Neutral Citation Number: [2021] EWCA Civ 789

Case No: B2/2020/1403

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT BRIGHTON
His Honour Judge Simpkiss
C15YP298

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/05/2021

Before :

THE RT HON LORD JUSTICE LEWISON
THE RT HON LORD JUSTICE ARNOLD
and
THE RT HON LORD JUSTICE EDIS

- -

Between :

KEITH VERNON GELL	**Appellant**
- and -	
32 ST JOHN'S ROAD (EASTBOURNE) MANAGEMENT COMPANY LIMITED	**Respondent**

- -
- -

James E. Petts (instructed by **Weil, Gotshal & Manges (London) LLP**) for the **Appellant**
Ryan S. Kohli (instructed by **KDL Law**) for the **Respondent**

Hearing dates : 12 May 2021

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Approved Judgment

Lord Justice Edis :

Introduction

1. This is an appeal against a decision of His Honour Judge Simpkiss on 21 August 2019 when he allowed an appeal against an order made by Deputy District Judge Thompson made on 26 February 2019. I shall call the claimant/respondent "the landlord" and the defendant/appellant "Mr. Gell". Mr. Gell is the leaseholder of one of seven flats which resulted from the conversion of an old building into flats many years ago.

2. It is right to begin this judgment with an acknowledgement that Mr. Gell is now represented by solicitors and counsel acting under the *pro bono* schemes operated by both branches of the profession in this jurisdiction. Mr. Gell represented himself before the Deputy District Judge and the Circuit Judge, and there is a letter from his General Practitioner which says that he suffers from conditions which cause memory loss and extreme fatigue. One of the doctor's suggestions is that Mr. Gell should be assisted by lawyers and the court is grateful to Mr. Petts, and to his instructing solicitors and to Baker & McKenzie who also provided some *pro bono* assistance to Mr. Gell at an earlier stage in the preparation of this appeal.

3. According to the claim form, the claim in this case is for "service charges, interest and costs arising under a lease to which both parties are subject". The sum claimed is £78,901.54, which, again according to the claim form, is made up of three elements, namely (1) unpaid service charges of £73,163.98, (2) interest "at the lease rate of 4% above base rate" of £3,529.56, and (3) legal costs of £2,208, including VAT claimed under a provision in the 1963 lease which had not been varied. The third part of that claim has not been pursued and the landlord has recovered costs under costs orders made in the proceedings.

4. This is the second action brought by the landlord against Mr. Gell for maintenance charges arising under the lease. He lost the first action, for service charges due prior to 25 March 2013, and eventually satisfied the judgment entered against him.

5. The maintenance charges in this case cover a period going back to 25 March 2013, and the proceedings were issued in 2016. The arrangement at the flats is a familiar one, whereby the leases require the tenants to contribute to the upkeep of the building, which is managed for their mutual benefit by a management company, the landlord, which appoints agents to carry out its functions. In this instance the landlord is the freeholder and the shares in it are held by the leaseholders in its building, one of whom is Mr. Gell. It instructs Carlton Property Management as its agent in the management of the property. The anticipated cost of maintenance in 2015 and 2016 was very high, because major works were believed to be necessary. If one of the flats fails to pay, and the dispute is not resolved promptly, that may have a significant effect on the other tenants and, probably, on the market value of their leasehold interests. It is unfortunate that over four years after the issue of proceedings the case has not been resolved. That is particularly true when Mr. Gell's defence was struck out in August 2017, and a default judgment entered against him for an amount to be assessed.

