UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

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

LANDLORD AND TENANT – SERVICE CHARGES – reasonableness of interim payments – application for dispensation from consultation requirements for major works

BETWEEN:

MICHAEL WYNNE

Appellant

-and-

(1) RODGER YATES
(2) LAWRENCE LIVINGSTON

Respondents

Re: 12 & 12A Cross St,
Hove,
BN2 1AJ

Upper Tribunal Judge Elizabeth Cooke
8 November 2021
Royal Courts of Justice

The following cases are referred to in this decision:

Daejan Investments Limited v Benson [2013] UKSC 13
Phillips v Francis [2014] EWCA Civ 1395
Schilling v Canary Riverside Development Ptd Limited [2005] EWLands LRX_26_2005

Introduction

1. This is an appeal by Mr Wynne, the freeholder of 12 and 12A Cross Street, Hove, from a decision of the First-tier Tribunal ("the FTT") about the reasonableness and payability of service charges demanded by him as landlord from the respondents, Mr Yates and Mr Livingstone, and from the FTT's refusal to grant him a dispensation from the consultation requirements that apply to service charges for major works.

2. I heard the appeal at the Royal Courts of Justice on 9 November 2021. Mr Marcus Staples, of Deacon Crickmay Asset Management (the appellant's managing agents) represented the appellant, and Mr Roger Yates, the first respondent, spoke for the respondents. I am grateful to them both.

3. In the paragraphs that follow I summarise the legal background to the dispute, which can be explained very briefly, and then set out the factual background. I summarise the decision of the FTT, discuss the grounds of appeal and explain why the FTT's decision is set aside. I then go on to substitute the Tribunal's own decision.

The legal background

4. Two of the ways in which the law regulates the relationship between landlord and tenant are relevant to this appeal.

5. The first is set out in section 19 of the Landlord and Tenant Act 1985 ("the 1985 Act): service charges in leases are payable only to the extent that they are reasonably incurred and, if they are incurred on the provision of services or the carrying out of works, on services or works of a reasonable standard. Section 27A gives the FTT jurisdiction to determine the reasonableness and payability of service charges.

6. Second, section 20 of the 1985 Act, together with the Service Charges (Consultation Requirements) (England) Regulations 2003, provide that a tenant cannot be charged more than £250 for "qualifying works" unless consultation requirements have been complied with. Qualifying works are defined as works that are going to cost the tenant more than £250 by way of service charge. The consultation process involves a sequence of notices, the circulation of estimates for work to be done, and the opportunity for tenants both to nominate a contractor to provide an estimate and to make observations on the landlord's plans.

7. A landlord can apply under section 20ZA of the 1985 Act for dispensation from the consultation requirements. Following the Supreme Court's decision in *Daejan Investments Ltd v Benson* [2013] UKSC 14, dispensation will normally be given unless the tenant can show that they have been prejudiced by the failure to consult. A tenant might be able to demonstrate that prejudice by showing for example that consultation would have enabled them to suggest a cheaper contractor or a better way of doing the work. The loss of an

opportunity to participate in the consultation process is not a relevant prejudice, nor is the "prejudice" of having to pay for the work.

8. Although both the reasonableness requirement and the consultation requirement are imposed on landlords in order to protect tenants, they are not the same. The fact that a landlord has consulted on works by sharing estimates and so on, and chosen a contractor in the light of their estimate, does not mean that the cost of the work will be reasonable and does not prevent the tenant from challenging the corresponding service charge on grounds of unreasonableness. Nor does it mean that nothing will go wrong and that an estimate will never be exceeded. An estimate is an estimate; if it is exceeded, that does not of itself make the cost unreasonable.

9. What the two requirements do have in common is that in order to use them as a basis of challenge a tenant has to engage with some evidence. A tenant will not be able to resist a landlord's application for a dispensation from the consultation requirement unless he or she can demonstrate some prejudice, beyond the simple fact of not having been consulted or of having had to contribute to the cost of the works. As Lord Neuberger put it at paragraph 68 of *Daejan Investments Limited v Benson*:

> "while the legal burden of proof [of entitlement to a dispensation] would be, and would remain throughout, on the landlord, the factual burden of identifying some relevant prejudice that they would or might have suffered would be on the tenants."

