UPPER TRIBUNAL (LANDS CHAMBER)

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

LANDLORD AND TENANT – SERVICE CHARGES – validity of demands

BETWEEN:

MS TRACY PRICE

Appellant

and

MR DAVID MATTEY (1)
MS PAULA MATTEY (2)
MR ALAN MATTEY (3)
MR STEVEN MATTEY (4)

Respondents

Re: Flat 14, Oak Close,
Gospel Oak,
Tipton,
DY4 OAY

Judge Elizabeth Cooke
12 January 2021 by remote video platform

Mr Simon Bradshaw for the appellant, instructed on a direct access basis.
Mr Andrew Beaumont for the respondents, instructed by Blue Property Management UK Limited

The following case is referred to in this decision:

Brent London Borough Council v Shulem B Association Limited [2011] EWHC 1663 (Ch)

Introduction

1. This is an appeal from a decision of the First-tier Tribunal ("the FTT") about the reasonableness and payability of service charges. It was heard by remote video platform on 12 January 2021. The appellant tenant, Ms Tracy Price, was represented by Mr SJ Bradshaw, and the respondent landlords by Mr Andrew Beaumont, both of counsel, to whom I am grateful.

The background and procedural history

2. The appellant holds a 99-year lease of Flat 14, Oak Close, Tipton, granted in 1974.

3. The respondents are her landlords, and the freeholders of Oak Close, which is a development of 31 flats in a number of blocks. In February 2018 they applied to the FTT for a determination of the reasonableness and payability of service charges demanded from the appellant for the years 2009 to 2017, pursuant to section 27A of the Landlord and Tenant Act 1985. They made the same application against the leaseholders of three other flats in Oak Close, which have been stayed pending the determination of this appeal. The total in dispute (and in arrears) for the four flats was said before the FTT to be £29,958.76.

4. The application to the FTT was first heard in August 2018, and the tribunal reconvened later to consider the material in the bundles. Its decision made in January 2019 was reviewed by the FTT and there was a re-hearing in September 2019. The decision that is now appealed is that dated 14 February 2020, which was reviewed on 17 June 2020 in respect of points not in issue in the appeal. The FTT gave permission to appeal "in respect of the question of the validity of the service charge demands", i.e. in respect of the two issues set out under the heading "Grounds of Appeal – validity of service charge demands" in the grounds of appeal presented to the FTT, drafted by Mr Bradshaw, and dated 9 April 2020. I labour that point because Mr Bradshaw sought to argue a further point in this appeal, namely the reasonableness of charges relating to the year ending 31 December 2012, for which permission was not given.

5. The appeal, therefore, is not about whether any of the charges for the years in question is unreasonable, but about whether the demands themselves were invalid. As it turned out the appellant raised just one point about the validity of the service charge demands. Mr Bradshaw's second point was about a different matter which I shall explain in due course.

6. I asked counsel at the start of the hearing to tell me which were the documents that the respondents say are valid demands and that the appellants say are not, because that was not entirely clear from the way the appeal bundle was organised. They agreed that the demands whose validity is in issue are 27 items (pages 256 to 282 in the bundle), headed variously "Tenant demand", "tenant invoice", or "invoice"; each is also headed "service charge invoice". They cover the years from 2009 onwards; there are two regular half-yearly demands for each year, while the rest are headed "Excess charge" and are said to be charges imposed where expenditure went over budget.

7. Each of the demands simply states the amount payable by the tenant and the period in respect of which it is demanded. No issue is taken by the appellant about their formal validity in terms of the statutory requirements to state the landlord's name and address. And of course it is perfectly clear from the heading that each is an invoice for service charges.

8. The demands are followed, in the bundle, by a series of documents headed "Oak Close: income and expenditure account" for the years 2009 to 2017 and in addition by documents headed "service charge budget calculation" for the years 2014 to 2017. The income and expenditure accounts show the total expenditure made by the landlords on the estate for the period concerned, itemised to show what was spent for example on buildings insurance, cleaning, repairs etc. The budget calculations are specific to flat 14 and indicate the proportion and amount of that expenditure that is due from the appellant; they state that she is charged 4.1667% of the total, equivalent to one twenty-fourth, for reasons I shall explain.

