



Mr Vishwaveer Ramjotton

-and-

Mr Bhavin Prafulchandra Patel

[2020] UKUT 0019 (LC)

First things first – I suspect that there is a mistake in the year of this citation, and that it should be 2021. The Upper Tribunal website says very clearly however that it is 2020, so 2020 it shall be, even though the decision is dated February 2021.

The second thing is also a numbers thing. This is a case of threes. Not only were there three charges – service charges; administration charges and costs – at issue:

- The proceedings were about three demands for payment;
- Each side made three applications, and
- The FTT issued three decisions – its decision was followed by two reviews.

The factual and legal background

The parties

There are two flats at 56 Moreland Road, Croydon.

Mr Patel is the freeholder, and the leaseholder of the ground floor flat, 56A. Mr Ramjotton was the long leaseholder of the first floor flat, 56B.



The lease

The machinery of the service charge required Mr Ramjot to pay his service charges in advance, with a balancing charge/credit to be applied on a reconciliation at the end of the year. His contribution was 60%.

Clause 2 of the lease contained the leaseholder's covenants, including:

- (e) to keep the flat and its fittings and installations in good repair;
- (f) to permit the landlord to enter the property and to give notice to the tenant of any work required to make good any defects for which the tenant was responsible;
- (g) if remedial work was not done, to permit the landlord to enter the flat on seven days' notice to do the work, and "to pay forthwith all costs and expenses reasonably and properly incurred in respect of such entry and the carrying out of such works";
- (m) To make good all damage caused through the act or default of the Tenant...
 - (i) to any part of the Building ... and
 - (ii) to any other owner occupier or tenant of the Building .. and ... to keep the Landlord indemnified from all claims expenses and demands in that respect;
- (r) To pay on demand all costs charges and expenses (including without limitation and on an indemnity basis legal costs surveyors' fees and fees of the lessor and/or management agents) of and incidental to:
 - (i) The preparation and service of a notice under section 146 of the Law of Property Act 1925...
 - (ii) The recovery of rent and other monies reserved in this lease and made payable if the same on not paid at the time is provided in this Lease
 - (iii) ...
 - (iv) Any notice given by the landlord under this lease
 - (v) Any schedule relating to wants of repair to the Property...



The bathroom leak expenses

For three months between October 2018 and January 2019, water leaked into the ground floor flat. The bathroom in the first floor flat was identified as its source.

On 23 January 2019, the landlord's agents therefore sent Mr Ramjotton a notice, requiring him to carry out remedial work; reminding him of the terms of his lease, and informing him that if no remedial work was done, the landlord would exercise his right to go into Mr Ramjotton's flat to carry out the work himself.

On 13 February 2019, a demand for £880 was sent to Mr Ramjotton, comprising:

- £250: insurance excess;
- £250: tracing the source of the leak;
- £130: plumber;
- £500: managing agents' expenses for having the notice prepared by their in-house solicitor.

The service charge

In March 2019, the landlord's managing agent sent him his annual service charge demand. The advance payment demanded for the 2019-2020 year was £26,141.33.

The common parts ceiling expenses

"Furthermore", said Judge Elizabeth Cooke, who heard the appeal, "In the early part of 2019, the ceiling of the common parts collapsed "because of water ingress from the first floor".

On 25 April 2019, another notice requiring remedial work was sent to Mr Ramjotton.

A demand for payment of £853.84 followed on 05 July, the sum being the expenses incurred in connection with that second leak. The landlord relied on clauses 2(e), (m) and (r) of the lease.

Mr Ramjotton did not pay any of the demands.

**The landlord's applications**

In the absence of payment, Mr Patel made the following applications to the FTT:

- Under section 27A, Landlord and Tenant Act 1985 for a determination as to Mr Ramjotton's liability to pay the £26,141.33 advance service charge demand;
- Under section 168, Commonhold and Leasehold Reform Act 2002, for a determination that there had been a breach of covenant by reason of the leak into the flat below and the collapse of the ceiling in the common parts, and
- Under paragraph 5, Schedule 11 to the 2002 Act, for a determination as to Mr Ramjotton's liability to pay the two demands of £800+ each for the bathroom and common parts ceiling expenses. Both sides agreed that those sums demanded were caught by the definition of "administration charge" in paragraph 1 of Schedule 11 to the 2002 Act.