10. So the tenant must demonstrate some prejudice arising from the failure to consult; it is not for the landlord to demonstrate, in the absence of any evidence of prejudice, that the tenants were not prejudiced.

11. Equally, it is well established (see for example *Schilling v Canary Riverside Development Ptd* Limited [2005] EWLands LRX_26_2005) that a tenant's challenge to the reasonableness of a service charge must be based on some evidence that the charge is unreasonable. Of course, the burden is on the landlord to prove reasonableness, but the tenant cannot simply put the landlord to proof; he or she must produce some evidence of unreasonableness before the landlord can be required to prove reasonableness.

The factual background

The lease and the service charges

12. The appellant's freehold property is a mid-terrace Victorian house of four storeys, which has been converted into two maisonettes: number 12 on the ground floor and lower ground floor, of which the appellant holds a long lease, and number 12A on the upper floors of which the respondents bought the long lease in March 2016.

13. The lease of number 12A is dated 15 June 1987. It is drafted in an elderly style, but the arrangements it makes for service charges are clear. The landlord is to maintain the building and the lessee is to maintain the interior of number 12A; and the lessee is to pay 50% of the landlord's expenditure in complying with his obligations. The lessee is to make an interim payment on 24 June and 25 December each year, on account of the landlord's expenditure in the next six months. Each year after 29 September the landlord is to produce a notice of his actual expenditure for the previous year, and anything owed from or to the lessee is to be paid or repaid within 14 days. However, the landlord is entitled instead of repaying any surplus to put it towards the next interim payment, or to retain it "to provide a fund for the payment of any liability of any kind which in the discretion of the landlord should reasonably be provided for including … any items of repair or maintenance not of a regular nature."

14. It appears that from when the respondents purchased and until 25 December 2019, whenever an interim service charge has been demanded it has been for the sum of £405.18, which Mr Staples says was the sum always demanded by the previous agent and which he continued to use when he took over

The external redecoration works

15. In summer 2019 work commenced on the external redecoration of the building. It is not in dispute that this work was going to cost each leaseholder more than £250 and engaged the consultation requirements of section 20 of the Landlord and Tenant Act 1985 and of the Service Charges (Consultation Requirements) (England) Regulations 2003. Nor is it in dispute that the appellant complied with those requirements and as a result engaged Mr George Ramjedas to do the work.

16. Mr Ramjedas started work in summer 2019 and completed, or nearly completed, the work at the front of the building. He was not able to do the work to the rear of the building, and in the closing weeks of the year and in January 2020 the appellant engaged different contractors to finish the job and also to do some roof repairs. Mr Ramjedas' estimate for the work had been £2,350; he was paid £970 for the work he did. Additional charges were made by new contractors who supplied scaffolding, redecorated the back of the house, and did some roof repairs. One of the issues in this dispute is the fact that no consultation was undertaken before the new contractors were engaged.

The dispute about the service charges

17. The respondents bought their flat in March 2016. They paid interim service charges of £405.18 in June and December that year.

18. It was not clear from the evidence before the FTT whether demands were made for interim service charges in June and December 2017. A demand was made on 25 June 2018 which stated that the charge of £405.18 for June 2017 was credited against the same charge in

December 2017 and that the only charge now due was £405.18 for June 2018. In response to that demand, the respondents paid that sum.

19. In later correspondence the appellant – despite what the invoice had said – attributed that payment to an interim charge for December 2017 and sought payment again in respect of June 2018.

20. The FTT found that the next demand the respondents received was dated 29 January 2020. The respondents explained that they thought nothing of the absence of demands in December 2018 and throughout 2019 because since the building is a single house not a great deal of expenditure is incurred. But the January 2020 invoice showed three interim payments due, in respect of December 2018 and of June and December 2019, amounting to £1,215.54. They queried this, and were told that this sum was required to meet the additional external decorating costs. In July 2020 they received correspondence from a debt recovery agency, including a schedule demanding payment of £405.18 in respect of each of June and December 2018 and June and December 2019 together with interest and expenses, amounting in total to £2,274.20.

