been found to have accepted or agreed that the interim charges were calculated on an estate-wide basis. That illustrates what I said above; the requirements of section 27A(4)(a) are simpler than those of estoppel by convention and there is no need to resort to the latter in the context of service charge disputes.

82. Second, I have not explored Ms Gourlay's argument that, even if the requirements for estoppel by convention were met, it is not possible to defeat by estoppel the provisions of the 2002 Act which enable an RTM company only to manage its own block. An exploration of that difficult point would be futile in the present case because in any event estoppel by convention cannot succeed on the facts, and would have no benefit in future cases since estoppel is not the appropriate concept for circumstances such as these.

Conclusion

83. Since the appeal has succeeded on both issues, it follows that the FTT now has to decide the amount in which final service charges are payable for the eight years from 2012/13 to 2019/20.

84. As I indicated above this has the potential to be a herculean task, and the proceedings have become enmired in preliminary issues. Urgent work on Block E may be delayed, and much-needed resources of the respondent are being wasted, while this dispute is further protracted. There are essentially three issues for decision: the first is the correct apportionment (if that is still in dispute), the second is the amount of final service charges for the eight years, and the third is the appellants' claim for set-off.

85. I suggest to the FTT, and it is no more than a suggestion, that it give directions for the determination of all outstanding issues at a single hearing, even if that hearing lasts a fortnight or more, so that all parties are obliged to bite the bullet of looking at this case as a whole and counting the cost of proceeding. I suggest to the parties, and again I can only suggest, that they ask themselves what they would settle for and then try again to settle (I know that mediation has been attempted), in the hope that the parties can move on from this litigation and work towards constructive co-operation.

Upper Tribunal Judge Elizabeth Cooke

8 April 2024

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.