UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2016] UKUT 0367 (LC)
UTLC Case Number: LRX/140/2015

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

IN THE MATTER OF AN APPEAL AGAINST THE DECISION OF THE FIRST TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY) MADE ON 6 OCTOBER 2015

LANDLORD AND TENANT – service charges – fair and proper proportion of service charge – one formula applied for current year but FTT applying different test for earlier yeas on grounds of fairness – appeal allowed

BETWEEN

(1) OGNIAN AVGARSKI
(2) DARINKA AVGARSKA **Appellants**

and

ALPHABET SQUARE MANAGEMENT COMPANY LIMITED **Respondent**

Re: 63 Alphabet Square, Hawgood Street, London E3 3RT

Before :**His Honour Judge John Behrens**

Sitting at: Royal Courts of Justice, Strand, London WC2A 2LL
on
28 July 2016

Harriet Holmes (instructed by the Bar Pro Bono Unit) for the Appellants
The Respondents did not appear and was not represented.

The following cases are referred to in this decision:

Conway and others v Jam Factory Freehold Ltd [2013] UKUT 0592 (LC)

Arrowdell Ltd v Coniston Court (North) Hove Limited [2007] RVR 39,

Zermalt Holdings SA v Nu-Life Upholstery Repairs Limited [1985] 2 EGLR 14,

Irwell Valley Housing Association v O'Grady [2015] UKUT 310 (LC).

DECISION

Introduction

1. This is an appeal against part of a decision of the First Tier Tribunal Property Chamber (Residential Property) ("the FTT") dated 6 October 2015. The decision concerned an application made by the Respondent pursuant to s.27A of the Landlord and Tenant Act 1985 which related to the service charges payable by the Appellants for their flat ("the Flat") at 63 Alphabet Square, London E3 3RT for the years 2010/2011 to 2015/2016.

2. The Flat is one of 33 units on an estate known as 'Alphabet Square'. It is a one-bedroomed flat within a building known as 'Link Block' ("the Building"), and is one of the smallest units on the estate being some $50m^2$ in size. On the estate there are 2 flats with an area of 50 m^2, 4 flats with an area of 70 m^2, 3 flats with an area of 75 m^2, 3 flats with an area of 85 m^2, 1 flat with an area of 110 m^2, 12 flats with an area of 115 m^2, and 7 flats with an area of 120 m^2.

3. Under the terms of their lease the Appellants were required to pay:

> A fair and proper proportion (to be determined by the Surveyor for the time being of the Lessor such determination to be final and binding on the parties hereto) of the Service Charge.

4. Prior to the FTT's Decision, the Respondent considered a "fair and proper proportion" of the service charge due under the Lease was $1/33^{rd}$ of the service charge or 'equal shares', there being 33 units on the estate at least when the estate was built. In effect, the total service charge costs across the estate were being divided equally according to the number of units believed to be on the estate.

5. The Appellants considered the equal shares approach to be manifestly unfair and not a "fair and proper proportion". At the hearing before the FTT, the Appellants proposed two mechanisms for apportioning the service charge:

1. A contribution based upon the floor area of each demise – the "floor area" approach;
2. A contribution based upon the respective floor area of each demise but refined so that different percentages were paid by different sections of the estate – the "multi-schedule" approach.

6. In paragraph 51 of its decision the FTT concluded that the "multi-schedule" formula was the appropriate one to determine what was fair and reasonable for the years 2015/2016 and for future years. The effect of that decision is the Appellants are liable to pay 1.53% of the service charge costs in respect of the estate, 8.26% of those costs incurred in respect of Block F/Link Block on the estate, and 2% in respect of any car parking space but 0% in respect of Blocks A and E.

7. There is no appeal by the Respondent against that decision.

8. However, in paragraph 54 of the decision the FTT refused to require the Respondent to recalculate the Appellants' proportion for the years 2012/2013 to 2014/2015[1]. In the result the Appellants would still have to pay 1/33rd of the service charge for all periods prior to 1 April 2015.

9. On 16 November 2015 the FTT granted the Appellants permission to appeal on the ground that it was arguable that the FTT was wrong not to recompute the service charges payable for the years prior to 2015 in accordance with the "multi-schedule" formula.

10. On 16 February 2016 the Respondent informed this Tribunal that it did not intend to participate in the appeal. It did not appear at the hearing.

11. As noted above the Appellants were represented by Ms Holmes acting on a pro bono basis. I should like to express my gratitude to her publicly. She produced a clear and extremely helpful skeleton argument. Her oral submissions were equally clear and concise during which she demonstrated a mastery of the case.

The decision of the FTT

12. The reasoning of the FTT can be seen from paragraphs 43 and 54 of the decision. In paragraph 43 the FTT said:

> Each lessee has a share in [the Respondent] and appoints the directors who are also lessees. It would not assist any of the lessees including these tenants were we to reach a decision the effect of which would be to force [the Respondent] into insolvency. We have regard to the decision of the deputy President in *Conway and others v Jam Factory Freehold Ltd* [2013] UKUT 0592 (LC). Albeit on a separate issue (costs under Section 20C), any tribunal must be mindful of the practical consequences of any decision it reaches.

13. In paragraph 54 the FTT gave 4 reasons for its decision:

1. It would be impossible for the Tribunal to calculate what the tenant's contribution would be under the "multi-schedule" formula.

2. Even if it had been possible to calculate the Tenant's contribution it would have caused an administrative nightmare for [the Respondent] to backdate it. Other lessees could have argued that their shares should be recomputed.