21. Those four charges of £405.18 are the charges which the respondents challenged in the FTT.

22. I have found it helpful to set out a schedule of interim service charges either demanded or at any stage said to have been demanded of the respondents from the time they purchased until the end of 2019; items in bold are the four charges in dispute:

i.	24 June 2016	(2016/17)	£405.18	Paid and not in dispute.
ii.	12 Dec 2016	(2016/17)	£405.18	Paid and not in dispute.
iii.	24 June 2017	(2017/18)	£405.18	Cancelled (if ever demanded).
iv.	12 Dec 2017	(2017/18)	£405.18	See paragraphs 16 and 17 above.
v.	**24 June 2018**	**(2018/19)**	**£405.18**	
vi.	12 October 2018		£1,591 external decoration, paid July 2019.	
vii.	**12 Dec 2018**	**(2018/19)**	**£405.18**	
viii.	**24 June 2019**	**(2019/20)**	**£405.18**	
ix.	**12 Dec 2019**	**(2019/20)**	**£405.18**	

23. The FTT gave case management directions, and during the period leading up to the hearing in November 2020 the appellant made an application for dispensation from consultation requirements in respect of the work done by the new contractors in early 2020, pursuant to section 20ZA of the 1985 Act

The FTT's decision

24. In the FTT the respondents challenged the reasonableness of the four interim payments that the appellant now seeks to recover from them – items v, vii, viii and ix on the above list. Their challenge can be summarised as follows:

    a. They never had a demand for an interim payment in December 2017. The payment they made in June 2018 related to the June 2018 demand (item v in the list above). They said that the appellant, having cancelled the charge for December 2017 in the demand sent out in June 2018, should not have attributed the June 2018 payment to a charge in December 2017.

    b. They should not have to pay more than £250 towards work done by the new contractors in early 2020 because no consultation was carried out; and those charges were in any event unreasonable. Therefore they challenged the reasonableness of the interim charges demanded in January 2020 in respect of December 2018, June 2019 and December 2019, which they had been told were demanded in order to meet these new costs.

    c. The respondents complained that Mr Ramjedas had offered to refund £500 to the landlord, which Mr Staples had refused.

25. The appellant's case in the FTT was that there was no need to consult about the new contractors, that in any event he had done his best to discuss matters with the respondents, and that having been placed in a difficult position by Mr Ramjedas he had to do the best he could to get the work done.

26. The FTT's decision is not easy to understand; it does not set out the facts, nor does it state what were the charges in issue, and it relies upon the references to the hearing bundle which, of course, readers other than the parties do not have. I do not think the FTT was aware, or if it was it did not say, that Mr Ramjedas was paid £970 rather than the whole of his estimated charge. What the FTT decided is as follows.

27. In paragraphs 36 and 37 the FTT noted that Mr Ramjedas had been unable to finish the work and criticised Mr Staples for refusing the offered refund. At paragraph 30 the FTT said:

> "We decline to grant dispensation. The Tribunal believes that the Respondent could have consulted with the Applicants, even some form of informal consultation would have been expected. No proper explanation has been provided as to why this did not take place and we are satisfied that the Applicants were prejudiced by this failure."

28. The FTT said nothing else about dispensation. It continued, in the same paragraph, with an assessment of the reasonableness of the total cost of the work done by both Mr Ramjedas and the new contractors:

> "In any event even if we are wrong, we determine that the reasonable costs of such works should not exceed the quotation of Mr Ramjedas.
>
> 40. He provided a fixed price quote which the Respondent chose to accept, It is clear from the presentation of the quote that it is less professional than others included within the bundle and at a significantly lower price. This was a decision the Respondent took and in our determination, taking account of the all the facts of the case it is reasonable to limit the costs to that figure."

29. The FTT then turned to the interim service charges and said:

> "42. The applicants accept they are liable for all the monies which they have paid to date. We find that the sums paid to date totalling £2,806.54 (see A[144]) are the monies due and owing by the applicants in respect of service charges up to and including 29 September 2019 and in respect of the Applicants' contribution to the costs of the major works being the external redecorations to the front and rear elevations of the Property.
>
> 43 For the year 2019 to 2020 the Respondent may produce accounts and may be entitled to seek additional monies.
>
> 44. In respect of the interim accounts … doing the best we can we say that the interim payments for the year 2019 to 2020 should total £650 per leaseholder."

