



Law & Lease

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Procedure

Gell v 32 St John's Road Eastbourne Management Co Ltd [2021] EWCA Civ 789

In a County Court claim for unpaid service charges, where the lessee's defence was struck out, the court was not required to assess the service charges for reasonableness under section 19 - or for compliance with the consultation requirements under section 20 of the Landlord and Tenant Act 1985 - before entering judgment.

Termhouse (Clarendon Court) Management Ltd v Al-Balhaa [2021] EWCA Civ 1881

Where proceedings are begun in the First-tier Tribunal (Property Chamber) for the determination of the amount of service charges payable by a leaseholder under section 27A of the Landlord and Tenant Act 1985, and those proceedings result in a decision that something is payable, even if the amount payable is specified, a landlord may not enforce the decision under either section 176C of the Commonhold and Leasehold Reform Act 2002 or section 27 of the Tribunals Courts and Enforcement Act 2007. The landlord should issue new proceedings in the County Court, where the decision of the First-tier Tribunal (Property Chamber) will be binding on the parties.

Boukadida v Priory Place (Abbey Wood) RTM Co Ltd & anor [2021] UKUT 160 (LC)

By rule 36(2)(b) of the FTT Rules, the First-tier Tribunal (Property Chamber) is required to give written reasons for final decisions.

On the leaseholders' appeal, the Upper Tribunal held that the First-tier Tribunal had failed to give adequate reasons for its dismissal of the leaseholder's case. Whilst it need not deal with every argument advanced by a party, it must "deal with every issue which may have a determinative effect on the outcome of part of the proceedings".

Suchorski v Norton [2021] UKUT 166 (LC)

Where a Tribunal-appointed manager had failed to account for sums received, the First-tier Tribunal referred the proceedings to the Upper Tribunal for enforcement pursuant to rule 8(5) of the FTT Rules. The Upper Tribunal required the manager personally to repay those sums.

Francis v Sandoz, Steer [2021] UKUT 0174 (LC)

The parties had been involved in two previous sets of proceedings in the FTT, resulting in inconsistent decisions. The Upper Tribunal held the dispute should be determined afresh.



***Bedford v Paragon Asra Housing Ltd* [2021] UKUT 266 (LC)**

The First-tier Tribunal (Property Chamber) has the power, under rule 9 of its procedure rules, to hear an application to strike out a landlord's application for a determination that there has been a breach of covenant under section 168, Commonhold and Leasehold Reform Act 2002.

Unless it is "indisputable" that the landlord has waived the right to forfeit, the landlord's application for a determination that there has been a breach of covenant is not an abuse of process. A finding of breach of covenant is required for remedies other than forfeiture.

***ASP Independent Living Ltd v Godfrey* [2021] UKUT 0313 (LC)**

The Upper Tribunal set aside the First-tier Tribunal's decision on the reasonableness of gardening and warden charges because it was "unexplained and impossible to understand".

The decision concludes with some simple guidance on evidence.

Notes



Interpretation of leases

City of London v Leaseholders of Great Arthur House [2021] EWCA Civ 431

In the leases, “specified repairs” were defined as “repairs carried out in order –

“(i) to keep in repair the structure and exterior of the premises and of the Building in which they are situated ... not amounting to the making good of structural defects;

“(ii) to make good any structural defect of whose existence the Corporation has notified the tenant in the notice served pursuant to [statutory requirements] which therein stated the Corporation’s estimate of the amount (at then current prices) which would be payable by the tenant towards the costs of making it good ... or of which the Corporation does not become aware earlier than ten years after the grant hereof and

“(iii) to keep in repair any other property over or in respect of which the tenant has any deemed rights.

The Court of Appeal determined the leaseholders’ liability to contribute towards extensive works to Great Arthur House, including works to make good structural defects.

Kensquare Ltd v Boakye [2021] EWCA Civ 1725

On the wording of the lease, time was of the essence of a provision requiring the landlord to serve a notice increasing on account service charges from a fixed amount of £360.

Whilst time is not generally of the essence of clauses triggering rent reviews or final service charge provisions, it is more readily to be understood to be of the essence in relation to notices increasing the interim service charge due from a leaseholder.