A summary of the facts

6. Mr. Gell lives at flat 3, 32 St John's Road, Eastbourne. He occupies it under a lease which was granted on 4 May 2001 by means of a deed of surrender and lease which had the effect of varying an earlier lease, dating back to 1963. It contains a provision for the payment by Mr. Gell of 22.5% of the total "maintenance charge" payable by the tenants of all the flats in the building to the landlord. The Particulars of Claim asserted that the claim was for service charge "of £73,163.98 as shown in the attached statement". The attached statement sets out a claim in that sum which is for the balance due on a running account which includes the transactions which settled the balance due following the first action. Stripping out the elements relating to the old liability, which cancel each other out in the account, most of the items on the statement are for service charges and administration charges in unremarkable sums. The unusual element was four debits for the period September 2015-September 2016 as follows:-

20-10-15	Service charges- Flat 3; 29 Sept 2015-24 Mar 2016	£4,449.72
20-10-15	Major works: 29 Sept 2015-24 Mar 2016	£30,145.50
25-2-16	Service charges- Flat 3; 25 Mar 2016-28 Sept 2016	£4,449.72
25-2-16	Major works: 25 Mar 2016-28 Sept 2016	£30,145.50
	Total Billed for 12 months to 28 September 2016	£69,190.44

7. These sums mostly relate to major works which are said to be necessary to maintain the building and concern, among other things, the fire escape and the roof and include concerns about asbestos. The sums claimed are based on an assessment of the necessary works and their cost by a building surveyor who is a shareholder in Carlton, the managing agents. The works have not been carried out, and the claim is a prospective one to raise funds for the work. At their completion, there will be an adjustment to reflect their actual cost. This is an appropriate procedure under the lease, and the expected cost is split into two half-yearly invoices, again as required by the lease. It is these two invoices which caused the majority of the argument before the Deputy District Judge.

8. Mr. Gell served a defence to the claim on 14 December 2016 which admits that he signed the 2001 deed but denies that it is binding because he claims that the other party obtained his signature by duress and acted in bad faith. He also maintains that he should not have to pay more than the sum which the DWP has agreed to pay for the service charges as part of his sickness benefit. That sum is £44.81 per week, which the landlord has refused to accept. He also asserts that he is not bound by the terms of the 2001 deed if they are different from those of the 1963 lease, which must be because of his fraud claim.

9. Interspersed with those contentions, the following is found (omitting the parts just summarised):-

> "4.2 I admit clause 3(1) to pay service charge, except that I deny that I should pay service charges in advance and of an amount purely based on the estimates of the managing agent. ….As my service charge is 22.5% of the total service charge payable, the total service charge received by Carlton [if he pays £44.81 per week] is over £10,300 a year which I believe should be more than enough to maintain a 7 flat block.
>
> The clause in the agreement of 1 May 2001 states: "the maintenance charge shall be paid half yearly on the 25 March and 29 September in every year and these interim payments shall be such sums as the Landlord or his agent shall estimate to be required to enable the Landlord to comply with his covenants under the terms of the lease including the cost of employing Managing Agents."
>
> This clause, if enforced, would imply the landlord can engage a managing agent to charge the defendant any amount of money for major works without having to provide contractor's quotes, estimates or invoices; or surveyors' reports stating why such works are necessary. The landlord has done just that by attempting to charge me £60,291 for major works without sending me any proof of the contractor's costs in terms of quotes of estimates or that the work is necessary in the form of surveyor's reports."

10. Paragraph 5.2 of the defence says:-

> "I admit I am liable for service charges and ground rent totalling £44.81 a week. This is the amount the DWP consider reasonable given the information I received from Carlton and then passed on to the DWP. I am sick with mild cognitive impairment at present and am in receipt of sickness benefit. I have applied to the DWP for help in paying the service charges the landlord claims, but understandably, the DWP will not pay service charges that are unsupported by evidence in the form of contractor's invoices. I have asked the landlord for evidence that the service charge claims are reasonably incurred under the Landlord and Tenant Act, and the landlord has not sent me the information I need."

11. The counterclaim contained two paragraphs. Paragraph 1 complains that he is not liable for an invoice which the landlord has accepted he is not liable to pay. He apparently seeks an explanation of why the landlord has decided not to pursue the invoice. It is not clear what cause of action might result in such a remedy. The second paragraph is more relevant for present purposes. It says:-

> "I counterclaim that the landlord is in breach of s21 and 22 of the Landlord and Tenant Act by not sending me information regarding service charges and service charge requests."