30. The reference to "A/144" is to the bundle before the FTT, and that page is the schedule produced by the debt collection agency (see paragraph 20 above) which indicates that by September 2019 the respondents had paid items i, ii, iii and vi on my list above (three interim service charges and the £1,591 towards the external works, amounting to £2,8604).

31. It follows from the FTT's paragraph 42, although the FTT did not say so, that the FTT regarded as unreasonable the other charges made before September 2019, namely the charges for June and December 2018.

32. It is not clear whether the FTT included in its assessment of "service charges up to and including 29 September 2019" the interim charge demanded for June 2019, which related to the period from June to December 2019; at any rate, the FTT then went on to allow an interim charge of £650 for the year 2019/20, and I take that to mean that the demands for June and December 2019 amounting to £810 were to be replaced by a liability for £650. The respondents explained to me at the hearing of the appeal that that sum was intended to represent the cost of insurance, accountancy, and the managing agents' fees.

The appeal

33. The Tribunal gave permission to appeal on the grounds that it was arguable, first, that there was insufficient reason for the FTT to refuse to grant a dispensation; second that the FTT's decision failed to set out the consequences of the refusal to grant a dispensation because it did not set out the amount in issue and the amount payable as a result of the refusal; and third that the FTT's decision about reasonableness in paragraph 42 was unexplained.

34. Before I examine those grounds I have to look separately at the interim service charge for June 2018. It became apparent on inspection of the bundle prior to the hearing that something had gone badly amiss as regards that charge. The invoice dated 25 June 2018 stated that the charge for June 2017 was cancelled and was set against the charge for December 2017 so that the only sum payable at that date was the £405.18 charge for June 2018, which the respondents paid. It was therefore difficult to understand why they were being pursued for that charge in 2020.

35. At the hearing Mr Staples agreed that that was what the June 2018 invoice said. He explained that in fact no payment had been made in June 2017 and that the set-off expressed in the invoice was not correct. I pointed out that if a mistake had been made it had been open to the landlord to require an additional payment from the respondents to make up any shortfall within 14 days of production of the September 2018 accounts. Mr Staples agreed and said that no additional payment had been required because there was no shortfall.

36. He therefore agreed that the interim service charge for June 2018 had been paid when demanded and was not now payable. It should not have been listed as payable in the debt recovery agency's schedule in July 2020.

37. Section 27A(4) of the 1985 Act states that an application to the FTT for a determination of payability (and reasonableness) cannot be made if the charge has been agreed or admitted by the tenant. The respondents in this case had not disputed that the interim service charge demanded in June 2018 was due and they paid it; accordingly, and paradoxically, the appeal succeeds on this point because the FTT had no jurisdiction to make a decision about this particular charge. That should not be regarded as a victory for the appellant; the respondents made their application, understandably, because the appellant was pursuing them for payment of a charge they had already paid. They had a complete defence to any attempt to make them pay again what they had already paid.

38. I now turn to the grounds of appeal.

The dispensation from consultation

39. I have set out, above, the principles on which an application for dispensation must be decided. There must be some prejudice to the tenants beyond the obvious fact of not being able to participate in the consultation process. The FTT found that there was prejudice to the tenants but did not say what it was, and nothing in the evidence given to the FTT indicated that the tenants might have suffered any prejudice. They gave no evidence that there was a

possibility that they could have suggested a way to get the work done more efficiently or more quickly or more economically. In the absence of any such suggestion there was no reason not to grant a dispensation. The FTT's decision on this point was irrational and is set aside.

The consequences of the refusal of dispensation

40. Because I have set aside the FTT's refusal to give a dispensation there is no need for me to consider whether the FTT gave adequate consideration to the consequence of its refusal.

The reasonableness of the service charges

41. The FTT's judgment about the reasonableness of the service charges in issue was set out in its paragraphs 38 and 39, and 42 to 44, quoted above. Two separate judgments seem to be made, one about the cost of the works, and one about the interim service charges. What appears to have happened, bearing in mind the schedule of payments due at page A/144, is that the FTT noted that the respondents had made a payment of £1,591 towards the external work and made a judgment that nothing more should be paid. The reason given for that judgment about the reasonableness of the service charge was at paragraph 39, namely that the appellant had chosen to engage Mr Ramjedas and that therefore "it is reasonable to limit the costs to that figure".

