UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charge – whether any evidence to justify finding that window cleaning for 2009 and 2010 and gardening for 2009 were subject to a QLTA – whether costs of defending separate threatened county court proceedings were recoverable under the lease – whether the Ft-T justified in rejecting claim – whether such costs within s 20C of the 1985 Act – Appeal allowed – Application for order under s20C in respect of costs of appeal refused.

IN THE MATTER OF AN APPEAL AGAINST THE DECISION OF THE FIRST TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY) MADE ON 10 MAY 2016

BETWEEN:

BRETBY HALL MANAGEMENT COMPANY LIMITED **Appellant**

and

CHRISTOPHER PRATT **Respondent**

Re: Apartment 17,
Bretby Hall,
Bretby,
Burton Upon Trent DE15 0QQ

Before: **His Honour John Behrens**

Sitting at: Royal Courts of Justice, Strand, London WC2A 2LL
on
10 February 2017

Simon Allison (instructed by Nelsons Solicitors Limited) for the Appellant.
Oliver Phillips (instructed by Brady Solicitors) for the Respondent.

The following cases are referred to in this decision:
Arnold v Britton [2015] AC 1619
The Jam Factory [2013] UKUT 0592

DECISION

Introduction

1. This is an appeal against a relatively small part of a detailed decision made by the First Tier Tribunal (Property Chamber) ("the Ft-T") on 10 May 2016. The decision extends to 26 pages and 92 paragraphs together with a 20 page Scott Schedule comprising some 90 items of dispute. Bretby Hall Management Company Ltd ("BHMC") has been granted permission to appeal against the ruling on 4 of the items in the Scott Schedule and the ruling on the application under s 20C of the Landlord & Tenant Act 1985 ("the 1985 Act"). In addition, it will be necessary to deal with an application by Mr Pratt under s 20C of the 1985 Act in respect of the costs of the appeal.

2. Bretby Hall is a former Grade II listed country house which has now been converted into 30 apartments of varying sizes. There is car parking within the central courtyard and also outside the main building. Houses have also been constructed in the grounds of the Hall.

3. Mr Pratt is the tenant of Apartment 17 under a lease dated 11 April 2003 for a term of 125 years at a ground rent of £150 p.a. BHMC is a party to the lease and described as the Manager and the Estate Manager. It is plain from Recital (3) to the lease that the management of the property should be the responsibility of BHMC and that Mr Pratt would be a member of BHMC. As Mr Allison pointed out this is a case where the whole of BHMC's income comes out of the service charges recovered under the leases of the apartments. It has no other sources of income.

4. There has been a long running dispute between the parties, which spans many years and different issues. The issues before the Ft-T related to: (a) the reasonableness of the service charge imposed by BHMC in service charge years 2009-2011 and 2013-2015; and (b) whether BHMC complied with the consultation requirements imposed by s 20 of the 1985 Act in those years. Additionally, as already noted, Mr Pratt made a s 20C application.

5. Permission to appeal has been granted in respect of items 6, 7, 17 and 84 of the Scott Schedule and in respect of the s 20C ruling.

6. Before the Ft-T Mr Pratt was represented by a solicitor, Mr Sam Andrews and BHMC acted as litigants in person. Before this Tribunal both parties were represented by Counsel.

Items 6, 7 & 17 of the Scott Schedule

7. The Ft-T decided that Mr Pratt's contribution to items 6, 7 and 17 in the Scott Schedule should be limited to the statutory cap of £100 per item on the basis that each of those costs was

subject to a Qualifying Long Term Agreement ("QLTA") and that the statutory consultation requirements had not been complied with. The items are as follows:

Item	Description	Year
6	Window Cleaning	2009
7	Gardening/Grounds Maintenance	2009
10	Window Cleaning	2010

8. It was common ground between the parties that there had been no consultation in respect of any of the three items. Thus, the issue before the Ft-T was whether there was in fact a QLTA in respect of any of them.

