Neutral Citation Number: [2024] UKUT 50 (LC)

Case No: LC-2023-328

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)
FTT REF: LON/00BK/2022/0143

Royal Courts of Justice

20 February 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – ADMINISTRATION CHARGE – recovery of costs as an administration charge when incurred "for the purpose of and incidental to the preparation and service of a notice under section 146 of the Law of Property Act 1925" – whether the issue of proceedings for a money judgment for unpaid service charges amounts to waiver of the right to forfeit for failure to pay those charges

BETWEEN:

PAOLO CLEMENTE

Appellant

-and-

MINDMERE LIMITED

Respondent

Flat 7,
154 Gloucester Terrace,
London, W2 6HR

Upper Tribunal Judge Elizabeth Cooke

Hearing date: 15 February 2024

Mr Daniel Wand for the respondent, instructed by William Heath & Co Solicitors.

The following cases are referred to in this decision:

Cornillie v Saha (1996) 28 HLR 561
Cussens v Realreed Limited [2013] EWHC 1229
London Borough of Tower Hamlets v Khan [2022] EWCA Civ 831

1.

Introduction

1. This is an appeal from a decision of the First-tier Tribunal ("the FTT") that administration charges in the sum of £15,363 would be reasonable and payable by the appellant, Mr Clemente, if demanded in respect of legal costs incurred in the FTT by his landlord, Mindmere Limited.

2. The appellant represented himself in the appeal and the respondent was represented by Mr Daniel Wand of counsel; I am grateful to them both.

The proceedings in the FTT

3. The appellant is the tenant of flat 7, 154 Gloucester Terrace, under a long lease granted in 1982. Mindmere Ltd owns the freehold of property comprising 67 flats at 142-168 (even) Gloucester Terrace and 9 – 15 (odd) Westbourne Terrace Mews, W12; the flats are all held on long leases and each of the tenants is a shareholder in Mindmere Ltd.

4. The appellant's lease contains provision for the tenant to pay service charges and ground rent. It also contains a covenant by the tenant at clause 3(g):

> "To pay all costs charges and expenses (including Solicitors' costs and Surveyors' fees) incurred by the Lessor for the purpose of or incidental to the preparation and service of a notice under Section 146 and/or 147 of the Law of Property Act 1925 notwithstanding forfeiture may be avoided otherwise than by relief granted by the Court."

5. On 7 October 2021 the respondent's solicitors sent to the appellant a letter stating that he was indebted to the respondent in the sum of £13,431.05 in respect of service charges, reserve fund contributions and ground rent; the letter said

> "We confirm that we are instructed with a view to serving a notice under section 146 Law of Property Act 1925."

6. No payment was made and on 27 October 2021 the respondent issued proceedings against the appellant in the County Court claiming service charges and ground rent. In his defence the appellant challenged the reasonableness and payability of the service charges and the proceedings, and therefore on 8 April 2022 Deputy District Judge Le Bas made an order that "The Claim be transferred to the First Tier Tribunal (Property Chamber)".

7. Following a number of procedural defaults in the FTT, on 17 January 2023 the appellant was debarred from disputing the service charges in issue. The FTT then conducted a hearing on 29 February 2023 and issued a decision on 3 April 2023. The service charges were found by the FTT to be reasonable and payable. The judge in the FTT, sitting as a judge of the County Court pursuant to judicial deployment arrangements, made orders about interest and costs.

8. The FTT then turned to the costs incurred by the respondent in the FTT. The FTT is a no-costs jurisdiction when determining the reasonableness and payability of service charges in its jurisdiction under section 27A of the Landlord and Tenant Act 1985. It may award costs, pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 when a party has behaved unreasonably but there was no

application for it to do so. However, the FTT considered the costs incurred by the respondent in the FTT and determined that the sum of £15,563 would be reasonable and payable if demanded as an administration charge pursuant to clause 3(g) of the lease, together with VAT if the respondent confirmed that it was unable to recover VAT as an input tax.

The appeal

9. The appellant applied for permission to appeal on a number of grounds. Some of them relate to decisions taken by the judge in the FTT sitting as a judge of the County Court, and I understand that he now has permission to appeal one or more of those decisions to a circuit judge. The Tribunal gave permission to appeal the FTT's determination that the sum of £15,563 would be reasonable and payable if demanded as an administration charge, on the ground that in issuing proceedings in the County Court for payment of ground rent and service charges Mindmere Ltd had waived its right to forfeit the lease for non-payment of the same and so could no longer rely upon clause 3(g) to recover its costs.

10. To waive the right to forfeit a lease means to give it up by choosing to do something incompatible with forfeiture. It is well-established that if a landlord demands rent that falls due after a breach of covenant by the tenant, it has waived the right to forfeit for that breach because it has chosen, or elected, a course of action that can only be consistent with the lease continuing in effect and therefore not being forfeited.

11. In considering the issue in the appeal it is helpful to begin with the relevant statutory provisions.

12. Section 81 of the Housing Act 1996 says:

> "(1) A landlord may not, in relation to premises let as a dwelling, exercise a right of re-entry or forfeiture for failure [by a tenant to pay a service charge or administration charge unless—
> (a) it is finally determined by (or on appeal from) [the appropriate tribunal] or by a court, or by an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, that the amount of the service charge or administration charge is payable by him, or
> (b) the tenant has admitted that it is so payable."