3. The application had not been brought promptly by the Appellants. Rather they withheld the service charge and permitted the arrears to accumulate. The method suggested by the

[1] It is not clear why the FTT did not deal with the years 31/3/2011 and 31/2012. By inference it would have adopted the same approach in respect of those years.

Appellants (the floor area formula) is no fairer than the method suggested by the Respondent.

4. It is not the role of the FTT to create an administrative nightmare for the Respondent and other lessees. It is required to determine cases fairly and justly having regard to the interests of all parties affected by the decision.

Grounds of Appeal.

14. Ms Holmes complains that the case referred to in paragraph 43 was not presented to either party for comment, nor was the application of that case discussed with the parties. Such an approach has been the subject of criticism in the following cases, has itself formed a ground of appeal, and has led to tribunal decisions being overturned: see, *Arrowdell Ltd v Coniston Court (North) Hove Limited* [2007] RVR 39, *Zermalt Holdings SA v Nu-Life Upholstery Repairs Limited* [1985] 2 EGLR 14, and *Irwell Valley Housing Association v O'Grady* [2015] UKUT 310 (LC).

15. She submits that if the Appellants had been given an opportunity to deal with the suggestion that the Respondent would be forced into insolvency she would have done so. First, she pointed out that there was no suggestion in Mr Tamuta's evidence or in his submissions that the Respondent would be forced into insolvency. Second, she drew my attention to the Respondent's latest accounts which show net assets of £62,177 including cash in bank in hand of £39,915. The adjustments for which she contended were of the order of £5,000. Third, she pointed out that as part of the service charge there was a reserve fund. Fourth, she drew my attention to the statement of account which showed that as at the date of the hearing before the FTT the Appellants owed the Respondent over £7,700 in respect of withheld service charge. The effect of the adjustment would be to reduce this debt rather than to force the Respondent into insolvency.

16. In my view there is force in these criticisms. In my view the FTT should not have attached any weight to the possibility of the Respondent's insolvency without evidence and without giving the Appellants the opportunity to deal with the suggestion. I accept Ms Holmes's submission that there was no evidence to support the suggestion.

17. Ms Holmes also criticises the reasoning in paragraph 54 of the decision. She accepts that the FTT did not have the material to calculate the Appellants contribution for the years before 2015. That however does not make the old method a fair and proportionate share. All it had to do was direct the Respondent to recalculate the Appellants' liability for the years before 2015 in accordance with the "multi-schedule" formula.

18. Ms Holmes submitted that there was no evidence before the FTT which entitled it to conclude that it would have been an administrative nightmare to backdate the Appellants' contribution. There was nothing in Mr Tamuta's statement or submission to support that finding. There was no suggestion that the individual figures for the previous 5 years were not available. Furthermore, the FTT acknowledged (in paragraph 51(ii)) that at least for the future the additional administration involved in the "multi-schedule" formula was "modest".

19. Ms Holmes did not accept the criticisms of the Appellants in paragraph 54(iii) of the decision. She drew my attention to paragraphs 6 to 9 of Mr Avgarski's witness statement which explained the reason for his actions. In any event it is difficult to see how the interpretation of the words "a fair and proper proportion of the service charge" can depend on the date when an application is made to the FTT.

20. In my view there is force in these criticisms. I do not think the FTT was entitled to find that the backdating of the Appellants' contributions would cause an administrative nightmare. Equally I do not see how (in the light of the finding in paragraph 51 of the decision) it can be said that the apportionment for the years before 2015 which was based on the "equal share" formula was a fair and proper proportion of the service charge. In my view the FTT should have ordered the Respondent to recalculate the contributions from 1st April 2010 in accordance with the "multi-schedule" formula.

21. It is true that it is possible that there might be other claims and it is also possible that the Respondent might not be able to recover any shortfall from tenants who had underpaid under the service charge provisions in the lease. However, that is a consequence of the Respondent adopting a formula which did not reflect the terms of the lease. It is difficult to see why that should be laid at door of the Appellants.

Conclusion

22. Ms Holmes drew my attention to s 12 of the Tribunals Courts and Enforcement Act 2007 and invited me to exercise my powers under s 12(2)(b)(ii) and to remake the decision. She invited me to read a further report (dated 14 July 2016) from Mr Peck which attempts to suggest the appropriate figures. I decline to follow that course for two reasons. First the Respondent has not had an opportunity to see or comment on this further report. Second, it is clear from the report that Mr Pack is not in a position to produce figures based on the "multi-schedule" formula. He has produced figures based on the floor area formula and made some attempt at adjustment in relation to the costs of the balcony. However, he has not been able to produce a report based on the correct formula.

23. The sums involved in this dispute are relatively small. Mr Pack's report shows what is likely to be the approximate sum to which the Appellants are entitled. I would hope that common sense would prevail and the parties can agree a figure in relation to the past credit in respect of the Appellants' contributions for the period commencing on 1 April 2010.[2]

24. Accordingly, the Appeal will be allowed. The Respondent is to recalculate the Appellants' contribution to the service charge for the years between 1 April 2010 and 31 March 2015 in accordance with the "multi-schedule" formula and to give appropriate credit to the Appellants in respect of any reduction to which they are entitled. In addition, there will be an order under s 20C of the 1985 Act in respect of the costs of the appeal.

[2] At the hearing before me it became clear that the Appellants were not entitled to any adjustment for the year from 1 April 2009 to 31 March 2010.

Dated 8 August 2016

His Honour Judge Behrens