12. Section 20 of the Landlord and Tenant Act 1985 and the Service Charges (Consultation Requirements) (England) Regulations 2003 made under that Act impose requirements for consultation and limit recovery if they are not complied with. Sections 21 and 22 were described by Lewison LJ in *Di Marco v Morshead Mansions Ltd* [2014] EWCA Civ 96 at [1] as follows:-

> "Section 21 of the Landlord and Tenant Act 1985 entitles a tenant to require his landlord to supply him with a written summary of costs which will form part of a service charge. If so required the landlord must comply with the request within one month. Section 22 entitles a tenant who has received such a summary to require the landlord to afford him reasonable facilities for inspecting the documents supporting the summary. The landlord must comply with that request within two months. Failure to comply with these obligations without reasonable excuse is a summary offence punishable with a fine."

13. As the court then held, those provisions do not give rise to any civil remedy, and section 21A of the Landlord and Tenant Act 1985, which would give a tenant a right to withhold service charge in the event of breach, has not yet been brought into force. Accordingly, paragraph 2 of the counterclaim disclosed no cause of action. It did, however, show that Mr. Gell was familiar with the provisions of the Landlord and Tenant Act 1985. He did not, in terms, allege that the service charges being claimed before the major works were commissioned were unreasonable and he did not mention the consultation requirements under section 20 of the Act at all.

The August 2017 Order

14. On 8 August 2017 Deputy District Judge Thompson struck out the defence and counterclaim and entered judgment "for an amount to be assessed". She struck out the Defence and Counterclaim in its entirety, because the allegation of duress, bad faith and deceit had not been raised by Mr. Gell in his Defence to the earlier proceedings, referred to above. The Deputy District Judge held that Mr. Gell was estopped from raising the allegation of fraud in the present proceedings and that the Defence was an abuse of the process of the court. She also held that the Counterclaim "disclosed no reasonable grounds". She was concerned about the documentation concerning the amount of the maintenance charge which had been disclosed by the landlord, and said:-

> "…whilst I am prepared to grant a judgment in principle but that the amount of that judgment be assessed upon the filing of further evidence."

15. That is why she gave directions for a further hearing.

16. There was no specific consideration of paragraphs 4.2 or 5.2 of the Defence or paragraph 2 of the Counterclaim. Paragraphs 4.2 and 5.2 of the Defence could not, so far as the parts I have set out above are concerned, be struck out as an abuse of the process of the court on the ground that they raised matters which could and should have been raised in the first set of proceedings. The references to the DWP's level of support could properly have been struck out as irrelevant, and the references to bad

faith and the invalidity of the terms of the 2001 deed were struck out as an abuse. The claim that the landlord's construction of the lease could not be sustained, and the request for evidence of reasonableness and the reference to the Landlord and Tenant Act 1985 were struck out along with the rest. The judge gave a judgment which concluded:-

> "17. I am, I have to say, concerned about the amount of the claim and the fairly unsatisfactory level of disclosure that I have before me and whilst I am prepared to grant a judgment in principle but that the amount of that judgment be assessed upon the filing of further evidence. The reason for this is that I have received two accounts, one saying £91,000 is outstanding and I am now glibly told that the claimant accepts that £21,000 is not recoverable. I have another one saying £73,000 and those statements of accounts if you look at them for the period May 2014 onwards actually do not bear a great deal of resemblance to each other.
>
> "18. I consider as well that Mr. Gell should be in a position to bring to this court any evidence that he may have with regard to the works that are to be done to the property and any requests which he may retain in respect of the service charges. I have no idea what the £30,000 odd relates to. I have seen a document, but I have not seen (and Mr. Gell tells me that he has not actually had) the relevant estimates either and it may well be that something of this nature should be referred to the First Tier Tribunal (Property Chamber), but at this stage, I do not know because I do not have the evidence before me. I am unhappy at this stage to quantify the judgment when I have got conflicting statements of account in front of me. That is my current position."

