

UPPER TRIBUNAL (LANDS CHAMBER)



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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – FTT PROCEDURE – whether applicant entitled to appoint a lay representative to conduct tribunal proceedings on its behalf – whether “conduct of litigation” before the FTT a reserved legal activity – whether lay representative an exempt person – s.22, Tribunals, Courts and Enforcement Act 2007 – ss. 13, 14, 18 Legal Services Act 2007 – rule 14, Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 – appeal allowed

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

BETWEEN:

BUTTERCUP BUILDINGS LIMITED

Appellant

-and-

AVON ESTATES (LONDON) LTD
SARIKA SHARMA
KIRAN RANMAL and PRIYESH RANMAL
MR PREMJI HALAI and MRS SAVITABEN HALAI
CAROL KUTAGAMPOLA and PATRICK KUTAGAMPOLA
MR E SCANLON and ALBERT DRAVINS
MAJOR ESTATES FINANCIAL SERVICES LTD
MR PINTU PATEL

Respondents

Re: Maison Alfort,
25 High Road,
Harrow Weald,
Middlesex HA3 5EL

Determination on written representations

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The following cases are referred to in this decision:

Agassi v Robinson (HM Inspector of Taxes) [2006] 1 WLR 2126

Allsop v North Tyneside Metropolitan BC (1991) 90 LGR 462

Gregory v Turner [2003] EWCA Civ 183

R (Factortame Ltd) v Secretary of State for Transport (No 8) [2003] QB 381

Rathbone v Bundock [1962] 2 QB 260

Introduction

1. This appeal raises a short question of practical importance for the conduct of proceedings in the First-tier Tribunal (Property Chamber) (the FTT) and in this Tribunal. It is this: is a party to proceedings before the FTT entitled to be represented in those proceedings by someone who is not an authorised person for the purpose of section 18, Legal Services Act 2007?
2. In this case the FTT has directed that the appellant company is not entitled to appoint its property management company to conduct service charge proceedings as its representative, and that all communications with the FTT and with the other parties concerning the proceedings must be conducted personally by a director of the appellant; nor will the FTT itself communicate with the appellant through its chosen representative. The FTT will allow the appellant to be represented by the management company at any hearing, but not at any earlier stage of the proceedings.
3. The proceedings in which the issue arises are an application under section 27A, Landlord and Tenant Act 1985 (LTA 1985) made by a landlord, Buttercup Buildings Ltd, for the determination of service charges payable by the long leaseholders of eight flats in a residential block in Harrow Weald known as Maison Alfort. In its application to the FTT the landlord nominated as its representative “KLPA & Company”, which it explained was a trading name of PL Estates Ltd, its managing agent.
4. After a case management hearing attended by Mr Kamlesh Kumar Anand, who is a director both of the landlord and of PL Estates Ltd, the FTT issued procedural directions in which it stated that it would not deal with KLPA & Company as the landlord’s representative because it was “not permitted to conduct litigation”. It recorded Mr Kumar Anand as the landlord’s representative and directed that, in his capacity as director of the landlord, he alone was entitled to carry out procedural steps on its behalf. The FTT provided fuller reasons for its decision on 6 April 2020 when it refused permission to appeal.
5. Permission to appeal was subsequently granted by this Tribunal, which has become aware of similar points being taken in other FTT proceedings, including the suggestion by one landlord that a group of tenants was not entitled to nominate one of their number as their representative for the purpose of communicating with the FTT.
6. None of the leaseholders of Maison Alfort chose to participate in the appeal. A substantial body of material was filed in support of the appeal by Mr Kumar Anand himself, but most of it was concerned with the issues in the main proceedings and very little was directly in point at this stage.

The relevant primary legislation

7. In England and Wales, the conduct of legal proceedings is regulated by primary legislation including the Legal Services Act 2007 (the LSA 2007) and, in tribunals, by the Tribunals,

Courts and Enforcement Act 2007 (the TCEA 2007). The TCEA 2007 obtained royal assent on 19 July 2007 and was the earlier of the two statutes to be enacted.