Issue 1: the validity of the service charge demands

9. Oak Close is a development in several blocks, comprising 31 flats; the appellant lives in a block of 8 flats, which is managed for the freeholders by Blue Property Management UK Limited. However, some of the blocks are now run by Right to Manage companies and, therefore, not by the respondents. For most of the period covered by the disputed demands the respondent was managing, and incurring expenditure in respect of, 24 flats, including the block of 8 in which the appellant lives.

10. The lease requires the appellant to contribute one eighth of the landlord's costs incurred in providing services to her block, and one thirty-first of the costs in respect of the development.

11. The service charge demands themselves say nothing about the way the charge is calculated. However, it can be seen from the budget calculations for 2014 onwards that the appellant was charged one twenty-fourth of the respondents' total expenditure, and it is accepted that that was what she was charged for all the years in issue. This was done for obvious reasons; the respondents were now managing 24 flats and would be left with a shortfall if they charged one thirty-first. But it is now accepted by the respondents that they are only entitled to one thirty-first of their expenditure on the development from each leaseholder, since no application has been made to vary the leases under section 35 of the Landlord and Tenant Act 1987. Accordingly I do not need to consider the arguments made about the interpretation of the lease, which is not in dispute.

12. The FTT, in exercise of its jurisdiction to determine a reasonable service charge, reduced the charge in each case to one thirty-first of the expenditure.

13. It is the appellant's case that the demands are invalid (and therefore the jurisdiction under section 27A does not arise) because they do not comply with the lease, in that they demand one twenty-fourth of the landlord's expenditure instead of one thirty-first.

14. In support of his argument Mr Bradshaw relies upon *Brent London Borough Council v Shulem B Association Limited* [2011] EWHC 1663 (Ch).

15. In *Shulem B* a landlord brought a claim against a tenant to recover unpaid service charges in respect of an extensive programme of work. The tenant relied upon section 20B of the Landlord and Tenant Act 1985, which requires demands for service charges to be made within 18 months of the expenditure being incurred (unless the tenant is given notice within that period that the expenditure has been incurred and that charges will be made in the future). The tenant applied for the claim to be struck out on the basis what the landlord said was a demand was not a valid demand

16. So the issue (as in this appeal) was not whether the service charge in question was reasonable, but was whether it had actually been demanded. If it had not, there could be no claim by the landlord (whether or not the charges were reasonable) because of the operation of section 20B.

17. The tenant said the demand, on which the landlord relied, was not valid because the lease entitled the landlord only to recover service charges once expenses had been incurred; there was no provision for the recovery of estimated service charges, with arrangements for balancing later, such as are typical in modern leases. An estimate of the cost had been given in 2004 before the work was done; once it had been completed, in February 2006, the landlord wrote to the tenant: "The actual costs have not been calculated as yet therefore this invoice is based on the estimated costs that you were sent with the section 20 notice", and charged the sum notified in 2004. A later demand for the actual cost was made, but it was outside the 18 months specified in section 20B.

18. Morgan J concluded, at paragraph 52, that the letter of February 2006 did not comply with the requirements of the lease and was therefore not a valid demand that could stop time running for the purposes of section 20B.

19. Mr Bradshaw argues that Morgan J held that while minor errors in a demand would not invalidate it, fundamental errors such as the one in question would. An example of a fundamental error given by Morgan J was the demanding of a sum due in respect of a different building, for which this tenant was not liable. By contrast, an arithmetical error in calculating the correct proportion of expenditure on the estate for which this tenant was liable would not have been a fundamental error; but asking her to pay the wrong proportion is outside the terms of the lease and invalidates the demand.

20. As Mr Beaumont points out, *Shulem B* did not decide that minor errors can be corrected while fundamental errors will invalidate a demand. *Shulem B* was about the circumstances where what is said on the face of a demand will invalidate it. A demand that says on its face that it is a demand for a contribution towards building the landlord's boat is not a service charge demand. A demand that says it is for service charges in respect of building A, addressed to a tenant whose lease makes her liable only for charges in respect of building B, is not a valid demand for service charges for building B.