17. The judge did not say that she intended to assess the reasonableness of the maintenance charges under section 19 of the Landlord and Tenant Act 1985 at the adjourned hearing. The consultation process required by section 20 of that Act was not mentioned at all. The Order which she made was as follows:-

> "1. Judgment for the claimant for an amount to be assessed.
>
> 2. Defence and Counterclaim be struck out.
>
> 3. The Claimant do file and serve a statement disclosing the following:_
>
> a) all invoices;
>
> b) an explanation as to the charges arising from 24 February 2014;
>
> c) all estimates relating to the charges of £30,145.50 dated 20 October 2015 and 25 February 2016

> On or before 28 August 2017
>
> 4. Defendant do file a statement in reply, if so advised, on or before 28 October 2017.
>
> 5. Defendant do pay the Claimant's costs to be assessed at the next hearing.
>
> 6. Reserved to Deputy District Judge Thompson. List for hearing on the first open date after 7 November 2017 with a time estimate of 2 hours."

18. Mr. Gell sought permission to appeal against the striking out of his defence which was refused by the Circuit Judge on 17 April 2018. He tried to get permission to appeal from the High Court which held that it had no jurisdiction on 18 June 2018.

The February 2019 Order which is the subject of this appeal

19. The case came on for hearing before the Deputy District Judge on 22 February 2019. We have a transcript of that hearing. In the end, she made an order that,

> "The question of the reasonableness of the amount of the service charge to be determined by the First Tier Tribunal (Property Chamber)".

Mr. Gell's allegation of discriminatory conduct

20. At this hearing, the landlord was represented by counsel. Its bundles were assembled and served on Mr. Gell not long before the hearing, but they contained material which had been served on him in time. There were only two new documents (an up to date interest calculation and a statement of costs) which were pointed out to Mr. Gell by counsel before the hearing started. Mr. Gell strongly objected to this, and to the size of the bundles. He complained that the bundles were "overfilled" and that this was discriminatory, given his mild cognitive impairment, referred to in his Defence. He continues to make this allegation, and set it out in emails to this court both before and after the hearing of this appeal. Mr. Petts did not include reference to it in his submissions. The Deputy District Judge did deal with it. She said this:-

> "Mr. Gell, all I can say is that it would appear that the bundles were served on you in time. It may be that [counsel who then appeared for the landlord] wanted to point to your attention to something in the bundle which was only fair that she should do beforehand. She wasn't serving on you an extra bundle of papers. The bundles you received you had actually received, as I understand it, some days ago. They actually relate to papers that had already been disclosed in these proceedings in any event and I certainly can't see there has been any conduct on the part of the claimant or her counsel that is such that you could complain about."

21. There is substantial evidence in the appeal bundles that Mr. Gell has refused to accept service of documents in the past, which resulted in an order by Judge Simpkiss on 8

November 2018 warning Mr. Gell that the hearing (which took place in February 2019) may proceed even if he contends that he has not received documents because it appeared that he may be refusing to accept papers deliberately. Judge Simpkiss directed that evidence of service should be filed as part of that order.

22. No new material was before the Circuit Judge and the bundles for this appeal also contain no new material, and contain about 220 pages. Mr. Gell is now, of course, represented. I have set out his complaint, because it is clearly important to him. It has nothing to do with what we have to decide. The only hearing to which it might be relevant was the February 2019 hearing at which an order was made to refer the assessment of the service charges to the First-tier Tribunal (Property Chamber). This was an order with which Mr. Gell was content, and which he now seeks to restore.

The evidence before the Deputy District Judge

23. Carlton Property Management, the landlord's agent, had filed and served a witness statement within the time allowed by the order of August 2017, together with about 1300 pages of documents.