Price v Matthey [2021] UKUT 0007 (LC)

Where the service charge demands were formally valid but the incorrect percentage had been applied, and the amount demanded therefore higher than it should have been, those demands were nonetheless valid. The First-tier Tribunal had the power to determine the amount payable.

Powell & Co Investments Ltd v Aleksandrova [2021] UKUT 10 (LC)

Where the lease provided that “the liability of the Lessee under the provisions hereinbefore contained shall be certified by a Chartered Accountant to be appointed by the Lessor,” the service charge accounts for the whole building could not satisfy that provision.

Until the certification specified in the lease, the service charge was not payable.



***H Stain Ltd v Richmond* [2021] UKUT 0066 (LC)**

Where payment was subject to a proviso that in certain circumstances the landlord must give the leaseholder “not less than one month’s notice of such advance payment or contribution”, a demand for payment “due 30 days after date of demand” received on 19 August was not valid. August has 31 days.

Notes



Statutory interpretation

***Aviva Investors Ground Rent GP Ltd v Williams* [2021] EWCA Civ 27**

In a lease where the leaseholder was required to pay a fixed percentage of the landlord's expenditure "or such part as the Landlord may otherwise reasonably determine", the power to determine a different percentage was transferred from the landlord to the First-tier Tribunal (Property Chamber) by virtue of section 27A(6) of the Landlord and Tenant Act 1985.

***Aster Communities v Chapman* [2021] EWCA Civ 660**

In its Notice of Intention under the Service Charges (Consultation Regulations) (England) 2003, a landlord failed to inform leaseholders that it proposed to replace balcony surfaces.

On the landlord's application for dispensation, the First-tier Tribunal found that the leaseholders had established a credible case of prejudice. It granted dispensation on three conditions:

- The landlord must pay the leaseholders' reasonable costs of responding to the dispensation application
- The landlord must pay the reasonable cost of an expert to be nominated by the leaseholders to consider the proposed balcony resurfacing
- The landlord must not charge the legal costs of the dispensation application to the service charge (an order under section 20C, Landlord and Tenant Act 1985)

The Court of Appeal dismissed the landlord's appeal against the first two conditions. In so doing, it held that a leaseholder may rely on the fact that another leaseholder would have acted differently if there had been compliance with the consultation requirements.

***No.1 West India Quay (Residential) Ltd v East Tower Apartments Ltd* [2021] EWCA Civ 1119**

A demand for payment of a sum potentially falling within the scope of the service charge provisions of the lease was served on the leaseholder. The demand was however made under the wrong provisions of the lease.

There had therefore never been a contractually valid demand for payment as a service charge, and more than 18 months had passed since the cost had been incurred. The leaseholders were not liable to pay the demand by reason of section 20B of the Landlord and Tenant Act 1985.



***Collingwood v Carillon House Eastbourne Ltd* [2021] UKUT 0246 (LC)**

When considering whether a landlord has complied with the requirements of the Service Charges (Consultation Requirements)(England) Regulations, the question of prejudice to the leaseholders is irrelevant. It becomes relevant on an application for dispensation from the requirement to consult.

It is further not open to the First-tier Tribunal to find that a landlord has complied with the regulations by describing non-compliance as “shortcomings” and its efforts as “good enough”.

***Wynne v Yates* [2021] UKUT 0278 (LC)**

Where a contractor was unable to complete work for which the landlord had consulted, as a result of which the landlord had engaged a contractor for which there had been no consultation, in the absence of evidence of prejudice to the leaseholders, the First-tier Tribunal should have granted the landlord’s application for dispensation.

Notes



Forfeiture and waiver

Faiz v Burnley Borough Council [2021] EWCA Civ 55

Whether a landlord waives the right to forfeit where a tenant is in breach of covenant and the landlord accepts rent with knowledge of that breach will depend on when the rent accrued due. A landlord waives the right to forfeit when they accept rent that accrued due and was demanded after a breach of covenant, where that landlord accepts the rent after becoming aware of the breach.

