UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2022] UKUT 68 (LC)
UTLC Case Numbers: LC-2021-322

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – ADMINISTRATION CHARGE – charge for collecting rent – whether covenant to pay landlord's deemed expenses for collecting rent could include a charge for giving a notice under section 166 of the Commonhold and Leasehold Reform Act 2002

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

BETWEEN:

PHILIPP STAMPFER

Appellant

-and-

AVON GROUND RENTS LTD

Respondent

Re: Flat 12,
Trinity Mews,
6 Redmans Road,
London, E1 3BT

Judge Elizabeth Cooke
2 March 2022
Royal Courts of Justice

Miss Rebecca Cattermole for the appellant, appearing pro bono
Mr Justin Bates for the respondent, instructed by Scott Cohen Solicitors Limited

Introduction

1. This is Mr Stampfer's appeal from a decision of the First-tier Tribunal ("the FTT") about the payability of an administration charge under his lease.

2. I heard the appeal on 2 March 2022. The appellant was represented by Rebecca Cattermole, and respondent by Justin Bates, both of counsel; I am grateful to them both, and to Miss Cattermole for appearing pro bono.

The factual and legal background

3. Mr Stampfer holds a 125-year lease, granted in 2010, of Flat 12, 6 Trinity Mews, London E1. The respondent Avon Ground Rents Limited is the freeholder. The ground rent payable in respect of the flat is £250 per annum, payable in equal half-yearly instalments.

4. The tenant's covenants in the lease are set out in Schedule 5, of which paragraph 10 reads:

> "The Tenant must pay to the Landlord the full amount of all costs, fees, charges, [etc etc] … incurred by the Landlord in relation to or incidental to: …
>
> 5-10.2 the contemplation, preparation and service of notice under the Law of Property Act 1925 Section 146, or the contemplation or taking of proceedings under Sections 146 or 147 of that Act …
>
> 5-10.3 the recovery or attempted recovery of arrears of rent or other sums due under this Lease…"

5. The lease also contains a covenant by the lessee to pay the service charge calculated in accordance with Schedule 7, being a specified percentage of the "Landlord's Expenses", which are defined to include (1) the costs incurred in providing the services listed in paragraph 3 of Schedule 7 and (2) some "deemed expenses" set out in paragraph 2-3 of Schedule 7.

6. The building is managed by an RTM company (that is, a company owned by the lessees which exercises for them their statutory right to manage the building), which provides the services listed in paragraph 3 of Schedule 7 and is paid a service charge accordingly. The freeholder still takes the fee required under the lease for registering sub-lettings, and of course still receives the ground rent.

7. Part of the definition of the landlord's deemed expenses in Schedule 7 paragraph 2.3.2 is the following:

> ""If the Landlord or a person connected with the Landlord or employed by the Landlord attends (where permitted by law) to:

> 7-2.3.2.1 the supervision and management of the provision of services for the Building,
> 7-2.3.2.2 the preparation of statements or certificates of the Landlord's Expenses,
> 7-2.3.2.3 the auditing of the Landlord's Expenses, or
> 7-2.3.2.4 the collection of rents from the Building,
>
> then an expense is deemed to be paid or a cost incurred by the Landlord, being a reasonable fee not exceeding that which independent agents might properly have charged for the same work."

8. Pausing there, it is worth noting the contrast between paragraph 5-10, which requires the tenant to pay the landlord's incurred costs when the tenant is in default and the landlord is pursuing arrears or serving a section 146 notice (etc), and 7-2.3.2 which requires the tenant to pay the landlord's deemed cost of doing various things routinely required under the lease, including collecting the rents.

9. Section 166 of the Commonhold and Leasehold Reform Act 2002 provides that ground rent is not owed by a lessee unless a notice in the form specified by section 166 is first given to him or her by the landlord. The notice has to set out the amount of the rent and the date when it is payable.

