A Practical Guide to Case Law in 2016

Mark Oakley
Judge & Priestley LLP
&
Ranjit Bhose and Shomik Datta
Cornerstone Barristers

About Us

Mark Oakley, J&P, Mark is a property litigation solicitor experienced in all aspects of leasehold management. Mark acts for social landlords on all aspects of the billing, consultation and recovery of service charges.

Ranjit Bhose, Cornerstone Barristers, has a broad practice, specialising in housing, commercial and residential property (all aspects), property-related negligence, local government, public, commercial contracts, and licensing law. Ranjit was called to the Bar in 1989, and appointed a QC in 2012.

Section 20 & Intermediate Landlords

Leaseholders of Foundling Court and O'Donnell Court [2016] UKUT0366(LC)

- Allied London (Brunswick) Limited owned the freehold of the Brunswick Estate.
- London Borough of Camden have a Head Lease of the two residential blocks containing 408 flats of which 87 have been let on long leases by LB Camden.

Section 20 & Intermediate Landlords

<u>The Facts</u>

- 10 June 2004, Allied served Notice of Intention on Camden to carry out external works with observations to be sent in by 16th July.

- 17th June, Camden wrote to each sub-lessee enclosing Allied's Notice and inviting observations by 14th July.

- Camden and 8 lessee observations sent to Allied on 16th July.

Section 20 & Intermediate Landlords

- A second stage Section 20 Notice sent by Allied to Camden 24th September.

- Camden write to sub-lessees 4th October enclosing Allied's Notice but asking for observations within 21 days.

Section 20 & Intermediate Landlords

The Lessees' challenge

- There was a failure to comply with the Section 20 consultation obligations because either the freeholder had not consulted with the sub-lessees or alternatively Camden did not allow 30 days for observations to be made and therefore the lessees' contributions were capped at £250 per flat.

The Submissions

The Lessees

- The lessees were “agnostic” on the issue simply taking the stance that until either Allied or Camden applied for and obtained dispensation, they did not have to pay more than £250.

The Submissions

Camden's Submissions

- As it was Allied who intended to carry out the works, the obligation to consult lay with Allied and not Camden. Alternatively if Allied were not required to consult the leaseholders, that did not mean that Camden was required to do so.

The Submissions

Allied's Submissions

- Allied did not have a contractual relationship as landlord and tenant with the sub-lessees.
- It was too difficult on a practical level for them to consult.

The Decision

- Regulation 1(3) of the 2003 Regulations state *"where a landlord … intends to carry out qualifying works".*
- Therefore the requirement for *"the Landlord"* to give notice can only refer to the Landlord who intends to carry out the work.

Practical Difficulties

- The need for a freeholder to identify the sub-lessees upon whom notice is to be served.
- Solutions
- Address the Notice to *"the Leaseholder".*
- Ask the intermediate landlord for names and addresses.
- Seek dispensation and if sought in advance a Tribunal *"could be expected to grant it on suitable terms designed to ensure that, so far as possible, notice of the consultation came to the attention of all those entitled to receive it …"*

Balkhi v Southern Land Securities Limited [2016] UKUT 0239 (LC)

- Mixed use building on Maddox Street, London W1
- Landlord (SLS) held headlease of upper residential floors
- Headlease did not include the structure
- The freeholder(P) was obliged to repair the structure and exterior
- The landlord was obliged under the headlease to pay a service charge towards these costs and a contribution to a sinking fund

Balkhi v Southern Land Securities Limited [2016] UKUT 0239 (LC)

- SLS let Flat 6 to B. Under the underlease, SLS were bound to use reasonable endeavours to procure P to carry out ‘the Services’
- In turn, B was obliged to pay a service charge to SLS including towards a sinking fund (though apparently for SLS)
- B was to pay 20.05% of the ‘total expenditure’ (defined as all costs and expenses paid to P and any other costs properly incurred by SLS in relation to the building)

Balkhi v Southern Land Securities Limited [2016] UKUT 0239 (LC)

- The sinking fund contributions increased markedly after 2011
- B refused to pay. SLS issued a claim in the count court, which was transferred to the FTT
- FTT (on paper) held Landlord entitled to recover sums under lease, and amounts were reasonable (based on a surveyor's report)