42. Why the FTT regarded that estimate as conclusive as to the reasonable cost of the work is not explained. As I noted above, the consultation requirement is distinct from the reasonableness requirement and an accepted estimate is not necessarily reasonable, nor is a cost that exceeds such an estimate necessarily unreasonable. The FTT gave no explanation of why any charge in excess of Mr Ramjedas' figure was unreasonable beyond the fact that the appellant had accepted Mr Ramjedas' quote. The FTT's decision was irrational and cannot stand.

43. The FTT's determination about the reasonableness of the interim service charges flowed from its assessment of the charge of external works. It appears to have decided that all the demands in issue were unreasonable save for £650 in 2019/20 in respect of charges other than the external redecoration. The decision about the reasonableness of the interim service charges rests upon the irrational decision about the charges for the external work and, again, it is set aside.

44. Accordingly the FTT's decision is set aside in its entirety, including its orders under section 20C of the Landlord and Tenant Act 1985 and paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 relating to the recovery of the appellant's costs of the proceedings by way of service or administration charge since those orders were made as a result of the substantive decisions that I have set aside.

The Tribunal's substituted decision

45. It is open to the Tribunal now either to remit the matter to the FTT for a fresh decision or to substitute its own decision. It is in the interests of all parties that I do the latter rather than subject them to further delay and expense.

46. This is an application for the determination of the reasonableness and payability of service charges. There are three charges now in dispute (since the appellant agrees that the charge for June 2018 has been paid and is not now payable), namely the interim charges for the periods from December 2018, June 2019 and December 2019.

47. The respondents say that no demands were made for interim service charges in December 2018 and June 2019 and that they were taken by surprise by the new demand in January 2020 amounting to £1,215.54; when they queried the demand they were told that it was needed to cover the additional outdoor work on the property, done by new contractors after Mr Ramjedas failed to complete. They say their landlord is not entitled to charge them for that work because he did not comply with the consultation requirements in respect of it.

48. The parties' evidence to the FTT indicates that all was well while Mr Ramjedas was working on the front of the house, having been chosen following a consultation process that all agree complied with the requirements of the 1985 Act. Nevertheless Mr Staples, as he explained to the FTT, had misgivings about Mr Ramjedas. His handwritten estimate was, as the FTT remarked, less professionally prepared than the others under consideration; the respondents themselves at the appeal hearing described it as being "written on the back of a fag packet". As it turned out Mr Ramjedas had some health problems and stopped work. There was correspondence between the parties about the outstanding works in the autumn of 2019; the respondents say there was no communication from Mr Staples after November and that they were surprised when they came back from holiday to find that the work had been finished by another contractor and that they were being asked to pay three instalments of interim payment in order to fund the work that Mr Ramjedas had left undone, when they thought they had paid in full. They took the view, and are still of the view as they said to me at the appeal hearing, that Mr Staples should have forced Mr Ramjedas to finish the work at his quoted price, using sub-contractors if necessary.

49. Mr Staples told the FTT was that he was not able to get in touch with the respondents because they went away for three weeks at the start of 2020; the work was urgent because there was some leakage through the roof into the respondents' property, and he felt he had to get it done, but that it was difficult and expensive to get contractors to do outdoor work on an urgent basis in the winter so inevitably costs went up. The overall cost of the work, including the £970 paid to Mr Ramjedas, was £4,754. The work eventually done was wider in scope than that for which Mr Ramjedas had originally quoted, because it included some repairs to the roof.