The lessee's applications

Mr Ramjotton responded with three applications of his own:

- Under section 20C of the 1985 Act, for an order that the costs of the proceedings not be put through his service charge;
- Under paragraph 5A of Schedule 11 to the 2002 Act, for an order that the costs of the proceedings not be charged to him as a variable administration charge, and
- Under rule 13 of the Tribunal Procedure Rules, on the ground that Mr Patel had acted unreasonably in bringing, defending or conducting the proceedings.

As Judge Elizabeth Cooke explained, Mr Ramjotton's first two applications were intended to prevent Mr Patel, as landlord, from exercising his rights under the lease to recover his legal costs from Mr Ramjotton, as lessee.

The third application sought an order that the landlord pay the tenant's own legal costs and arose from the statutory powers of the Tribunal.



She said:

“16. Paragraph 5A of Schedule 11 was enacted so that proceedings can be brought to an end without the potentially endless loop that arises where a landlord seeks to recover litigation costs, after the litigation has come to an end, by way of an administration charges, the tenant then brings proceedings under paragraph 5 to challenge the reasonableness of those charges, and then again after that second round of litigation comes and end the landlord demands further administration charges to recover its costs, and so on. Paragraph 5A enables the tenant to challenge the costs “incurred or to be incurred” (see the explanation of these provisions set out in *Avon Ground Rents Limited v Child* [2018] UKUT 204 (LC), particularly paragraph 53). Thus the tenant’s application in this case anticipated a future demand for administration charges by the landlord to recover his costs of the FTT proceedings by way of service charge, and enabled the FTT to consider those future charges and either extinguish or reduce them, or indeed to refuse to do either.

“17. Paragraph 5A of Schedule 11 does not, of course, enable the FTT to make a costs order in the proceedings. A tenant’s contractual liability to pay costs under the lease will arise only when the relevant administration charge is demanded, and the order made by the FTT on an application under paragraph 5A may reduce or extinguish liability under such a demand.”

The FTT’s decisions

The decision of 27 January 2020

The FTT decided that:

- Mr Ramjotjon was liable to pay the £26,141.33 service charge demand;
- He was “not in breach of the lease in relation to the water leaks” (my emphasis);
- As there was no breach “in relation to the water leak into the hallway” ... “we disallow the costs claimed in relation to the alleged breach of the lease”.



The parties could not agree. The use of plural and singular in the decision was inconsistent:

- did the reference to “leaks” mean that there was no breach of covenant?
- did the disallowal of the hallway ceiling expenses mean that only the first leak was a breach?

Mr Ramjotton's costs applications

The FTT then proposed to determine the section 20C and paragraph 5A applications. To that end, it asked the parties for further submissions and information, “including time sheets and details of hours spent”.

There was no mention of the rule 13 application.

Mr Ramjotton made submissions on all three of his costs applications. The landlord informed the FTT that he intended to recover his legal costs as an administration charge, not through the service charge.

He also asked the FTT to review its decision on the ground that it had not made a decision on whether the leak into the ground floor flat, said to emanate from Mr Ramjotton's flat, constituted a breach of covenant.

The May review

The FTT duly carried out a review.

It held that Mr Ramjotton was in breach in relation to the leak from the bathroom, but not in relation to the collapse of the ceiling hallway.

At that stage, three issues then remained outstanding:

- Mr Ramjotton's rule 13 costs application.
- Mr Patel's paragraph 5 application for the bathroom leak and common parts ceiling collapse expenses;
- Mr Ramjotton's paragraph 5A application;



It was here that the review decision became rather muddled.

In two and a bit lines, it dismissed Mr Ramjotton's application for costs under Rule 13 of the Tribunal's Procedure Rules.

It was silent on Mr Patel's application for a determination of the reasonableness of the expenses connected with the bathroom leak and the collapse of the common parts ceiling.

Instead, it turned its attention to the litigation costs that the parties had incurred in pursuing the various applications.

