UPPER TRIBUNAL (LANDS CHAMBER)

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UTLC Case Number: LRX/58/2016

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – reasonableness of – exercise of discretion to allow or refuse adduction of further evidence before final determination

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

BETWEEN:

POWELL AND CO PROPERTY (BRIGHTON) LIMITED

Appellant

and

MR D PATEL
MR U PATEL

Respondents

Re: 3, 5, 10 Regent Gate,
Crown Street,
Kettering
Northamptonshire
NN16 8JD

His Honour Judge Gerald

The Royal Courts of Justice

2 December 2016

There are no cases referred to in this Decision.

Introduction

1. The appellant landlord appeals against the 6th April 2016 decision ("Decision") of the First-tier Tribunal Property Chamber (Residential Property) ("F-tT"), permission to appeal having been refused by the F-tT on 14th April 2016 ("Refusal Decision") but granted by the Deputy President of this Tribunal on 20th June 2016 when permission to rely upon additional evidence was given provided served by 20th September 2016 which the appellant has availed itself of by serving, albeit late, some additional evidence as did the respondents.

2. The appellant appeals against the F-tT's refusal to allow architect's fees of £7,066.40, surveyor's fees of £3,870.00 and legal fees of £6,167.73 for the service charge year ended 24th March 2014. A previous and differently constituted F-tT with different long-leaseholder applicants had approved estimated costs of £6,000 for both architect's and surveyor's fees for the same year.

3. Whilst the F-tT did not question that these monies had been expended by the appellant, it held that the appellant had failed to discharge its burden of proof because insufficient evidence had been adduced for it to determine whether or not same fell within the service charge provisions of the leases and, if so, whether they were reasonable and had been reasonably incurred. In its Refusal Decision, the F-tT also said that it did not regard itself as bound by the previous decision of the F-tT.

4. By way of contrast, in respect of the insurance premium which the F-tT accepted had been expended but there was insufficient information for the F-tT to determine recoverability (in respect of which there is no appeal), on 16th February 2016, the day after the hearing had concluded and presumably after the F-tT had conducted some initial deliberations, the F-tT invited the appellant to furnish further information to substantiate the insurance premiums.

5. It was common ground before me that all sums were in principle recoverable under the service charge provisions of the leases in question (a different stance from that adopted by the respondent tenants before the F-tT).

6. The sole ground of appeal advanced before me was that the F-tT should have exercised its discretion and invited and allowed the appellant to provide further information and explanation in relation to each of these three sums as it had in relation to the insurance costs and, further, that there was a requirement for consistency of decision bearing in mind the treatment of the insurance costs and also the previous decision of the F-tT in approving the estimated architect's and surveyor's fees for the same period.

7. The respondents' position was that the appeal should be dismissed because the appellant had failed to adduce evidence before the F-tT and should not have been should not now be given a further opportunity to do so. As I have said, neither party

appeals against the F-tT's decision to permit further evidence in relation to the insurance premium.

8. After completion of evidence and close of submissions and once the tribunal (as with any court) has withdrawn to deliberate, the tribunal nonetheless retains a discretion to invite further evidence or submissions on any point in issue which discretion, no doubt, will generally be exercised sparingly because it is for the parties to ensure that all relevant evidence is before the tribunal in compliance with previous directions and there must be finality. However, once exercised, the discretion must be exercised in a way which is consistent and promotes consistency of judgment. There generally will be a reluctance of any appellate tribunal (or court) to intervene unless it can be shown that the inferior tribunal has acted perversely, that is, has acted in such a way as no reasonable tribunal vested with the knowledge and information of the instant tribunal would do.

9. In my judgment, this is just such a case. Where, in regard to the architect's and surveyor's fees, (a) an albeit differently constituted tribunal with different parties but in relation to the same premises, had approved the proposed or estimated expenditure and where (b) the F-tT accepted that the amounts in issue had been expended and also (c) knew that major works had been undertaken by the appellant which were inherently likely to require the on-going services of the architect and surveyor (as presaged and approved by the previous tribunal) to continue the work which they had been doing the previous year (which fees had also been approved and allowed by the previous tribunal) and (d) had decided that the appellant should be given the opportunity to furnish further information in relation to insurance premium, (e) it in my judgment was irrational for the F-tT not to have afforded the like accommodation in respect to the architect's and surveyor's fees.