10. Because the rent for Mr Stampfer's flat is payable in half-yearly instalments, the respondent freeholder has to provide two s.166 notices each year. It bought the block in 2017, and since July 2019 it has charged each tenant a "Ground Rent Collection Fee" of £30 plus VAT, twice a year. Rather than paying rent of £250 per annum the lessees find themselves paying £322 per annum once the collection fee is included.

11. On receipt of the invoice for the first of these charges Mr Stampfer asked for an explanation from Avon Estates (London) Limited, the respondent's management company, which responded in an email of 1 July 2019 as follows:

> "The £30 + VAT "surcharge" is a Ground Rent collection fee that we have introduced this year.
>
> The lease is set out in a way that the Landlord should receive Ground rent net and not incur costs in the collection
>
> There is work involved in collection of Ground rents.
>
> The legal demand issued must be in a prescribed form and if error is made it can be fatal to collecting and cause the Freeholder damages Each demand and notice must be checked and administrative work is reflected in the charge that is charged to the Landlord and passed on to leaseholders in accordance with the lease terms."

12. Mr Stampfer and a number of other leaseholders applied to the FTT for a determination of the reasonableness and payability of the £30 + VAT for the two periods July to December 2019 and January to June 2020. It was common ground in the FTT that the charge was an

administration charge; the application was therefore properly made under paragraph 5 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

The decision in the FTT

13. I have to set out the text of the FTT's decision insofar as it is relevant to this appeal because Miss Cattermole and Mr Bates disagree about what exactly the FTT decided. Neither of them appeared before the FTT.

14. The FTT recorded at paragraphs 3 and 4 of the decision that it had to decide two issues. The first issue "concerns fees charged for collecting the ground rent". It recorded that the appellant's case was that there was no provision in the lease enabling the charge to be made, but that if there was then the amount charged was unreasonable. The second issue was about fees charged for the registration of subleases, and is not relevant to this appeal.

15. Under a heading "The directions", in paragraphs 10 and following, the FTT recorded that it had given directions some four months earlier for the respondent to disclose documents on which it wished to rely by 25 November 2020, and that during the week of the hearing in February 2021 it had served three witness statements from Mr Ost, an employee of Avon Estates (London) Limited. The FTT refused to admit that evidence, saying at its paragraph 14 that this was because "there would have been enormous prejudice to the applicants if we had allowed this evidence in". It appears from what is said later in the decision that the excluded witness statements explained what the Ground Rent Collection Fee was for, and also provided evidence of charges made by other agents for doing such work.

16. The FTT then proceeded under a main heading "The ground rent charge issue" to discuss payability and reasonableness separately. Under a sub-heading "Is it payable under the lease?" it set out paragraph 7-2.3.2, and explained the requirement for a s.166 notice. At paragraph 19 it said:

> "The first question is whether this statutory notice can be said to relate to the collection of rents."

17. The FTT went on to explain at paragraphs 20 and 21 that Mr Stampfer said that it does not, because collecting ground rent is not the same as demanding it, and the rent cannot be collected until it is due, so that the giving of the s.166 notice predates collection and cannot be seen as part of the collection process.

18. Counsel for the respondent, Ms Helmore, argued by contrast that "the service of the s.166 notice and associated work is part and parcel of the collection process. In order to collect, the landlord has to serve the notice and carry out work associated with it." She relied upon another decision of the FTT, *Newton House* in 2018, which the FTT said was directly on point. The FTT then said at paragraph 25 "Although we are not bound by [*Newton House*] we prefer the submissions of Ms Helmore on this point. Serving the s.166 notice and the work associated with it are part and parcel of collecting the rent."

19. The FTT then went on under another sub-heading to decide that the amount charged was reasonable.

The appeal

The arguments for the appellant

20. The appellant's grounds of appeal are, first, that the FTT gave no reasons for preferring Ms Helmore's arguments, second that it should not have relied upon the *Newton House* decision, third that paragraph 7-2.3.2 which permits the recovery of the costs of the collection of rent does not permit the recovery of the cost of giving a section 166 notice, and fourth that the raising of a ground rent demand is a management function that is transferred to the RTM company so that the landlord is not allowed to charge for it.