As a consequence of the Court of Appeal's decision, there appear to be six possible permutations of events where there is a once-and-for-all breach. Two result in waiver: four do not:

- Breach – rent accrues due – landlord discovers breach – landlord accepts rent – waiver
- Breach – rent accrues due – landlord accepts rent – landlord discovers breach – no waiver
- Breach – landlord discovers breach – rent accrues due – landlord accepts rent – waiver
- Rent accrues due – breach – landlord discovers breach – landlord accepts rent – no waiver
- Rent accrues due – breach – landlord accepts rent – landlord discovers breach – no waiver
- Rent accrues due – landlord accepts rent – breach – landlord discovers breach – no waiver.

Notes



Tribunal-appointed managers

***Chuan-Hui v K Group Holdings Inc* [2021] EWCA Civ 403**

Service charges paid to a Tribunal-appointed manager during their management are service charges within the meaning of s.18 of the Landlord and Tenant Act 1985. At the end of the manager's appointment however, arrears that had accrued during the appointment vested in third party management company.

Covenants in the leases are not displaced by the management order from which a Tribunal-appointed manager derives their powers and obligations, and the leaseholders remain bound by those covenants, subject to the terms of the management order.

***Bentham v Lindsay Court (St Annes) RTM Company Ltd* [2021] UKUT 166 (LC)**

Where the Tribunal has appointed a manager over premises, and the leaseholders subsequently acquire the right to manage part of those premises through a Right to Manage company, the Tribunal does not have the power to vary the existing management order to deprive the Right to Manage company of its right to manage.

That limitation does not however prevent a person applying for a management order over those premises if such an application is subsequently justified by the circumstances.

***Orchard v Mooney* [2021] UKUT 0173 (LC)**

The First-tier Tribunal granted a Tribunal-appointed manager's application for a direction that she be empowered to raise an immediate supplementary interim service charge demand to cover the legal costs of an imminent Tribunal hearing.

The Upper Tribunal held that the direction was not an "interim order" but a variation of the management order under section 24(9) of the Landlord and Tenant Act 1987.

***Whale v Maunder-Taylor* [2021] UKUT 210 (LC)**

In County Court proceedings between a Tribunal-appointed manager and leaseholders, it was conceded that the leases did not allow for a reserve fund. The Court made an order to that effect. The First-tier Tribunal later determined that the management order permitted the manager to collect a reserve fund. The Upper Tribunal reversed that decision: the management order should not have been interpreted independently of the leases. The manager and the parties to the County Court proceedings were bound by the decision of the County Court.





Costs

No.1 West India Quay (Residential) Ltd v East Tower Apartments Ltd [2021] EWCA Civ 1119

In a forfeiture costs recovery clause, the words “in contemplation of any proceedings... arising out of any default on the part of the Lessee” require an investigation of the landlord’s state of mind at the time when the costs were incurred.

On the facts of the case, it could not be said that the leaseholders were in “default”.

Kensquare Ltd v Boakye [2021] EWCA Civ 1725

In a forfeiture costs recovery clause, a covenant by the leaseholder “To pay all costs charges and expenses (including Solicitors’ costs and Surveyors’ fees) incurred by the Lessor for the purpose of or incidental to the preparation and service of a Notice under Section 146 of the Law of Property Act 1925” was broad enough to encompass tribunal proceedings.

Ramjotton v Patel [2021] UKUT 0019 (LC)

The Upper Tribunal allowed an appeal about the costs connected with a leaseholder’s breach of covenant where parts of the First-tier Tribunal’s decision contained “defective reasoning and lack of explanation”.

Kyriacou v Linden [2021] UKUT 0288 (LC)

In a dispute which related primarily to the positioning of dustbins, the First-tier Tribunal had been entitled to make an order under rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

Shearbarn Holiday Park Ltd v Wornell [2021] UKUT 0099 (LC)

Where, in County Court proceedings, the parties had agreed a consent order, including that there should be no order as to costs, on the true interpretation of that order, the landlord was not entitled to charge its costs to the leaseholders through the service charge, irrespective of whether those leaseholders had been involved in the County Court proceedings.

Notes



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