Balkhi v Southern Land Securities Limited [2016] UKUT 0239 (LC)

- There was a complete re-hearing in the UT (and evidence taken)
- The issue of construction was upheld in the UT
- However, it held that the sinking fund contribution was not payable simply on the basis of what the landlord had paid – the amount still needed to be reasonable under section 19
- UT reduced the amount claimed (by about a third) – Landlord had not acted reasonably in paying what freeholder demanded without justification

Balkhi: Lessons

- As ever, check the terms of underleases to ensure the charges in question are recoverable
- Moreover, do not pass on costs without taking some steps to establish that the sums sought (i.e. by a freeholder) are themselves reasonable
- If unsure, request information
- This was really a burden of proof case – SLS called no evidence to justify the sums sought – if queries are raised, the (intermediate) landlord will need to do this

Willow Court Management v Alexander [2016] UKUT 290 (LC)

- The first UT case relating to Rule 13 costs applications for ‘unreasonable conduct’
- Rule 13 states the FTT may only make such an order, “if a person has acted unreasonably in bringing, defending or conducting proceedings…”
- Unlike under the old LVT rules, there is no cap on the order which may be made

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Willow Court Management v Alexander [2016] UKUT 290 (LC)

- In Willow Court a £13k costs order was made against the management company in a service charge claim worth £5,700
- In Sussex Gardens, a £17k costs order was made against the applicant in a dispute worth £10k
- In Hogarth Road, a £2k costs order was made after late withdrawal of a claim
- All of these orders were overturned on appeal

The Guidance

- The UT discouraged unreasonable conduct costs applications
- “We … consider that tribunals ought not to be over-zealous in detecting unreasonable conduct after the event and should not lose sight of their own powers and responsibilities in the preparatory stages of proceedings.”
- “…such applications should not be regarded as routine, should not be abused to discourage access to the tribunal, and should not be allowed to become major disputes in their own right.”

Three stages

- Stage 1 – Has there objectively been “unreasonable conduct”?
- “If there is no reasonable explanation for the conduct complained of, the behaviour will properly be adjudged to be unreasonable, and the threshold for the making of an order will have been crossed.”
- If the party is unrepresented, this may be relevant: “The behaviour of an unrepresented party with no legal knowledge should be judged by the standards of a reasonable person who does not have legal advice. The crucial question is always whether, in all the circumstances of the case, the party has acted unreasonably in the conduct of the proceedings.”

Three stages

- Stage 2: Should the FTT exercise its discretion to make an order for costs?
- "…it is essential for the tribunal to consider whether, in the light of the unreasonable conduct it has found to have been demonstrated, it ought to make an order for costs or not"
- "the nature, seriousness and effect of the unreasonable conduct will be an important part of the material to be taken into account"

Three stages

- Stage 3: What order should be made?
- The FTT's power is unfettered in this regard, save by reference to the overriding objective in Rule 3. The costs need not be 'caused' by the unreasonable conduct.
- "…which is to enable the tribunal to deal with cases fairly and justly. This includes dealing with the case "in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal." but other circumstances will clearly also be relevant..."

Procedure

- Applications should be dealt with summarily, and briefly
- "…[Applications] should be determined summarily, preferably without the need for a further hearing, and after the parties have had the opportunity to make submissions…The applicant for an order should be required to identify clearly and specifically the conduct relied on as unreasonable, and if the tribunal considers that there is a case to answer (but not otherwise) the respondent should be given the opportunity to respond to the criticisms made and to offer any explanation or mitigation."
- "A decision to dismiss such an application can be explained briefly."