21. Ground 1 does not have a great deal of force by itself. The FTT was aware of Mr Stampfer's argument about the meaning of the word "collection" and obviously disagreed with it, and I am not sure that it could have said much more about that although its reasoning is certainly brief. As to the second ground, Mr Bates did not seek to rely upon *Newton House*, and was right not to because it was a decision about a covenant in different terms, but Mr Bates argues that the FTT was correct in any event. The fourth ground was not pursued with any enthusiasm by Miss Cattermole and I need say no more about it. The appeal turns on ground three, which is the argument that the FTT was wrong because the service of a s.166 notice is not the collection of rent.

22. Miss Cattermole relies simply upon the meaning of the word "collection". Only rent that is due can be collected, and before the s.166 notice is given it is not due. Moreover, paragraph 7-2.3.2 does not entitle the landlord to any "incidental" or ancillary costs – contrast the wording in paragraph 5-10, quoted above. The parties to the lease chose to omit these words in the context of the collection of rent. They also chose to make express provision about s.146 notices (and indeed elaborate provision, enabling the landlord to charge merely for contemplating the service of such a notice), but made no mention of s.166 notices. These deliberate choices indicate that the intention was not to enable the landlord to charge for the giving of s.166 notices.

The arguments for the respondent

23. Mr Bates and Miss Cattermole disagree about what the FTT decided.

24. Miss Cattermole says that what the FTT decided was that the Ground Rent Collection Fee, which was regarded by both parties as a charge for the giving of a s.166 notice and the work associated with giving that notice, fell within the terms of paragraph 7-2.3.2.4 because giving that notice is part and parcel of "the collection of rents from the Building". That, she says, was how the respondent argued the case before the FTT. The appellant's case, of course, is that that decision was wrong.

25. Mr Bates says that the FTT made a decision about a package of work. The Ground Rent Collection Fee, he says, was a charge for a number of tasks that make up the collection of rent, one of which was giving the s.166 notice. Moreover, he says the work involved in collecting ground rents cannot be "salami-sliced;" the FTT was right to regard the s.166 notice as part and parcel of the whole package of work undertaken by the management company, and its decision was about that whole package.

26. He says this because of what the FTT recorded under its second sub-heading, "Was the amount charged reasonable?", in paragraphs 26 to 32.

27. It will be recalled that Mr Ost's witness statements were not admitted. However, the FTT allowed him to give evidence in chief at the hearing. What the FTT said was:

> "28 Mr Ost was not allowed to rely upon his comparables because this was part of his evidence we excluded. However he was taken through all the aspects of the work required to be done in the preparation of a s.166 notice."

28. The FTT continued:

> "29. What he told us corresponds entirely with what was recorded in paragraph 17 of the Tribunal's decision in *5 Flats at 104 Torrington Way, London N& 6RY* (LON/ooAU/LAC/2016/0009):
>
> 'It is also said that there are serious consequences if the notice required under section 166 of the Commonhold and Leasehold Reform Act 2002 is not in the correct format. It is said to be vital to ensure the notice is properly served and is not unreasonable for a freeholder to employ a professional managing agent to deal with these notices and collection of the ground rent to ensure that it can recover the ground rent. The work carried out is listed which includes checking the lease, issuing the notice, dealing with queries, monitoring bank details to recognise payment, recording payment and/or monitoring for non-payment, accounting to the freeholder and maintaining records/an office. In addition disbursements such as postage, bank charges and computer maintenance are incurred.' "

29. Mr Bates argues that some or indeed much of the work described by the un-named witness in *Torrington Way*, with which Mr Ost's evidence is said to "correspond", goes beyond the giving of the s.166 notice, for example dealing with queries, monitoring bank details for payment accounting to the freeholder and so on, as well as disbursements and the maintenance of an office.

30. Moreover, Mr Bates argued that the work is an unseverable package; it is not possible to isolate the work involved in the giving of the section 166 notice from the rest of the work involved in collecting rent, so the whole must be payable. He suggested that it would not be possible to get an agent to take on the giving of the section 166 notices as a discrete task.