9. It was also common ground between the parties that there had been QLTAs in respect of gardening and grounds maintenance between January 2010 and 2012, and a further contract between 2013 and 2015. Pursuant to an order for disclosure BHMC disclosed the 2013 contract or a document evidencing its terms. It was BHMC's case that the contract for 2009 was an "ad hoc" contract and not a QLTA. No documents were disclosed for this period. It was BHMC's case that no such documents existed.

10. The position in relation to the window cleaning was similar. There was a contract for the period between May 2011 and April 2013. It was common ground that this was a QLTA and was duly disclosed by BHMC. It was BHMC's case that the contracts for 2009 and 2010 were "ad hoc" contracts and not QLTAs.

11. The pleaded case in respect of these items was contained in the Scott Schedule. Mr Pratt simply stated that *[BHMC] to confirm whether contracts are Qualifying Long Term Agreements;* BHMC replied in each case that the contract *was not at this time a [QLTA]*.

12. No additional evidence was submitted at the hearing. Furthermore, there were no specific submissions addressed to the Ft-T in relation to these 3 contracts.

13. The Ft-T gave no reasons in the Scott Schedule other than to refer to paras 74 and 75 of its decision. This is a typographical error for paragraphs 75 and 76 but these paragraphs do not in fact assist. The relevant findings of fact are at paragraphs 75.4 and 75.5 of the decision. These refer to the written contracts for later years but make no reference to the years in issue. In the result the decision makes no finding as to the nature of the contract or why the Ft-T have decided

it is a QLTA. Furthermore, there was no evidence filed by either side justifying the inference that these were QLTAs. The matter was not referred to in cross-examination.

14. Although the Ft-T agreed to review this part of its decision it declined to alter it or to give any substantive reasons. It merely said that its finding was "*entirely consistent with the evidence which was placed before the Tribunal by the Applicant and the submissions which were made*".

15. It is, to my mind, quite understandable that in a case involving as many detailed issues as this that the Ft-T might have thought that the long term contracts to which they were referred covered the periods referred to in these 3 items. However, it is quite clear that the Ft-T were mistaken about this. They have given no further reasons why these items were the subject of QLTAs and there was no additional evidence or submissions on the point. In those circumstances the decision cannot stand and must be set aside.

16. The sums involved in these 3 items are small. If the parties are unable to resolve them by agreement the matter must be remitted to the Ft-T to remake the decision on these 3 items in the light of such further evidence, cross-examination and submissions as the parties choose to adduce.

Item 84 of the Scott Schedule

17. This item was a claim by BHMC to include as part of the service charge the sum of £11,100 in respect of BHMC's legal fees in a dispute with Mr and Mrs Pratt. The Ft-T disallowed the item in its entirety.

18. There was significant material about this item in the submissions, at the hearing, in the decision itself and in post decision correspondence.

Terms of Lease

19. By paragraph 16 of the General Costs section to the Sixth Schedule BHMC can recover through the service charge fund:

> "All other expenses (if any) incurred by the Manager in and about the maintenance and proper and convenient management and running of the development including in particular but without prejudice to the generality of the foregoing any expense incurred in rectifying or making good any inherent structural defect in the Building or any other part of the development (except insofar as the cost thereof is recoverable under any insurance policy for the time being or from a third party who is or may be liable therefor) and interest paid on any money borrowed by the Manager to defray any expenses incurred by it and specific in this Schedule any costs incurred by the Manager in accordance with paragraph 4 of the Seventh Schedule and **any legal or other costs reasonably and properly incurred by the Manager and otherwise not recovered in taking or defending proceedings (including any arbitration) arising out of any lease of any part of the Development** or any claim by or

against any lessee or tenant thereof or by any third party against the Manager as owner lessee or occupier of any part of the Development." [emphasis added]

Background

20. The background to the dispute is set out in some detail in a pleading at pp 920 – 924 of Bundle 4 and in paragraphs 27 – 40 of Mr Pratt's witness statement dated 26 October 2015. A short summary of the background is:

1. Mr Pratt was a director of BHMC between 2006 and 2010 when he resigned as a result of disagreements with his fellow directors.