50. The FTT assumed without discussion that the landlord should have consulted afresh about the additional work, but I see no reason why a fresh consultation was necessary. I explained

above that compliance with the consultation requirements gives no guarantee to the tenants about the eventual price and scope of the work. The consultation process requires the presentation of estimates and a choice between them; it does not require that estimates are not exceeded, as anyone who has engaged decorators or builders knows does happen. And the consultation process does not guarantee that the contractor whose estimate is chosen will be able to finish the job. The consultation requirement applies to a "set of works" (*Phillips v Francis* [2014] EWCA Civ 1395), and if a contractor engaged to carry out a set of works is unable to complete it there is no requirement for a fresh consultation about the same set of works, even if the price is going to go up (as it normally will if the original contractor gave the cheapest quote), and even if the tenant's contribution is going to rise by more than £250.

51. The same can be said where the work to be done turns out to be more than expected and more than the estimate covered – again, we all know that it happens.

52. There will be cases where the project takes an unexpected turn so that the new work cannot be said to be part of the same "set of works". Whether that is the case will be a matter of fact and degree. If it is, fresh consultation is required, although where new work is found to be necessary while the original project is under way then a fresh consultation will often be impracticable and there will be an application for a dispensation.

53. I do not think that the additional work done to the roof in this case amounted to a fresh "set of works". The Notice of Intended Expenditure given by the appellant in 2015 (before the respondents purchased) specified the work as "External redecoration, repairs to roof and associated works". I cannot see that any of the work done in 2019 or 2020 fell outside that description. Accordingly no fresh consultation was required.

54. In case I am wrong about that, if a dispensation were needed I would grant one. The respondents have come nowhere near to showing any prejudice arising from a failure to consult. Of course, they did not have an opportunity to suggest a different contractor, but that is not the type of prejudice required as I explained above. It is significant that they have not produced any evidence that another contractor could have done the work more cheaply but just as well (and I note that they have expressed no complaint about the standard of work). The eventual price of the works was less than any of the estimates set out in the appellant's statement of estimates given in July 2015, before Mr Ramjedas gave his estimate. As Lord Neuberger put it at paragraph 45 of the decision in *Daejan Investments Ltd v Benson*:

> "Thus, in a case where it was common ground that the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the Requirements, I find it hard to see why the dispensation should not be granted (at least in the absence of some very good reason): in such a case the tenants would be in precisely the position that the legislation intended them to be – ie as if the Requirements had been complied with."

55. Accordingly the appellant is not prevented by a failure to consult or to obtain a dispensation from charging for the external work on the property done after Mr Ramjedas stopped work.

56. The FTT also determined that the reasonable cost of those works should not exceed Mr Ramjedas' price, and as I have said above there was no basis for that judgment. The respondents have not offered any evidence that there was anything unreasonable about either the quality of the work or its price. Their argument that Mr Ramjedas should have been held to his price and forced to use sub-contractors to finish the work is unrealistic (and I think the FTT criticised Mr Staples for refusing the refund on the assumption that Mr Ramjedas had been paid the full price which, as we have seen, was not the case). The appellant took a pragmatic approach which resulted in the work being done and the respondents have neither challenged its quality nor produced any evidence that the price was unreasonable.

57. That means that the challenge to the last three interim service charges (for December 2018, June 2019 and December 2020) fails.

Conclusion

58. The appeal succeeds. Of the three service charges in issue, it is agreed by the appellant that the one for June 2018 was paid without dispute and therefore the FTT had no jurisdiction to make a decision about it; the last three as just mentioned are payable and the challenge to their reasonableness has failed.

59. I have not re-determined the respondents' application to the FTT for orders under section 20C of the Landlord and Tenant Act 1985 and paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002; if they want me to make a decision on that application they are to make written representations to that effect within 21 days of the date on which this decision is sent to them. If they do, I will make a decision on the application., and if they do not do so the application will be refused.

60. I am troubled to hear that the September accounts for 2020 and 2021 have not yet been delivered, and that no interim charges have been demanded since January 2020, because the appellant was waiting for the outcome of these proceedings. That means that the appellant is likely to be out of pocket and there will be some catching up to do once those accounts are produced. At the hearing I expressed the hope, and I repeat it here, that the appellant will produce those accounts forthwith, adjusted to reflect this judgment about the interim charges. I hope, too, that the respondents will then swiftly catch up with their payments, and that the property can be managed on a more co-operative basis in the future with careful thought being put into regular and proportionate demands for interim service charges.

Upper Tribunal Judge Elizabeth Cooke

12 November 2021