Residential Service Charges—How Long Have You Got to Challenge Them?

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Residential service charges are subject to a multitude of statutory regulations many of which must be complied with if the landlord is to be able to recover the sums contractually due under the lease. If a tenant wishes to challenge whether a particular element of his service charge is payable, he can bring an application in the First Tier Tribunal for a determination under s.27A of the Landlord and Tenant Act 1985. Such an application can be made irrespective of whether the service charge has already been paid which means the tenant can, and often does, seek a refund many years after the landlord thought the account had been settled. The question of whether there is a time limit on seeking a determination under s.27A is one which has troubled the Property Chamber Tribunals on a number of occasions in recent years, but has received no clear answer. We are, however, one step nearer to the imposition of a deadline with the case of Cain v Islington LBC *[2015] UKUT 542 (LC).*

The legislation

Under s.27A(1) of the 1985 Act, an application may be made to the appropriate tribunal for a determination of whether a service charge is payable. Subsection (2) states that this is the case whether or not any payment has been made. However, s.27A(4)(a) states that no application can be made in respect of any matter which "has been agreed or admitted by the tenant" although the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment: see s.27A(5).

There is no express statutory limitation period in respect of applications under s.27A so, in theory, a tenant could make an application 20 years after having paid his service charge. This is, of course, extremely unsatisfactory. Say, for example, the tenant wants a determination that the redecoration of the common parts was not carried out to a reasonable standard in 1995, there are all sorts of practical problems that might arise in dealing with the claim. The works will be 20 years old and will have deteriorated, the landlord may have changed, the paperwork may have been lost or destroyed and it will be too late to get the contractors back to sort out the problem.

Parissis—the limitation story so far

In the case of *Parissis v Blair Court (St John's Wood) Management Ltd* [2014] UKUT 503 (LC); [2015] L. & T.R. 7, the tenant challenged service charges relating to the years 2001–2005 and the issue before the Upper Tribunal was whether he was out of time. Various sections of the Limitation Act 1980 were put forward as contenders to bar an action under s.27A including s.19, s.9 and s.5 of the 1980 Act. Section 19 provides that no action shall be brought to recover arrears

of rent more than six years after the date on which the arrears become due. This was no help because an application for a determination under s.27A is not a claim for arrears of rent. Section 9 provides that no action to recover a sum recoverable by virtue of any enactment shall be brought after the expiration of six years from the date on which the cause of action accrued. Again, this does not assist because s.27A does not allow for the recovery of any sum; it merely allows for a determination of what was payable.

More hopeful was a bar based on s.5 of the 1980 Act which provides that an action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued. As a restitutionary claim for money received can be regarded as founded on a simple contract, any claim for the recovery of any overpayment determined under s.27A might be statute barred after six years. However, s.5 would not prevent the claim under s.27A itself just any action for recovery of the sum determined under s.27A to have been overpaid. HH Judge Huskinson, sitting in the Upper Tribunal, found that the application in *Parissis* was not statute barred under any of these provisions but remitted the application to the First Tier Tribunal stating:

> "In these circumstances it may be that, upon this matter being remitted to the LVT (as I conclude it must be) the LVT will give consideration, either of its own motion or because of an application to do so by the Respondent, to the question of whether the appellant's applications should be dismissed as being "frivolous or vexatious or otherwise an abuse of the process of the tribunal" within regulation 11 of the Leasehold Valuation Tribunals Procedure (England) Regulations 2003 … ."

Any "abuse of process" application will, of course, turn on its own facts. However, if the only purpose of the application would be to obtain a determination of an overpayment which is irrecoverable by virtue of s.5 of the 1980 Act, would not such an application be a waste of time and, therefore, frivolous and vexatious? Questions might, of course, arise as to whether the limitation period under s.5 was extended under s.32 of the 1980 Act if the action was for relief from the consequences of a mistake.