2. In November 2011 Mr Pratt gave notice of his intention to challenge the service charge through a review carried out by a surveyor – Mr Edwards. This eventually led to a dispute over Mr Edwards's fees which is alleged to have cost BHMC £1,300.

3. In September 2012 Mr Pratt sought the appointment of a further surveyor - Mr Corns – to examine the service charge challenge. No agreement was reached between BHMC and Mr Pratt as to the terms of reference of Mr Corns's appointment. At no stage did BHMC agree to pay any part of Mr Corns's fees.

4. On 31 March 2014 Mr Corns invoiced Mr Pratt £11,664 and having received payment from Mr Pratt published a document outlining the conclusion of his enquiries. One of the conclusions was that BHMC should pay Mr Pratt the £11,664 and should also credit his service charge account with the relevant proportion of the service charge that he had disallowed.

5. Mr Pratt sought to recover the £11,664 from BHMC. In so doing he instructed solicitors who entered into correspondence with solicitors instructed by BHMC. On 8 September Mr Pratt's solicitors sent BHMC's solicitors a formal letter of claim including a draft Particulars of Claim which were to be issued in the County Court. The basis of the claim was paragraph 4 of 7th Schedule of the Lease which was said to contain an arbitration agreement. It is clear from the prayer for relief that Mr Pratt claimed:

    1) The sum of £11,664

    2) A declaration that Mr Pratt was entitled to have the sums disallowed in Mr Corns's determination credited to his service charge.

    3) An order permitting Mr Pratt to set off the sums disallowed against future service charges.

6. In the event no proceedings were ever instituted by Mr Pratt. However, BHMC incurred substantial legal costs in relation to the dispute. These comprise Counsel's fees of £2,000 plus £400 VAT and Solicitor's fees of £7,250 plus £1,450 VAT making a total of £11,100 inclusive of VAT.

The pleaded cases before the Ft-T

21. BHMC sought to include the £11,100 as an item of service charge to be divided between the tenants in accordance with the proportions in their leases. It submitted that it fell fairly within paragraph 16 of the 6th Schedule.

22. Mr Pratt challenged the £11,100 in two ways. First he submitted that the matter fell within s 20C of the 1985 Act and could be disallowed accordingly. Second he submitted that the sums claimed were unreasonable. Although he referred to the Commonhold and Leasehold Reform Act 2002 it was common ground before me that the Ft-T had jurisdiction to consider the reasonableness of the claim under s 19 of the 1985 Act.

The proceedings before the Ft-T

23. It is common ground between the parties that at the hearing no further submissions were invited from the parties because the FtT informed the parties that it would invite further submissions from the parties once the rest of the issues had been determined.

The Determination of the Ft-T

24. In the event the Ft-T did not invite further submissions. It disallowed the claim for £11,100 in its entirety.

25. It dealt with the issue in paragraphs 58 – 65 of the Determination. In summary the Ft-T held that the agreement relied on by Mr Pratt and which was contained in paragraph 4 of the 7th Schedule was void as a result of s 27A (6) of the 1985 Act. The matters contained in Mr Corns's determination were matters that should have been determined by the Ft-T (under ss 27A (1) and (3)). It afforded no status to the report. It pointed out that it had not seen his instructions and that he had not been cross-examined.

26. The actual decision is contained in paragraph 64 which reads:

> It follows therefore that the fees of Mr Corns should not be included in the service charge. The proper forum for considering those fees is the County Court since paragraph 4 of the Seventh Schedule imposes a contractual provision on the parties that costs shall be borne by whomsoever the expert shall decide. Given that the fees were incurred in providing a determination that is of no practical benefit to the parties, because it contravened Section 27A (6), the fees were not reasonably incurred for the purposes of Section 19(1) (a) of the Act. Thus, as the Applicant has paid Mr Corns' fees and seeks to recover the same under the contractual provisions of the Lease from the Respondent, the jurisdiction for the resolution of that dispute lies with the County Court but for the purpose of this application, those fees are not recoverable as service charge item.