87 St George's Square Management Ltd v Whiteside [2016] UKUT 438 (LC)

- Where the landlord has been awarded some of its costs under rule 13, may it later rely on a contractual indemnity clause for the whole of the costs of the same proceedings as an administration charge?
- FTT orders tenant to pay 20% of landlord's costs of service charge proceedings
- Landlord then writes to tenant to say it proposes to rely on its contractual rights under clause 3 of the lease and encloses demand for £40,701
- Later FTT holds it is "inappropriate" and landlord cannot have "two bites at the cherry"

87 St George's Square Management Ltd v Whiteside [2016] UKUT 438 (LC)

- UT holds that FTT had elided its consideration of two separate entitlements on the part of the landlord
- Where a party has two legal routes to the recovery of the same sum, it will not be entitled to recover that sum twice but there is no reason why it should be required to elect between those routes unless they are inconsistent
- In this case there is no inconsistency
- Nor is there any abuse or process or procedural estoppel

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Admiralty Park Management Company Limited v Ojo [2016] UKUT 421 (LC)

- 2010-2104 services provided not been calculated in accordance with the lease
- FTT takes the point for itself, refuses landlord an adjournment and and holds it has no entitlement, refused to the service charges
- UT grants permission to appeal on grounds of arguable serious procedural irregularity!
- UT holds that UT was entitled to take point for itself but that manner in which it then decided it was unfair

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Admiralty Park Management Company Limited v Ojo [2016] UKUT 421 (LC)

- On the merits, finds for landlord
- Rather than apportioning costs between flats in the individual block, division is between all 9 blocks
- Method of apportionment is obvious to lessees because percentage shown on annual statements
- As Mr Ojo does not object to this method for a prolonged period, makes periodical payments, and did not deny his service charges in an 2011 LVT, he has acquiesced in this manner of calculation
- It would now be unfair for Mr Ojo to be allowed to dispute this liability; he is estopped by convention

Nemcova v Fairfield Rents Ltd [2016] UKUT 303 (LC)

- Lessee covenants “Not to use the Demised Premises or permit them to be used for any illegal or immoral purpose or for any purpose whatsoever other than as a private residence”
- Lessee admits making short term lettings of her 1 bed flat and advertising availability on-line
- Lets flat out for about 90 days a year to business visitors working in London; otherwise she stays there
- FTT determines that this is a breach of covenant; lessee appeals to UT

Nemcova v Fairfield Rents Ltd [2016] UKUT 303 (LC)

- UT dismisses appeal
- The fact that the lessee had granted the lettings meant that her occupation of the flat was so transient and not sufficiently permanent that she would not consider the property her private residence
- it was necessary that there was a connection between the occupier and the residence such that the occupier would think of it as his residence, albeit not without limit of time: for the covenant to be observed, the occupier for the time being had to be using it as his private residence

Jarowicki v Freehold Managers (Nominees) Limited 2016 [UKUT 0435] (LC)

- Five leaseholders of flats make an application in respect of the sum payable by them for three service charge years.
- Issues regarding interpretation of the lease and the extent to which leaseholders had access to certain areas of the Estate.
- The Tribunal issued a decision stating that it had determined the disputed issues *"in principle"* and passed questions back to the landlord saying:

  "The Tribunal has decided the issue in principle and the Respondent is required to determine the consequent figures as the Respondent did not have the relevant figures available during the hearing".

Jarowicki v Freehold Managers (Nominees) Limited 2016 [UKUT 0435] (LC)

- The Upper Tribunal granted permission on the ground that the lessees had requested a determination of the amount payable and the FtT had not provided one.
- The Upper Tribunal.

"If an application is made to the FtT … for a determination … it is incumbent upon the Tribunal to determine that application … until it has quantified the service charge payable, the FtThas not yet fully determined the application. It cannot properly delegate its duty by directing one of the parties to determine the financial consequences of its decision".

Jarowicki v Freehold Managers (Nominees) Limited 2016 [UKUT 0435] (LC)

- The Upper Tribunal pointed out that a First-tier Tribunal had adequate case management powers under Rule 6 to direct that a party should provide information that was necessary to determine the amount of service charge payable.

Tedworth North Management Limited v Miller, Ogorodnov & Ogorodnov 2016 UKUT 0522 LC

The Facts

- Crittall windows
- Repair or improvement
- An approximate cost of £5,000 per lessee
- Both sides represented by Counsel and solicitors at the Tribunal Hearing.