Cain v Islington

The whole limitation conundrum was circumvented in the case of *Cain v Islington LBC* [2015] UKUT 542 (LC). Again, the question for the Upper Tribunal was whether the tenant was too late to challenge the reasonableness and the method of apportionment of service charges which he had paid for the years 2001/2002–2006/2007. Not only had the tenant not questioned any of the sums claimed in in the intervening decade or so, he had also failed to dispute that they were due in other proceedings between the same parties. The First Tier Tribunal found that, in the circumstances, the tenant was to be treated as having agreed or admitted each of the elements of the service charge and that the application was now barred by virtue of s.27A(4). The appellant appealed this finding on the grounds that this could not be right because s.27A(5) expressly provides that payment of the sum due cannot found an admission or agreement. HH Judge Nigel Gerald, sitting in the Upper Tribunal, disagreed. He said:

> "14. Before considering the facts of this case, it is necessary to consider the meaning and effect of section 27A(5). An agreement or admission may be express, or implied or inferred from the facts and circumstances. In either situation the agreement or admission must be clear, the finding being based upon the objectively ascertained intention of the tenant which may be express or implied or inferred from the conduct

of the tenant—usually an act or a series of acts or inaction in the face of specific circumstances or even mere inaction over a long period of time or a combination of the two.

15. Absent sub-section (5) and depending upon the facts and circumstances, it would be open to the F-tT to imply or infer from the fact of a single payment of a specific sum demanded that the tenant had agreed or admitted that the amount claimed and paid was the amount properly payable, *a fortiori* where there is a series of payments made without challenge or protest. Part of the reason for this is that people generally do not pay money without protest unless they accept that that which is demanded is properly due and owing, and certainly not regularly over a period of time. Whilst it would generally be inappropriate to make such an implication or inference from a single payment because it could not be said that the conduct of the tenant was sufficiently clear, where there have been repeated payments over a period of time of sums demanded, there may come a time when such an implication or inference is irresistible.

16. Taking matters one step further, it would be open to the F-tT to make such a finding even where there had been no payment at all but there were other facts and circumstances clearly indicating that the tenant had agreed or admitted the amounts claimed. What is required is some conduct which gives rise to the clear implication or inference that that which is demanded is agreed or admitted by the tenant. The relevant question, therefore, is: are there any facts or circumstances from which it can properly be inferred or implied that the tenant has agreed or admitted the amount of service charge which is now claimed against him?

17. The effect of sub-section (5), however, is to preclude any such finding "by reason *only of* [the tenant] having made *any payment*" [italics supplied]. The reference to the making of "any payment", and "only" such payment, indicates that whilst the making of a single payment on its own, or without more, will never be sufficient to found the finding of agreement or admission, the making of multiple payments even of different amounts necessarily over a period of time (because that is how service charges work) may suffice. Putting it another way, the making of a single payment on its own, or without more, will never be sufficient; there must always be other circumstances from which agreement or admission can be implied or inferred. And those circumstances may be a series of unqualified payments over a period of time which, depending upon the circumstances, could be quite short, it always being a question of fact and degree in every case."

In *Cain*, the Upper Tribunal was in no doubt that Mr Cain's actions (or rather inactions) were sufficient to amount an admission that the sums which he had paid many years earlier were due. As a result, the Tribunal was deprived of its jurisdiction to entertain an application under s.27A. The Upper Tribunal went on, however, to consider the other grounds on which the FtT had found that the tenant's claim was brought too late.

Limitation defences were dismissed as misconceived on the same basis as in *Parissis*. A claim for a determination under s.27A is not a claim to recover rent, arrears, service charges or damages and, therefore, ss.8 and 19 of the 1980 Act were found not to apply. Similarly, the doctrine of laches is of no assistance because it applies only to equitable claims.

Lastly, Judge Gerald considered whether the First-tier Tribunal could strike out stale claims under its case management powers by applying the overriding objective. The Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 give the Tribunal the power to deal with an

issue as a preliminary issue (r.6(3)(g)) or to strike out the whole or part of proceedings where the Tribunal considers there is no reasonable prospect of the applicant's case succeeding (r.9(3)). The First-tier Tribunal considered the difficulty of unearthing documentation in relation such an old claim and took the view that the expense of doing so would be completely disproportionate to the sums being challenged.

Judge Gerald was not impressed by this reasoning. He observed that case management powers are not intended to prevent litigants from pursuing claims. The purpose of these powers is to manage the litigation once it has been commenced and to make its management proportionate—not to strike it out. Unfortunately, it does not seem to have been submitted in *Cain* that the application was an "abuse of process" under r.9(3)(d). It will be recalled that this was a beacon of hope suggested by HH Judge Huskinson in *Parissis*. The case of *Parissis* is not referred to in *Cain*, so it remains to be seen whether applications brought under s.27A disputing service charges which were paid many years ago can be struck out on the ground that the claim is "frivolous or vexatious or otherwise an abuse of process of the Tribunal". Sadly, stale claims are not unusual in the First-tier Tribunal, so the writer suspects it will not be long before we find out.

The law is stated as at October 16, 2015.