21. Morgan J started from the proposition that the validity of the demand depends upon what the lease says. In *Shulem B* the relevant clause in the clause 2(6), which required the lessee to pay a proportion of the expenses incurred in relation to specified matters. At paragraph 40 Morgan J said:

> "*As a matter of form*, the demand must relate to the specified matters for which a charge may be made and a demand which *on its face* relates to other matters will not be valid in point of form, quite apart from the lessor having no entitlement to charge for those other matters. I can illustrate this point with an example. The specified matters include works to the building of which the flat forms a part. Accordingly, the specified matters do not include works to another building. If the lessee of a flat in building 1 was served with a demand to pay a proportion of the lessor's expenses of repairing building 2, in my judgment, that would not be a valid demand pursuant to clause 2(6) of the relevant lease and, in addition, the lessor would not be entitled to recover the expenses of the works to building 2 from the lessee of a flat in building 1." (emphasis added)

22. Clause 2(6) required payment of a proportion of the landlord's expenses, to be determined by the lessor's surveyor in case of dispute. At paragraph 41 Morgan J continued:

> "… must the demand be for x% of £y or can a simple demand for £z suffice? It can certainly be argued that the demand must specify the amount of the proportion to enable the lessee to understand the proportion which is claimed and to be in a position to dispute it so that it can be referred to the lessor's surveyor for decision. On balance, I prefer the construction which requires the lessor to state the sum which he demands (as a due proportion of its expenses) without separately stating the amount of the proportion and the amount of the expenses."

23. In the present appeal, as we have seen, the demands simply stated £z. Only the budget calculation shows that £z was the wrong proportion. Mr Bradshaw says that that was a fundamental error that invalidated the demand. Mr Beaumont says that the demand was formally valid, but that the FTT then of course had jurisdiction under section 27A of the 1985 Act to determine what was payable, namely the correct proportion being 31%.

24. That Mr Beaumont is right can be seen from paragraph 43 of Morgan J's decision:

> "The final point which arises in relation to clause 2(6) relates to the correct treatment of a demand which is for a specified amount which is in excess of the lessor's true entitlement under clause 2(6). The amount demanded by a lessor may be too high for any number of reasons. The landlord may have made a mathematical error in computing the amount of its expenses or the due proportion or the result of multiplying one by the other. *The lessor may have included costs which are not recoverable under clause 2(6) although that fact does not appear on the face of the demand.* If, for whatever reason, the figure specified in the demand is in excess of the lessor's underlying entitlement, is the demand formally invalid? … In such a case, does the court dismiss the lessor's claim because there is no prior demand for the smaller sum as determined by the court or does the

> court give judgment for the smaller sum? In my judgment, the court should give judgment for the smaller sum on the basis that the original demand was formally valid but cannot entitle the lessor to recover the specified sum unless the lessor has an underlying entitlement under clause 2(6) to that sum."

25. Again, the emphasis is mine, and the sentence I have emphasised exactly matches the case here. Mr Bradshaw says that the emphasised sentence refers only to arithmetical errors, but that is manifestly incorrect; it is a separate example from those given in the previous sentence. In this appeal there is no formal invalidity on the face of the demands. It can be seen from the budget calculations, and it is admitted, that in fact the sums demanded are too high. The demands seek payment of costs that are not recoverable under the lease, being in excess of the proportion for which the tenant is liable; they are valid demands, and the FTT had jurisdiction under section 27A to permit the landlords to recover only what the lease entitled them to.

26. Mr Bradshaw resists this construction of *Shulem B* on the basis that it would encourage landlords to be unspecific in their demands. On the contrary, it encourages them to be precise, and it does nothing to detract from the FTT's jurisdiction to look at the detail of the charges and ascertain what is both payable and reasonable.

27. Accordingly this ground of appeal fails and the demands were valid – albeit that they were subjected to the FTT's jurisdiction under section 27A and the amount charged was reduced.

Issue 2: future demands and section 20B of the Landlord and Tenant Act 1985

28. Mr Bradshaw's second argument was that if the demands in issue in the appeal are found to be invalid, the Tribunal should determine that any fresh demands served by the respondents in respect of those years will be time-barred by section 20B (summarised at paragraph [ ] above), because the information given to the tenants so far is insufficient to comply with section 20B(2) (which enables the landlord to stop the clock by telling the tenants that the charges have been incurred and will be billed in the future).

29. The point does not arise, since I have decided that the demands in issue are valid. If I had found them to be invalid then I would nevertheless have declined to decide this point since it is not an appeal from a decision made by the FTT.

Conclusion

30. The demands for service charges from 2009 to 2018 were valid demands, and the appeal fails.

Judge Elizabeth Cooke

13 January 2020