Discussion and conclusion

31. Mr Bates' argument about what the FTT decided rests upon the oral evidence given by Mr Ost. What the FTT said at its paragraph 28, quoted above, is not consistent with what the FTT said at its paragraph 14, where it explained that Mr Ost's evidence could not be admitted because it was late and would cause enormous prejudice to the applicants if admitted. I do not understand why Mr Ost was allowed to give evidence in chief.

32. Nor do I understand why the FTT chose not to summarise Mr Ost's evidence directly but to quote instead its judgment in a different case, where it gave an account of the evidence of a different witness, to which it said Mr Ost's evidence "corresponded entirely". Does that mean that the evidence was identical? It is unlikely to mean that the very same words were used. It is not even clear that both witnesses were answering the same question. This was not a helpful way of recording evidence, either for the parties or for the Tribunal on appeal.

33. If it is the case that the Ground Rent Collection Fee in this case was a charge for a number of items including the giving of the section 166 notice, then I do not accept that the latter task cannot be isolated from the rest.

34. But in any event it is clear from the terms of the FTT's decision that this was not how the respondent put its case in the FTT. The Ground Rent Collection Fee was explained to the FTT as a charge for giving the section 166 notice and that is how the FTT understood it. That is clear because Mr Stampfer and his fellow lessees disputed the whole charge. If the FTT had been contemplating a charge for a package of work, with just one element being the s.166 notice, it would have had to say, first, that the elements that did not relate to the s.166 notice were chargeable as a fee for collecting ground rents, and then, second, that the s.166 notice itself was part and parcel of the collection of ground rents. It did not do that. It made a decision about the s.166 notice because that was the only thing in issue, because the landlord's case was – as indicated in the email of 1 July 2019 – that this was a charge for giving the s.166 notice, which was a substantial task because of the need to check the details to ensure the landlord got it right.

35. I take the view that the £30 + VAT was, exactly as the landlord said in correspondence, a charge for giving the s.166 notice. The FTT in its sub-heading "Is it payable under the lease?" was asking a question about the whole of the charge. It answered that question by discussing only the charge for giving a s.166 notice; that, in the FTT's mind, was what this charge was for.

36. As for Mr Ost's evidence, it is not possible to know exactly what he said since his witness statement was not admitted and so is not before the Tribunal, and because of the way in which the FTT chose to record the evidence he gave at the hearing. Importantly, however, the FTT said at paragraph 28 that he was taken through "all the aspects of the work required to be done in preparation of a s.166 notice". Whatever that work was, it was seen by the FTT as the work required to be done in preparation of a s.166 notice and not as a wider package of work of which the s.166 notice was a component.

37. Accordingly I accept Miss Cattermole's explanation of what the FTT decided, and I reject Mr Bates' explanation.

38. Turning then to whether that decision was correct: I disagree with the FTT's construction of the lease. The FTT was led astray by its decision in *Newton House*, where the covenant given by the tenant was to pay "all legal and administration and other ancillary costs incurred in the collection of any sums … due under the terms of this lease." That is a different covenant and sheds no light on the construction of Mr Stampfer's lease. The question is whether "the collection of ground rents" includes giving a section 166 notice.

39. There is no mention in paragraph 7-2.3.2.4 of the giving of notices. Section 166 notices were introduced in order to protect tenants from forfeiture for trivial amounts; it is open to the parties to a lease to make provision for a tenant to pay for such a notice, but that provision would need either to be express (as must provision for the recovery of costs associated with a section 146 notice), or at the very least to take the form of a reference to ancillary or incidental costs. There is no such reference, and the omission is conspicuous because of the inclusion of provision for incidental costs in paragraph 5-10. Rent cannot be collected until it is due, and giving a s.166 notice in order to make it due is not the same as collecting it.

40. Accordingly the appeal succeeds; there is no provision in the lease enabling the respondent to charge the Ground Rent Collection Fee that it demanded in July 2019 and January 2020.

Judge Elizabeth Cooke

10 March 2022

Right of appeal

Any party to this case 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.