Tribunals, Courts and Enforcement Act 2007

8. The TCEA 2007 established the First-tier Tribunal and the Upper Tribunal (section 3(1)-(2)). It provided, by section 22(1), that there are to be rules “governing the practice and procedure to be followed” in those tribunals, to be called “Tribunal Procedure Rules”. By section 22(2) Tribunal Procedure Rules are to be made by the Tribunal Procedure Committee.
9. Part 1 of Schedule 5 to the TCEA 2007 makes “further provision” about the content of Tribunal Procedure Rules. Paragraph 1(2) of Part 1 states that “the generality of section 22(1) is not to be taken to be prejudiced” by what follows in that Part.
10. Part 1 then makes provision concerning a variety of matters which may be the subject of Tribunal Procedure Rules. Two of these are relevant to this appeal: paragraph 9 which deals with representation and paragraph 16 which is concerned with ancillary powers. They provide as follows:

“Representation

9. Rules may make provision conferring additional rights of audience before the First-tier Tribunal or the Upper Tribunal.”

“Ancillary powers

16. Rules may confer on the First-tier Tribunal or the Upper Tribunal, such ancillary powers as are necessary for the proper discharge of its functions.”

11. Part 3 of Schedule 5 to the TCEA 2007 deals with the process for making Tribunal Procedure Rules. By paragraph 28(5)-(6), rules made by the Committee and allowed by the Lord Chancellor are to be contained in a statutory instrument to which the Statutory Instruments Act 1946 applies as if the instrument contained rules made by a Minister of the Crown. The statutory instrument is subject to annulment in pursuance of a resolution of either House of Parliament.

Legal Services Act 2007

12. The Courts and Legal Services Act 1990 (the 1990 Act) introduced a single modern code to replace the diverse statutory and common law rules which had previously governed the provision of legal services (as Brooke LJ explained in *Gregory v Turner* [2003] EWCA Civ 183, at [50]). Section 27 of the 1990 Act contained specific restrictions on the right of audience before a court (section 27) and on the right to conduct litigation (section 28). These have been replaced in substantially similar terms by the LSA 2007.
13. Section 1 of the LSA 2007 sets out a series of “regulatory objectives” which the statute is intended to further. These include the objectives of protecting and promoting the public

interest; supporting the constitutional principle of the rule of law; improving access to justice; and protecting and promoting the interests of consumers.

14. Part 3 of the LSA 2007 is concerned with “reserved legal activities”. Those are defined to mean six specified activities listed in section 12. The first is the exercise of a “right of audience”. The second is the “conduct of litigation”.
15. By paragraph 2 of Schedule 2, a “right of audience” means the right to appear before and address a court, including the right to call and examine witnesses.
16. The “conduct of litigation” is defined by paragraph 4 of Schedule 2, as follows”

“4.(1) The “conduct of litigation” means–

- (a) the issuing of proceedings before any court in England and Wales,
- (b) the commencement, prosecution and defence of such proceedings, and
- (c) the performance of any ancillary functions in relation to such proceedings (such as entering appearances to actions).

(2) But the “conduct of litigation” does not include any activity within paragraphs (a) to (c) of sub-paragraph (1), in relation to any particular court or in relation to any particular proceedings, if immediately before the appointed day no restriction was placed on the persons entitled to carry on that activity.”

The “appointed day” for this purpose was 1 January 2010 (para.2, Schedule 2, LSA 2007 and SI 2009/3250).

17. The definitions of “rights of audience” and “conduct of litigation” each refer to any “court”. Section 207, LSA 2007 is an interpretation section containing definitions which are stated to apply “except where the context otherwise requires”. It defines “court” as including a tribunal that was a listed tribunal for the purpose of Schedule 7 to the TCEA 2007 immediately before that Schedule was repealed. Both the First-tier Tribunal and the Upper Tribunal were listed tribunals for that purpose (paragraph 25, Schedule 7, TCEA 2007).
18. Section 13, LSA 2007 provides that a reserved legal activity may only be carried on by a person who is “an authorised person” in relation to the relevant activity or who is an “exempt person” in relation to that activity. No other person may carry on a reserved legal activity and section 14 makes it an offence to do so. On conviction of such an offence a person may be sentenced to a term of imprisonment or a fine and may be liable for contempt of court.
19. Section 18 relates to authorised persons. An authorised person in relation to a reserved legal activity means a person authorised to carry on the relevant activity by an approved regulator, or a licensable body. Solicitors and barristers are some of the professionals who are authorised persons. It is not necessary to say more about authorised persons as it is not suggested that KLPA & Co is such a person.