27. It is to be noted this paragraph appears to confuse two issues. The first is whether Mr Pratt can recover the £11,664 he paid to Mr Corns from BHMC. As the Ft-T said this was a matter for the County Court and not within its jurisdiction. The second was whether BHMC could include the sum of £11,100 which it spent in defending the proposed County Court proceedings as a service charge item. BHMC were not seeking to include Mr Corns's charges as a service charge item. They had not paid those charges and maintained they were not payable. The Determination does not address BHMC's actual claim at all.

The refusal of permission

28. In its letter seeking permission to appeal Mr Harper drew attention to the procedural ruling and made the point that the £11,100 costs incurred by BHMC were different from the modest costs incurred in the proceedings before the Ft-T.

29. On 6 July 2016 pursuant to a request from a case officer to provide more information Mr Harper enlarged on its submissions by exhibiting correspondence between the parties' respective solicitors between September 2014 and February 2015 including the draft Particulars of Claim referred to above.

30. The Ft-T did not agree to review its decision and refused permission to appeal. As already noted permission was granted by the Deputy President.

Discussion

31. Putting to one side the procedure adopted by the Ft-T, it is to my mind quite clear that the decision of the Ft-T must be set aside. For the reasons set out above the Ft-T appears to have been confused as to the nature of the claim and has not really addressed the question of whether the £11,100 is recoverable at all. If it is recoverable under the terms of the lease the Ft-T has not gone on to consider the extent to which it is reasonable within s 19 of the 1985 Act.

32. In the course of Counsel's submissions in this Tribunal it became clear that there were 2 issues which it would be convenient for me to decide. The first was whether the £11,100 was recoverable as part of the service charge under paragraph 16 of Schedule 6. If it is not so recoverable it is plain that there would be no point in remitting the matter to the Ft-T because there would be nothing to decide.

33. On behalf of BHMC Mr Allison drew my attention to the first part of the clause - *"All other expenses (if any) incurred by the Manager in and about the maintenance and proper and convenient management and running of the development."* He submitted that the costs incurred in defending threatened legal proceedings fell plainly within the generality of such a clause. He pointed to the subsequent words "*including in particular and without prejudice to the generality"*. Those words led him to submit that the examples that followed were examples and not an exclusive list. He pointed to the words referring to proceedings - and "*any legal or other*

costs reasonably and properly incurred by the Manager and otherwise not recovered in taking or defending proceedings (including any arbitration) arising out of any lease of any part of the Development". Whilst he accepted that Mr Pratt did not in fact commence proceedings, he submitted that the use of the proceedings in the clause was wide enough to include threatened proceedings.

34. He pointed out that (as was contemplated in the lease) BHMC's members were the individual tenants, and that the service charge was its only source of income so that there would be no way of recovering the costs outside the service charge. He therefore submitted that it was inconceivable that the parties could have intended that the reasonable costs incurred by BHMC should be recoverable if proceedings were actually commenced but not if they were merely threatened.

35. Mr Phillips submitted that as the proceedings were merely threatened the costs were not within the service charge.

36. I prefer the submissions of Mr Allison. The rules of construction are well-known and recently encapsulated in paragraph 15 of the judgment of Lord Neuberger in *Arnold v Britton* [2015] AC 1619:

> When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd *[2009] AC 1101*, para 14. And it does so by focusing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see Prenn *[1971] 1 WLR 1381*, 1384—1386; Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) *[1976] 1 WLR 989*, 995—997, per Lord Wilberforce; Bank of Credit and Commerce International SA v Ali *[2002] 1 AC 251*, para 8, per Lord Bingham of Cornhill; and the survey of more recent authorities in Rainy Sky *[2011] 1 WLR 2900*, paras 21—30, per Lord Clarke of Stone-cum-Ebony JSC.

37. To my mind the first part of the clause is wide enough to cover the costs of intended proceedings so it is unnecessary to decide whether they are also included within the example set out in the second part of the clause. It was, to my mind, plainly contemplated that the reasonable costs of managing the development should be recoverable under the service charge. Subject to the question of reasonableness the costs of defending threatened proceedings would seem to me to fall squarely within such a definition. I can think of no reason why the parties should have intended that the costs would only be recoverable under the service charge if proceedings were actually commenced.