10. Whilst it was not inaccurate for the F-tT to say that the approval of the estimated fees was not binding upon it, the fact that the reasonableness of expending (estimated) service charge monies on these architect's and surveyor's fees was approved by the previous tribunal coupled with the fact of the ongoing major works being carried out to the subject premises give a strong steer in the direction that at least some if not all of the actual fees being sought were or were likely to be recoverable. Of course, there were different tenant-respondents before the previous tribunal, but it was the same premises, the same service charge and the same landlord who was intending to and, so far as I am aware, has expended money on precisely what was previously approved – architect's and surveyor's fees.

11. Whilst the F-tT, when considering the unsatisfactory nature of the evidence before it (but accepting that the fees had actually been expended by the appellant), said that the appellant had failed to discharge its burden of proof, it overlooked that it had declined the opportunity to inspect the premises which would or might have afforded it an opportunity to evaluate the nature and extent of the work and the likely involvement of architect and surveyor in the year in question which had been approved albeit prospectively and on an estimated basis by the previous tribunal. In

other words, the F-tT's complaint of insufficient evidence was or might have been in part because it had chosen not to inspect.

12. This is not to overlook the need for documentary evidence to reconcile or further explain precisely what the architect's and surveyor's fees had been expended upon. In this respect, it is possible that the F-tT was confused into trying to distinguish between fees which had been spent in order to put the property into repair, irrespective of why and how the property had got into disrepair, and those which might possibly have been spent on upgrading, or improving, the premises: I refer to paragraph 38 of the Decision. If that is so, on which more below, it does not remove from the fact that it was more likely than not that at least some of these fees had been spent and spent reasonably on works of repair which would or could have been clarified had the appellant been given the same opportunity to furnish further information as it was in respect of the insurance premium. In this respect, I could discern no rational reason why the insurance premium should be treated differently.

13. Whilst all relevant evidence should have been before the F-tT at the time of the hearing, if the F-tT was going to allow more time for some evidence, then there is no rational reason, or none that I can discern, why it should not have permitted more time for further evidence in relation to the architect's and surveyor's fees. In my judgment, the same can be said of the legal fees, albeit that slightly different considerations apply to them. In neither situation is this a case where there was no more evidence. Indeed, before me further evidence has been adduced which might assist in the determination of the amounts in issue – save to note that it is likely that yet more information will be made available by the appellant.

14. I therefore allow this appeal and remit to the F-tT for reconsideration of the reasonableness of architect's fees of £7,066.40, surveyor's fees of £3,870.00 and legal fees of £6,167.73 for the service charge year ended 24th March 2014 which can be determined by the same panel members who determined the Decision, they being cognisant with the matters in issue and well-suited to determine these remaining discrete matters. I leave it to the F-tT to make any further directions as to the production of further evidence in addition to that which has been provided to this Tribunal, any timetable being as tight as is realistically possible.

15. When the F-tT reconvenes, it will be necessary for it to consider, and make clear, the legal basis upon which it is allowing or disallowing the architect's and surveyor's fees. I say this because, as already alluded to, paragraph 38 of the Decision gives the impression that the F-tT might be of the view that some of the fees are or might not be recoverable because some or all of the works of repair were or might be to correct latent or inherent defects and that any fees associated with local authority certification might fall out-with the repairing obligation.

16. Whether that is so will depend upon a careful consideration of the whole of the relevant leases, including any obligation to comply with building and other statutory requirements and regulations. As the F-tT rightly notes, it must be in the interests of

all concerned for the appropriate certificates to be issued otherwise the flats can not be sold. If the appellant was not under a duty to repair in that regard, it would follow that it was under no obligation to carry out the works and expend the money it has – which might seem a little odd given that the previous tribunal had, as I understand it, approved the expenditure now being claimed, or most of it.

Dated: 8 February 2017

His Honour Judge Gerald