20. Section 19 concerns exempt persons, a status explained in Schedule 3, LSA 2007. So far as the conduct of litigation is concerned, paragraph 2 of Schedule 3 identifies five separate categories of exempt person. In particular, a person is an exempt person for the purpose of carrying on any activity which constitutes the conduct of litigation in relation to any proceedings if the person is not an authorised person in relation to that activity, but either (a) has a right to conduct litigation “granted by a court” in relation to those proceedings, or (b) has a right to conduct litigation in relation to those proceedings “granted by or under any enactment”.

The relevant Tribunal Procedure Rules

21. The Tribunal Procedure Rules made under section 22, TCEA 2007 include the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (the 2013 Rules). Rule 14 deals with representation and provides as follows:

“Representatives

14.(1) A party may appoint a representative (whether legally qualified or not) to represent that party in the proceedings.

(2) If a party appoints a representative, that party must send or deliver to the Tribunal and to each other party written notice of the representative’s name and address.

(3) Anything permitted or required to be done by or provided to a party under these Rules, a practice direction or a direction may be done by or provided to the representative of that party except—

(a) signing a witness statement; or

(b) sending or delivering a notice under paragraph (2), if the representative is not a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the exercise of a right of audience or the conduct of litigation within the meaning of that Act.

(4) A person who receives due notice of the appointment of a representative—

(a) must thereafter provide to the representative any document which is required to be sent to the represented party, and need not provide that document to the represented party; and

(b) may assume that the representative is and remains authorised until receiving written notification to the contrary and an alternative address for communications from the representative or the represented party.

(5) At a hearing a party may be accompanied by another person whose name and address have not been notified under paragraph (2) but who, with the permission of the Tribunal, may act as a representative or otherwise assist in presenting the party’s case at the hearing.

(6) Paragraphs (2) to (4) do not apply to a person who accompanies a party under paragraph (5).”

22. Rule 14 distinguishes between a person who has been appointed by a party as their representative and whose name and address have been notified to the FTT and to each other party (rule 14(1)-(2)), and a person who accompanies a party at a hearing without having notified the FTT of their name and address in advance (rule 14(5)). A person in the former category can do everything which the party themselves could do, except signing a witness statement or giving the notice of their own appointment required by rule 14(2) (unless they are an authorised person for the purposes of the LSA 2007 in relation to the exercise of a right of audience or the conduct of litigation). A person who simply accompanies a party at hearing to act as their representative or assistant has a more limited role, and may not do any other thing on behalf of the party. Apart from this distinction, rule 14 does not differentiate between the role of a representative at a hearing and at other stages of the proceedings.

The FTT’s decision

23. The FTT noted that the application before it had been made on a form which “purported to appoint KLPA & Co as the representative for the Applicant”. The form had been signed by Mr Kumar Anand in his capacity as a director of the appellant, and he had submitted to the FTT that this was sufficient to appoint KLPA & Co as a representative in accordance with rule 14(1)-(2). The FTT disagreed, as it explained in paragraphs [7] to [14] of its decision.
24. The FTT held that KLPA & Co “cannot conduct the procedural aspects of the litigation on the Applicant’s behalf” including serving documents or corresponding with other parties or with the FTT. It explained that the 2013 Rules were secondary legislation and so could not go further than was permitted by the primary legislation under which they were made. It referred to paragraph 9 of Schedule 5, TCEA 2007, which enabled Tribunal Procedure Rules to make provision conferring additional rights of audience before the First-tier Tribunal. It explained that “rights of audience” were to be contrasted with “the conduct of litigation”. Both were reserved legal activities under section 12, LSA 2007, and could not be undertaken by someone who was not either authorised or exempt.
25. The FTT considered that KLPA & Co were not “authorised” or “exempt” under any provision of LSA 2007. They were entitled to exercise a right of audience before the FTT because rule 14 of the 2013 Rules permitted them to do so and to that extent rule 14 was in accordance with paragraph 9 of Schedule 5, LSA 2007 which allowed rules to confer “additional rights of audience”. But conducting litigation was different, as the FTT explained at paragraph [13]:

“There is no equivalent for the conduct of litigation to the provision of rights of audience under paragraph 9 of Schedule 5 to the Tribunals, Courts and Enforcement Act 2007. Therefore, the procedure rules made under that Act may not extend the right to conduct litigation. There is no other

statutory power permitting the extension of the right to conduct litigation beyond authorised or exempt persons.”

26. In my judgment the FTT misunderstood the relationship between the LSA 2007, the TCEA 2007 and the 2013 Rules.

The scope of section 22 and the validity of rule 14

27. The FTT correctly appreciated that its own powers, including its powers in relation to the recognition of representatives and the conduct of proceedings before it, are governed by the 2013 Rules made under section 22, TCEA 2007. But it concluded that rule 14 exceeded the rule making power and was invalid so far as it had the effect of allowing persons who were neither authorised nor exempt to “conduct litigation” before it.
28. As section 22(1) explains, the purpose of Tribunal Procedure Rules is to govern the practice and procedure to be followed in the First-tier Tribunal and in the Upper Tribunal. Although Schedule 5, TCEA 2007 identifies a number of specific matters which may be the subject of Tribunal Procedure Rules, it is important to appreciate that the provisions of Schedule 5 do not limit the scope of section 22. That is indicated by section 22(3) and paragraph 1(1) of Schedule 5, both of which refer to the Schedule making “further provision” about the content of Tribunal Procedure Rules. It is made explicit by paragraph 1(2), which stipulates that nothing in Part 1 of Schedule 5 is to be taken to prejudice “the generality of section 22(1).”
29. The position is therefore that any matter of practice or procedure in tribunals may be made the subject of Tribunal Procedure Rules. It is not necessary for there to be a specific power in Schedule 5 to authorise the making of a rule, since section 22 itself delimits the rule making power and Schedule 5 is expressly stated not to prejudice the generality of that power.
30. If that were thought to be too broad an interpretation of section 22, it is also relevant that paragraph 16 of Schedule 5 specifically authorises rules conferring on tribunals such ancillary powers as are necessary for the proper discharge of their functions.
31. I therefore disagree with the FTT’s conclusion at paragraph [13] of its decision that Tribunal Procedure Rules made under section 22, TCEA may not extend the right to conduct litigation simply because the conduct of litigation is not a matter mentioned in Schedule 5, TCEA 2007. In my judgment permitting a party to appoint a representative (whether legally qualified or not) is a matter of practice and procedure falling within section 22 and it is therefore a matter on which the Tribunal Procedure Committee is competent to make Tribunal Procedure Rules.
32. I do not think it is necessary to rely on paragraph 16 of Schedule 5, TCEA 2007 in support of this conclusion. If it was necessary to do so, I would regard a rule such as rule 14 of the 2013 Rules which allows the FTT to treat things done by a properly appointed representative as if they were done by a party, as conferring on the FTT an

ancillary power which is necessary for the proper discharge of its own functions. Such a rule is authorised by paragraph 16.

Is the conduct of proceedings before the FTT a reserved legal activity?