24. On the eve of the hearing, Mr. Gell had served a document dated 20 February 2019. He had asked for, and been granted by consent, a number of extensions of time for the "statement" which he had been permitted to file by the order of August 2017. This document was served five weeks after the last of these extensions had expired. It is a carefully drafted but very unhelpful document, which repeats at some length the abusive allegations of fraud which had already been struck out. He continues to assert that he is not liable for a sum of £21,585.20 which had been demanded from him at one point, although the order of 7 August 2017 recorded in a recital that the landlord accepted that this sum was not due. He sets out a lot of material designed to discredit Mr. Buckland, the building surveyor on whose opinion the landlord had relied in accepting the necessity and probable cost of the major works in the two large invoices in the Table above. This was the first time this issue had been raised in the proceedings. There are also, for the first time, some references to section 20 consultation documents, although there is even now no allegation that the obligations were not complied with. Mr. Gell sets out references to the CPR and refers to a decision which asserts the powers of the court to regulate the amount of material placed before it. This is in support of his complaint about the size of the bundles, which I have dealt with above.

25. The content of this document is largely irrelevant. A schedule of comments on the landlord's bundles is attached to it which includes a few observations about the section 20 consultation notices. These observations do not allege any legal consequences which might flow, should they be true. There is no challenge to the reasonableness of the service charges nor any evidence of any kind which might suggest that they are not reasonable, despite the landlord's witness statement and supporting documents having been served in August 2017, eighteen months before. When describing this material in giving judgment on the appeal in August 2019, Judge Simpkiss said:-

> "At 4.24pm the day before [the February 2019 hearing] the defendant served 103 pages of submissions and further evidence for that hearing. Although ordered to be served at a

> much earlier stage, as a result of various agreements between the parties, this document should have been served by 14 January 2019, and therefore even with having regard to the extensions it was five weeks late and the day before the hearing."

26. At the hearing, the Deputy District Judge concentrated on the two large invoices for major works. Documents concerning the statutory consultation in respect of this work had been disclosed and placed in the bundles before the court. The notices were described as the "section 20 notices" by reference to section 20 of the 1985 Act and the 2003 Regulations cited above. The fact that they existed meant that there had been at least purported compliance with that requirement, and that Mr. Gell had had them before proceedings were issued. He never formulated any complaint about it, until some passing references to the notices in his document of 20 February 2019. The consultation as an issue in the proceedings was first mentioned during the hearing in February 2019, by the judge.

27. The landlord relied on two statements by Rohini Allen, a director of Carlton. Her first statement was dated 24 August 2017 and it exhibited a number of documents including a report by Mr. Buckland, a building surveyor. He is a shareholder in Carlton, but provided this report under the auspices of a firm called Chapman Willis Building Surveyors and Consultants. Mr. Gell complained that Mr. Buckland is not an independent expert. His report identified six items of work which it advised were necessary. It was dated 20 August 2015. The statement of Ms. Allen says that it, and the consequent budget, was provided to all leaseholders by letter of 20 October 2015, which was in the bundle. She says this:-

> "26. Each of the proposed major works projects, collectively or singly, amount to "Qualifying Works" under section 20 Landlord and Tenant Act 1985. As a result compliant Notices of Intention, one for each set of works, were drafted and served upon all leaseholders, including the Defendant, on 22 October 2015 following service of the budget referred to above. Copies of the Notices and letter…are attached. The latter [reference] is a response to the Defendant's proposal of a contractor and comments made out of time to the notices served…and thus is confirmation of receipt by the Defendant of those notices.
>
> 27. Only one reply was received in time from a leaseholder (not the Defendant) in response to the section 20 Notices of Intention served……..
>
> 28. The tendering process would have commenced immediately following expiry of the Notice of Intention period, but for the Defendant. Given past experience and the Defendant's absolute refusal to recognise his contractual liability for service charges, it was correctly anticipated that recovery from the Defendant would involve a lengthy piece of further litigation. Accordingly the decision was taken to delay the provision and expense of producing a specification of the works, on which the tenders would subsequently be based, until recovery was

> obtained from all leaseholders including the Defendant's 22.5% share of that cost."