38. The second question is whether the Ft-T could have disallowed these costs under s 20C of the 1985 Act. Section 20C provides, so far as is relevant, as follows:

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation tribunal or the First-tier Tribunal, or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to the county court;…

(ba) in the case of proceedings before the First-tier Tribunal, to the tribunal;

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to the county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

39. It is to be noted that the section is concerned with proceedings before a court, tribunal or arbitral tribunal. The application is to be made to the court, tribunal or arbitral tribunal where the proceedings are taking place (or the county court if they are concluded).

40. This is a case where there were no proceedings in respect of Mr Corns's fee. The threatened proceedings did not materialise and thus the jurisdiction under s 20C does not arise. Mr Phillips seeks to get round this difficulty by pointing to the alleged overlap between the threatened proceedings and the proceedings before the Ft-T. In my view he does not succeed. The costs incurred by BHMC were not incurred in relation to these proceedings before the Ft-T; rather they were in connection with a claim primarily for Mr Corns's fee which, as the Ft-T correctly pointed out was a matter for the County Court.

41. It follows that I agree that s 20C has no application to the costs incurred by BHMC. The matter does not, of course, end there. The reasonableness of the costs has been put in issue in Mr Pratt's pleading. This is plainly within s 19 the 1985 Act. It has not been determined. The matter must be remitted to the Ft-T to determine the extent to which the sums are reasonable.

Section 20C

In respect of the hearing before the Ft-T

42. In paragraph 91 of its decision the Ft-T determined that BHMC could only recover 25% of its total costs of the proceedings by way of the service charge. BHMC's costs were modest – only £200. Mr Pratt's percentage was 6.16%. Thus Mr Pratt's share of the service charge attributable to these costs would be just over £3. It may be that as a result of the success of this

appeal the Ft-T would be minded to increase the percentage to say 50%. That would only make a difference of another £3.

43. It is self-evident that it is disproportionate for this ground of appeal to be pursued as it would plainly cost more than £6 or even £12 to put the relevant material before the Ft-T and to argue about it.

44. In those circumstances BHMC (with some encouragement from this Tribunal) elected not to pursue this ground of appeal. It is accordingly dismissed.

In respect of the appeal

45. BHMC has incurred substantial costs in this appeal. It has instructed solicitors and Counsel. It points to the fact that it has no source of funds other than the service charge. Its costs in these proceedings are plainly within paragraph 16 of Schedule 6. Mr Allison submitted that I should not deprive BHMC of its right to claim a share of the costs from Mr Pratt.

46. I was referred to a number of cases where s 20C has been considered including the decision of the Deputy President in *The Jam Factory [2013] UKUT 0592* which contains a full review of relevant authorities. I shall not lengthen this judgment by setting out the lengthy passage from the report. I summarise what I take to be the principles:

1. The only principle upon which the discretion should be exercised is to have regard to what is just and equitable in the circumstances.

2. The circumstances include the conduct of the parties, the circumstances of the parties and the outcome of the proceedings.

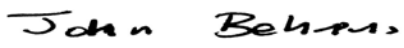
3. Where there is no power to award costs there is no automatic expectation of an order under s 20C in favour of a successful tenant although a landlord who has behaved unreasonably cannot normally expect to recover his costs of defending such conduct.

4. The power to make an order under s 20C should only be used in order to ensure that the right to claim costs as part of the service charge is not used in circumstances which make its use unjust.

5. One of the circumstances that may be relevant is where the landlord is a resident-owned management company with no resources apart from the service charge income.

47. This is a case where the appal has succeeded on almost all points. It has been opposed by Mr Pratt. It is a case where the landlord is a resident owned management company with no resources other than the service charge income. In my view it is just and equitable that Mr Pratt should bear his fair share of BHMC's costs of the appeal. It follows that I would refuse an order under s 20C of the 1985 Act in respect of the costs of the appeal.

Dated: 17 February 2017



Judge Behrens