33. What are the consequences of this conclusion for the application of sections 13 and 14, LSA 2007 to the conduct of proceedings in tribunals?
34. When considering whether steps taken in tribunal proceedings amount to the “conduct of litigation” there does not appear to me to be any reason not to apply the wide definition of “court” in section 207 so that it includes tribunals.
35. The steps described in paragraph 4(1) of Schedule 2, LSA 2007 as the “conduct of litigation” are all steps which are necessary in tribunal proceedings. Those steps include issuing proceedings, prosecuting or defending them, or carrying out ancillary functions in relation to them.
36. Paragraph 4(2) contains an exemption. It provides that the “conduct of litigation” does not include any of the activities described in paragraph 4(1) in relation to any particular court or proceedings, if immediately before the appointed day no restriction was placed on the persons entitled to carry on that activity. A similar exemption from restrictions on those entitled to conduct litigation was contained in section 28(4), 1990 Act. The object and effect of these provisions was to preserve pre-existing rights to conduct litigation and to exempt them from the restrictions first introduced by the 1990 Act. It is necessary to consider whether either of these provisions apply to lay representation in proceedings under section 27A, LTA 1985 in particular or to proceedings in the FTT generally.
37. Section 27A, LTA 1985 confers jurisdiction on tribunals to make determinations concerning service charges and came into force on 30 September 2003. At the commencement of section 28, 1990 Act on 1 January 1991, section 27A did not exist. At that time, and until 31 August 1997, jurisdiction to make determinations about service charges lay with the County Court under section 19(4), LTA 1985. The general restrictions on the conduct of litigation in the County Court applied to those proceedings. There was therefore no relevant legacy right for lay representatives to conduct litigation under section 27A, LTA 1985 pre-dating the commencement of section 28, 1990 Act.
38. The First-tier Tribunal existed on the appointed day for the purpose of Schedule 2, LSA 2007 (1 January 2010) but the Property Chamber was not created until 1 July 2013.
39. From 1 September 1997 until 1 July 2013 (and therefore during the period immediately before the appointed day) proceedings concerning service charges under section 19 and later section 27A, LTA 1985 were conducted in leasehold valuation tribunals. Procedure was regulated by the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, made under powers conferred by Schedule 12, Commonhold and Leasehold Reform Act 2002.

40. Regulation 14 of the 2003 Regulations made provision for hearings and laid down that a person was entitled to appear before the tribunal at a hearing either in person or by an authorised representative, whether or not that representative was a barrister or a solicitor. The 2003 Regulations contained no other express provision concerning representation and there was no equivalent of rule 14(3) of the 2013 Rules providing that an authorised representative can do anything which a party is permitted or required to do. There would seem therefore to have been no relevant legacy right to conduct litigation pre-dating the commencement of section 13, LSA 2007 to which the exemption in paragraph 4(2) of Schedule 2 could apply.
41. My conclusion so far is that the “conduct of litigation” in the FTT in relation to applications under section 27A, 1985 Act is not excluded from the restrictions and penalties provided for by sections 13 and 14, LSA 2007 by virtue of any provision which applied to such proceedings on 1 January 2010 or 1 January 1991.
42. It follows that, at least in relation to proceedings under section 27A, LTA 1985, the conduct of proceedings in tribunals is a reserved legal activity which, by section 13, may only be carried on by a person who is either “an authorised person” or an “exempt person” in relation to the relevant activity. For a person who is not authorised or exempt to issue proceedings in a tribunal, to prosecute or defend such proceedings, or to perform “ancillary functions” in relation to them would be an offence under section 14.

Who is an exempt person?

43. There is no question in this case of KLPA & Co being an authorised person. But is it an exempt person?
44. Schedule 3, LSA 2007 classifies exempt persons by reference to the different reserved legal activities. Paragraph 2 of Schedule 3 lists five ways in which someone may be an exempt person for the purpose of the conduct of litigation. Of relevance to this appeal, a person is an exempt person for the purpose of carrying on any activity which constitutes the conduct of litigation in relation to any proceedings if the person is not an authorised person in relation to that activity, but either has a right to conduct litigation “granted by a court” in relation to those proceedings (paragraph 2(2)), or has a right to conduct litigation in relation to those proceedings “granted by or under any enactment” (paragraph 2(3)).
45. The first of the two alternatives can be disregarded because the FTT has no inherent jurisdiction to grant a right to conduct litigation. It can only act in accordance with the 2013 Rules.
46. But there is no need for the FTT to grant a right to conduct litigation in any particular case because rule 14 is a general authorisation for a representative (whether legally qualified or not) to represent a party in proceedings. Where the representative’s appointment is notified to the FTT under rule 14(2) they may do everything which the party themselves may do, including things which amount to conducting litigation.