28. The late served evidence of Mr. Gell attacks the opinion of Mr. Buckland on the basis that his report does not comply with the requirements of CPR Part 35, and complains that he is not independent. Mr. Buckland was not instructed as an expert witness for the purposes of litigation. As to the Section 20 Notices, Mr. Gell accepted in his statement that he received them, and responded to them but criticises their lack of specificity. He did not allege that this suggested failure constitutes a breach of the Section 20 requirements.

29. At one point in the hearing, the judge said:-

> "…currently Mr. Gell is being sued for a figure in excess of £76,000 which from what I've read he's not in a position to pay at all because I believe he's on benefits, so it follows that unless his mortgage company is willing to actually pay he will forfeit his lease and so we're in a situation where I have to be absolutely clear that section 20 has been complied with, that estimates have been obtained which they haven't in this particular instance. All I have is a building surveyor's report and it happens to be the same man who is the director and shareholder of the management company [the judge means the landlord's agent] and the consequences of me dealing with this are that Mr. Gell could lose his property, so it is a matter which concerns me."

30. The judge then gave her decision and referred the issue of the amount of the service charges which were payable to the First-tier Tribunal (Property Chamber) "for them to make an investigation into the matter". Counsel for the landlord objected that this would allow all issues concerning the amount of the service charges to be litigated, even where they had never been raised in the defence and where the defence had in any event been struck out. The judge was invited to limit the issue referred to the Tribunal to the reasonableness of the major works claim. She declined to do this, and declined to enter judgment for the £16,000 which she said was not affected by those issues. This meant that apart from deleting the parts of the Defence which alleged an historic fraud, nothing at all had been achieved between November 2016 when the proceedings were issued and February 2019.

After the February 2019 Order

31. The First-tier Tribunal gave directions and hoped to hear the case in May or June 2019, with an estimated length of hearing of two days. Directions were given for an inspection by the Tribunal judge of the property during those two days. The Tribunal directions identify the question transferred to it as "the reasonableness of the amount of the service charges." Given the appeal against the order referring the case to the Tribunal, that hearing did not take place.

The appeal to His Honour Judge Simpkiss

32. On 27 August 2019 Judge Simpkiss allowed the appeal by the landlord and set aside the order of Deputy District Judge Thompson from February 2019. He entered judgment for £73,163.98 plus interest of £12,775.06 at the contractual rate, giving rise to a judgment sum of £85,939.04. He ordered Mr. Gell to pay the landlord's costs of the proceedings to be assessed on the indemnity basis, directed a payment on account of costs and ordered him to pay the costs of the appeal which he assessed summarily at £11,000.00.

33. In explaining this decision, Judge Simpkiss identified the two grounds of appeal:-

    i) The judge was wrong to transfer the claim for an assessment of the reasonableness of the amount of the service charges being claimed because:

        a) Her order has the effect of allowing the defendant to defend the claim in circumstances where his defence was struck out and he had failed to file a response to the claimant's evidence within the time allowed by the court; and

        b) After the Defence had been struck out there was no outstanding question between the parties falling for determination, therefore the power to transfer the claim under section 176A of the Commonhold and Leasehold Reform Act 2002 was not available.

    ii) It was procedurally unfair for the judge to raise issues around compliance with section 20 of the Landlord and Tenant Act 1985 and to treat those issues as a reason for transferring the matter to the tribunal. The claimant was not on notice that the issue might be raised and was prejudiced because it was unable to respond effectively.