13. The effect of that provision is that where service charges have not been paid, in breach of covenant, a landlord cannot go straight to the service of a section 146 notice as a prelude to forfeiture proceedings, It must first obtain a decision that the charges are payable.

14. Section 81 expressly provides for the landlord to obtain that decision from a court or a tribunal. So whilst the usual course of action would be to apply to the FTT, in its jurisdiction pursuant to section 27A of the Landlord and Tenant Act 1985, for a determination that the charges in question were reasonable and payable, the landlord might equally apply to the County Court for a declaration to that effect, as did the landlord in *Cussens v Realreed Limited* [2013] EWHC 1229.

15. The question in this appeal is whether it is equally open to the landlord to apply to the County Court for a money judgment, or whether that would amount to a waiver of the right to forfeit for the breach.

16. At the hearing the appellant argued that the respondent by seeking a money judgment in the County Court had elected to pursue that remedy instead of forfeiting the lease.

17. Mr Wand for the respondent took the Tribunal through the relevant statutory provisions, including not only section 81 of the Housing Act 1996 but also the corresponding provision relating to forfeiture for breaches of covenant other than failure to pay a service charge is section 168 of the Commonhold and Leasehold Reform Act 2002. Like section 81, it envisages that the decision that the landlord needs before it can serve a section 146 notice can be obtained from either the FTT or the County Court.

18. Mr Wand observed that there appears to be no decision directly on the point in issue. But two cases contain helpful comments. *Cussens* (see paragraph 13 above) was about breaches of a covenant relating to the use of a flat, and the appeal was about the source of the County Court's jurisdiction to make a declaration that the covenant had been breached. The Court of Appeal pointed out at paragraph 17 that one way the landlord could obtain the determination it needed pursuant to section 168 of the 2002 Act was to bring an action in damages for breach of covenant:

> "The determinations of breach made in [the landlord's proceedings for a declaration] are effective under section 168 of the 2002 Act, just as they would have been had the landlord (as it could have done) claimed damages (whether nominal or not) for the tenant's breach of the covenants or sought an order to restrain them."

19. The point of obtaining a determination of breach under section 168 is as a prelude to forfeiture; here the Court of Appeal was saying that it regarded a declaration as equally effective for that purpose, and likewise an action for damages – so clearly it did not regard an action for damages, in that context, as a waiver of the right to forfeit.

20. More pertinently, *London Borough of Tower Hamlets v Khan* [2022] EWCA Civ 831 was an appeal arising from failure to pay service charges. The landlord had done exactly as has Mindmere Ltd in the present appeal and issued proceedings in the County Court for a money judgment for service charge arrears in order to obtain the determination needed pursuant to section 81 of the 1996 Act. The issue before the Court of Appeal was the extent of the costs recoverable pursuant to a clause very similar to clause 3(g) in the present appeal, and waiver was not an issue; but it is helpful to note that there was no suggestion that the issue of the County Court proceedings might amount to a waiver of the right to forfeit.

21. Turning to the nature of waiver, Mr Wand referred me to the relevant paragraphs of *Woodfall, Landlord and Tenant*, at paragraph 17.092 and following. Again there is nothing directly on the point in issue in the appeal, but at 17.097 the learned authors say:

> "The act relied on as constituting waiver must amount to a recognition of the continued existence of the tenancy."

22. In *Cornillie v Saha* (1996) 28 HLR 561, for example, a flat had been sublet in breach of covenant, The landlord issued proceedings to enforce his right to access the flat in question, and that was found to be an unequivocal demonstration that the landlord regarded the lease as continuing and therefore waived the right to forfeit. Here, by contrast, Mr Wand argued, the landlord had not done that. The letter before claim

(paragraph 5 above) made the landlord's intention clear, and the landlord made no demands for rent or service charges after that. Had it demanded, or sued, for rent or service charges falling due after that date then indeed it would have waived the right to forfeit for the failure to pay the service charges falling due earlier, but that did not happen.

23. Mr Clemente in response was unable to point to anything that made the procedural steps taken by the landlord in *London Borough of Tower Hamlets v Khan* different from those in the present case. He suggested that perhaps the landlord in that case, being a social landlord, was in a different position; but that is not the case. He sought to re-open a number of points on which permission to appeal had not been given, and which are of no assistance to him in this appeal.

Conclusion

24. It is perhaps curious that this point has not arisen for decision before; as Mr Wand said, there is no direct authority on the point and nothing in the textbooks. But it is significant that in *London Borough of Tower Hamlets v Khan* the point was not taken and did not trouble the Court of appeal. It is also significant that an action for damages for a breach of a covenant other than one to pay service charges does not appear to amount to waiver of the right to forfeit for that breach.

25. Accordingly I conclude that the pursuit of a money judgment, for service charges is not a waiver of the right to forfeit for failure to pay those charges, and therefore the appeal fails.

Upper Tribunal Judge Elizabeth Cooke

20 February 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.