Tedworth North Management Limited v Miller, Ogorodnov & Ogorodnov 2016 UKUT 0522 LC

The Upper Tribunal's Decision

- It doesn't matter because the case turned upon its facts and the Upper Tribunal's decision noted that "*the relevant legal principles were not in dispute".*

Tedworth North Management Limited v Miller, Ogorodnov & Ogorodnov 2016 UKUT 0522 LC

Case Management Observations

"The fact that two issues in this appeal arose out of evidence which the FtT and the parties lost sight of, illustrates the risks which parties take when they over complicate the presentation of an essentially straightforward case".

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Tedworth North Management Limited v Miller, Ogorodnov & Ogorodnov 2016 UKUT 0522 LC

"The FtT hearing lasted 3 days, 8 lever arch files of documents were deployed and the detailed submissions made by Counsel were supported by a very large number of authorities. Even for the appeal, it was felt necessary to produce more than one thousand pages of documents, only a handful of which were referred to. There is unlikely to have been any good reason why the documents provided to the FtT could not have been contained in a single file, for example, by omitting hundreds of unnecessary pages of building contracts and duplicate leases and including only the material pages"

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Tedworth North Management Limited v Miller, Ogorodnov & Ogorodnov 2016 UKUT 0522 LC

"Most of the citation of authority could probably have been eliminated in favour of reference to one of the standard practitioners text books".

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Tedworth North Management Limited v Miller, Ogorodnov & Ogorodnov 2016 UKUT 0522 LC

"Had preparation for the hearing been approached with greater forethought and restraint, both the parties and the Tribunal would have been able to focus on the documents of significance and on well established legal principles. The FtT has sufficient case management powers to require that hearing bundles contain only directly relevant documents or extracts from documents, to limit the number of such documents it will receive in evidence."

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Tedworth North Management Limited v Miller, Ogorodnov & Ogorodnov 2016 UKUT 0522 LC

"In cases such as this where both parties are professionally represented and can be expected to cooperate with each other to a high degree, there is scope for those powers to be employed more ambitiously, to the benefit of all concerned".

LB Southwark v Proktor 2016 UKUT0504LC

The Challenge

- Mr Proktor contended that because the annual estimate for service charges excluded any provision for anticipated major works in the forthcoming year, that the demand was invalid.

LB Southwark v Proktor 2016 UKUT0504LC

- The Lessee argued by reference to *LB Southwark v Woelke* in which the Upper Tribunal had said:

  "[The lease] requires the Appellant to make "a reasonable estimate of the amount which will be payable by the lessee by way of service charge" … this case raises the question whether the [landlord] is entitled to omit from its estimate some component of the expenditure which it can reasonably anticipate will be incurred. That is what it did in relation to the leaseholders' share of the window replacement contract which was not included in the service charge estimate for 2004/05 or 2005/06"

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LB Southwark v Proktor 2016 UKUT0504LC

"[The lease] imposes a positive obligation on the [landlord] which it is not entitled to waive, to provide a reasonable estimate before the start of the year of the service charge which will be payable … the [landlord's] obligation is to provide a reasonable estimate of the fair proportion of the costs and expenses to be incurred in the year which will be payable by the leaseholder. If the [landlord] reasonably anticipates that its expenditure will include expenditure on major works, as it could have done in this case, it is required to include that expenditure in its estimate. The omission of such expenditure from the estimate is not consistent with the contract".

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LB Southwark v Proktor 2016 UKUT0504LC

The FtT agreed and found that the estimated demand was invalid although it did grant permission to appeal.

LB Southwark v Proktor 2016 UKUT0504LC

The Upper Tribunal Decision

- It must be possible to identify on receipt of an estimate whether it is a valid estimate and the validity cannot depend upon subsequent events.
- The practical consequence of a failure to take account of major works in the estimate is that the landlord would not be entitled to collect advance payments from a leaseholder towards the cost of the anticipated works.

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LB Southwark v Proktor 2016 UKUT0504LC

The omission would not invalidate the estimate in relation to matters which were included within the estimated demand.

Contact Details

Mark Oakley, Partner
Judge & Priestley
moakley@judge-priestley.co.uk
Direct Line: 020 8290 7337

Ranjit Bhose QC
Cornerstone Barristers
ranjitb@cornerstonebarristers.com
Direct Line: 020 7421 1841