It decided that all of the costs of the proceedings were recoverable by Mr Patel from Mr Ramjotton, except those relating to the collapse of the common parts ceiling.

Having received time sheets and details of hours spent from Mr Patel's solicitor, the FTT assessed the amount payable by Mr Ramjotton at £15,612.00 for the section 27A application, and £3,565.53 for the section 168(4) application. The total amount said to be payable by Mr Ramjotton was £19,177.63.

The FTT appears to have entirely overlooked the costs incurred in connection with the application under paragraph 5 of Schedule 11 to the 2002 Act. Those were the two demands for payment of amounts in the region of £800 each.

The June review

The FTT carried out a further review.

In June 2019, it decided that Mr Ramjotton was liable to pay all £880 of the bathroom expenses. Judge Cooke observed that:

No explanation is given for the liability; nothing is said about the provision in the lease under which the expenses are payable, and nothing is said about their reasonableness.



The appeal

Permission to appeal was granted on the following grounds:

- Whether the FTT had had the jurisdiction to order Mr Ramjotton to pay Mr Patel's litigation costs;
- Whether the FTT had given any or sufficient reasons for finding that Mr Ramjotton was liable to pay all £880 of the bathroom expenses.

Consideration of liability to pay litigation costs often signals the final flourish of the judicial quill, but Judge Cooke dealt first with that ground of appeal, and then with the bathroom expenses.

May I be forgiven for flipping that arrangement and reverting to the orthodoxy.

The bathroom expenses

The FTT appeared to have overlooked the bathroom expenses in both its January decision and May review. It did however determine their reasonableness in their June review.

Setting aside that decision, Judge Cooke observed that:

“...the decision about the bathroom expenses was made – as the landlord's representative concedes – without the explanation to which the tenant is entitled.”

She then set about deciding the matter afresh.

There was no doubt, on her reading of the lease, that Mr Ramjotton was liable for those expenses under clauses 2(g) and (m), nor was there any “realistic argument” that the insurance excess and the plumbing costs were unreasonable.

She found the managing agents' costs, comprising two hours of the in-house solicitor's time, “similarly unsurprising” because the notice was detailed and the person preparing it would have had to read the lease carefully.



That said, the notice covered another breach of covenant that was unrelated to Mr Patel's application, and she therefore reduced £500 claimed by £160.

Overall, Mr Ramjot's liability for the bathroom expenses was therefore reduced from £880 to £720.

The Tribunal's jurisdiction to order payment of litigation costs of £19,177.63

The basis on which the FTT had considered itself tasked with deciding Mr Ramjot's liability to pay Mr Patel's litigation costs was a mystery. Neither party had applied for a decision as to whether Mr Ramjot was liable to pay Mr Patel's litigation costs.

It is true that the FTT has the power to make a rule 13 costs order on its own initiative, but before doing so, it should have given Mr Ramjot an opportunity to make representations. It had not done so, nor was there any suggestion that the order was made under rule 13.

Given the context and the fact that Mr Patel wished to recover his costs as an administration charge, rather than as a service charge, the FTT could only have been considering Mr Patel's litigation costs as part of its decision about Mr Ramjot's paragraph 5A application. However:

"The FTT was empowered, as we have seen, to make "whatever order it considers to be just and equitable", but that is not a power to make a costs order in the form seen in the May review. The FTT's order has to relate to the tenant's application to reduce or extinguish the administration charges. The power in paragraph 5A to do what is just and equitable is not inconsistent with and indeed does not have any impact on the limitations on costs orders in rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. Paragraph 5A was enacted in response to the commonplace situation where the FTT cannot make an order for costs (because the special grounds in rule 13 are not made out), yet the landlord has a contractual power to recover costs by way of administration charges, and it is that contractual power that the FTT can control when making an



order under paragraph 5A. It is open to the FTT to say that the landlord should not recover any litigation costs by way of administration charge – just as section 20C of the 1985 Act enables it to order in relation to service charges - or to say that certain elements of the costs could not be recovered, or to decline to make such an order.”