47. Is the right to conduct litigation which is conferred on a duly notified representative by rule 14 a right “granted by or under an enactment”? If rule 14 is “an enactment” then the answer to that question is yes.
48. *Bennion on Statutory Interpretation* at section 19.4 states that:
- “The word 'enactment' may be used in different senses and its natural meaning must be determined by reference to its context. It is commonly used to refer to an Act or part of an Act, and may cover delegated legislation.”
49. As *Bennion* explains, whether a provision of subordinate legislation can be described as “an enactment” is a matter of interpretation of the legislation in which the expression is used. For example, in *Rathbone v Bundock* [1962] 2 QB 260 it was held that references to “enactments” in the Road Traffic Act 1960 did not include regulations made under the Act. In *Allsop v North Tyneside Metropolitan BC* (1991) 90 LGR 462 the opposite conclusion was reached in relation to section 111(1), Local Government Act 1972 which was expressed to be “subject to the provisions of this Act and any other enactment passed before or after this Act”. Rejecting the argument that enactments 'passed' could not include delegated legislation Parker LJ said:
- “The word “enactment” is apt to cover Regulations made by Statutory Instrument and the word “passed” sensibly means no more than “effectively made.”
50. There does not seem to me to be anything in the context in which the expression “granted by or under any enactment” is used in paragraph 2 of Schedule 3, LSA 2007 to indicate that only primary legislation is intended and that subordinate legislation, such as the 2013 Rules, are excluded.
51. One reason for giving “enactment” its wider meaning is that the subject matter to which it relates, namely the conduct of proceedings in courts and tribunals, is one which is usually dealt with by detailed procedural rules made under statutory instrument. Section 22, TCEA 2007, which provides for Tribunal Procedure Rules to be made in that way had been enacted only a few months before the LSA 2007 and the drafter cannot have been unaware of it.
52. A second reason for giving “enactment” a wide rather than a narrow meaning is that paragraph 2(2) also contemplates that a person may be exempt in relation to the conduct of litigation by virtue of a right granted by a court. Parliament clearly did not intend that such a right should be conferred only by primary legislation.
53. Finally, as conducting litigation before the FTT is a reserved legal activity, the consequence of a narrow interpretation of “enactment” in paragraph 2 of Schedule 3 would be to criminalise the large number of lay representatives who provide representation for parties involved in tribunal proceedings. That cannot have been intended. In *R (Factortame Ltd) v Secretary of State for Transport (No 8)* [2003] QB

381 at [25], and in *Agassi v Robinson (HM Inspector of Taxes)* [2006] 1 WLR 2126 at [43], the penal consequences of a breach of section 20, Solicitors Act 1974 were relied on by the Court of Appeal as justifying a narrow interpretation of what amounted to acting “as a solicitor”. For the same reason it is necessary to construe “exempt person” as including a person who is granted the right to conduct litigation by subordinate legislation.

Disposal

54. My conclusions are: first, that no part of rule 14, 2013 Rules is beyond the power conferred by section 22, TCEA 2007; secondly, that the conduct of proceedings before the FTT is a reserved legal activity; but, thirdly, that any person who has been appointed in accordance with rule 14(1)-(2) to conduct proceedings on behalf of a party is an exempt person and does not act contrary to section 13, LSA 2007 by doing so.
55. I therefore allow the appeal and determine that KLPA & Co is entitled to represent the appellant in the proceedings before the FTT, including by doing anything permitted or required to be done under the 2013 Rules, any practice direction or any direction by the FTT, except signing a statement of truth.
56. I now remit the application to the FTT for further consideration.

Martin Rodger QC,
Deputy Chamber President
10 December 2020