So saying, Judge Cooke set aside the FTT’s decision that Mr Ramjotton was liable to pay Mr Patel’s litigation costs. She held that the decision had been made without jurisdiction because:

- It was said to be made in response to the landlord’s paragraph 5 application, but it could only have been a response to the tenant’s paragraph 5A application, and
- It was not a proper response to the paragraph 5A application.

What then to do about Mr Ramjotton’s paragraph 5A application?

Re-determination of the paragraph 5A application

Mr Ramjotton was liable on the indemnity basis under clause 2(r)(ii) of the lease to meet Mr Patel’s litigation costs, but that liability was subject to Schedule 11 to the 2002 Act, and even within that Schedule, there were questions to be mulled:

“The relationship between paragraphs 2 and 5A of Schedule 11 to the 2002 Act has not previously been the subject of argument and decision in this Tribunal. Paragraph 2 says that administration charges are payable only insofar as the amount of the charge is reasonable, while paragraph 5A enables the FTT to make whatever order is just and equitable on an application to reduce or extinguish an administration charge in respect of litigation costs. The amount of the costs incurred by a landlord might be perfectly reasonable yet it may not be just and equitable for the tenant to pay them because he was successful in the FTT. In those circumstances the FTT would make an order extinguishing the tenant’s liability for those costs and the question of reasonableness would not arise.



“Where the tenant was unsuccessful in the FTT a variety of questions may arise. It might be found to be just and equitable for him to pay the landlord’s costs by way of administration charge (even though he was not liable to pay costs under rule 13); where the FTT makes that determination, should it also assess the reasonableness of the costs? If it does, would that create an issue estoppel preventing further litigation on that point? If it does not, could the tenant to make an application later under paragraph 5 of Schedule 11 for reasonableness to be determined? Where the tenant was partially successful, is it open to the FTT to assess reasonableness of the landlord’s costs and then reduce the tenant’s liability by ordering that he pay a proportion of them by way of administration charge, thus preventing a further round of proceedings?”

The appeal did not require her to answer those questions because neither party argued that the Tribunal should assess the reasonableness of Mr Patel’s litigation costs. Mr Ramjotton relied on a passage from HHJ Gerald’s decision in *Church Commissioners for England v Derdabi* [2011] UKUT 380 (LC), while Mr Patel’s focus was the apportionment of costs between the section 27A and 168 applications.

“So”, said Judge Cooke, “the Tribunal can consider only whether, and to what extent, it is just and equitable for the tenant to pay the landlord’s litigation costs by way of administration charge, and if the tenant wishes to challenge the reasonableness of costs that are found to be chargeable to him in that way he may do so under Schedule 11 to the 2002 Act in the usual way”.

Applying the same principles to the paragraph 5A application as to a section 20C application, Judge Cooke decided that Mr Ramjotton should pay Mr Patel’s litigation costs of:

- the section 27A application about the advance service charge demand;
- the section 168(4) application as regards the bathroom leak,
- the paragraph 5 application in relation to the bathroom expenses.



Mr Patel had however been unsuccessful so far as the ceiling collapse and associated expenses were concerned.

For that reason, having reviewed the time sheets and submissions, Judge Cooke reduced Mr Ramjot's liability to pay the litigation costs incurred by Mr Patel by 10% to reflect that lack of success.

Disposal of the appeal

- The FTT's decision that Mr Ramjot pay Mr Patel's litigation costs, assessed at £19,177.63, was set aside for want of jurisdiction;
- Under Mr Ramjot's paragraph 5A application, his liability to meet Mr Patel's litigation costs was reduced by 10%;
- Under Mr Patel's paragraph 5 application, the FTT's decision that Mr Ramjot pay £880 in relation to the bathroom expenses, was set aside;
- The Tribunal substituted its own decision that the tenant is liable to pay £720 by way of administration charge arising from the bathroom leak.

Judge Cooke reserved her bitterest observation for the concluding sentence of her decision:

"It will be seen that although the appeal succeeds on both grounds, as a result of defective reasoning and lack of explanation by the FTT, the tenant's liability to the landlord remains much the same."

My own observations on this appeal will follow in a separate post.