34. The judge found in favour of the landlord on the first ground, and did not hear argument on the second.

35. The judge held that the principles to be applied after a defence has been struck out are to be found in CPR 3A paragraph 4.2:-

> **"4.2** Where a judge at a hearing strikes out all or part of a party's statement of case he may enter such judgment for the other party as that party appears entitled to."

36. This Practice Direction reflects the terms of CPR 12.11(1) which is in similar terms:-

> **"12.11**
>
> (1) Where the claimant makes an application for a default judgment, judgment shall be such judgment as it appears to the court that the claimant is entitled to on his statement of case."

37. CPR 12.1 defines the term "default judgment":-

> "Meaning of 'default judgment'

> **12.1** In these Rules, 'default judgment' means judgment without trial where a defendant –
>
> (a) has failed to file an acknowledgment of service; or
>
> (b) has failed to file a defence."

38. The judge reviewed *Lunnun v. Singh (Hajar)* [1999] CPLR 587, and *Merito Financial Services Limited v. Yelloly* [2016] EWHC 2067 (Ch). In reliance on the latter decision, he directed himself that the starting point was the form of the claim form. It claimed a specified amount of money, which was set out in the Particulars of Claim and the schedule attached. Then, the judge reviewed the Defence, noting paragraphs 4.2 and 5.2, set out at [9] and [10] above, and said:-

> "There is no specific challenge to the reasonableness of the charges and no mention of section 20.
>
> "Had the issue of reasonableness been raised in the defence it would have been open to the judge to strike out those parts of the defence leaving an issue, for example, of reasonableness of the service charges to be dealt with either by the court or more likely the tribunal, but that was not the situation here."

39. The judge decided that this was a claim for a specified amount of money, with the result that it was not open to the defendant to claim that the amount was not due after the Defence was struck out. He contrasted this kind of claim with a claim for damages for trespass where no specific sum was, or could properly be, claimed. The judge therefore found for the landlord on both limbs of the first ground of appeal. Since it was not open to Mr. Gell to dispute his liability there was no question "which falls for determination which the First Tier Tribunal or the Upper Tribunal would have jurisdiction to determine" under the Landlord and Tenant Act 1985, and no power therefore to refer anything to the Tribunal under section 176A of the Commonhold and Leasehold Reform Act 2002.

The issues on this appeal

40. The issues are:

    i) Whether the His Honour Judge Simpkiss was right in law to decide that because his Defence had been struck out it was not open to Mr. Gell to dispute his liability to pay the service charges in the sum which had been demanded, and contractual interest under the lease.

    ii) If so, should the judge have refrained from entering judgment for amount claimed plus interest because of the decision of the Deputy District Judge of August 2017? Did that, in effect, amount to the grant of leave to defend the claim on the issue of the reasonableness of the service charges?

Authority and principle

41. It is perhaps surprising that in the 35 years since the Landlord and Tenant Act 1985 was enacted the effect on a claim for service charges of the striking out of a defence has not been determined.

42. The central submission of Mr. Petts, for Mr. Gell, is that the effect of section 19 of the 1985 Act is that "the Management Company would be entitled on its statement of case to judgment for such of the service charges claimed as the court considered reasonable". He relies on *Yorkbrook Investments Ltd. v. Batten* (1986) HLR 25 for the proposition that neither party bears the burden of proof in respect of the reasonableness of service charges and that therefore the issue is at large for determination by the court, whether there is a defence raising the issue or not. He contends that on a proper construction, the effect of section 19 of the 1985 Act is to place claims for service charges in the same category as claims for general damages in personal injury, trespass, and defamation claims with the result that the court is required to consider and adjudicate on the reasonableness of all claims for service charges before any monetary judgment can be entered.

43. Section 19 of the Landlord and Tenant Act 1985 provides as follows:-

> **19.— Limitation of service charges: reasonableness.**
>
> (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—
>
> (a) only to the extent that they are reasonably incurred, and
>
> (b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;
>
> and the amount payable shall be limited accordingly.
>
> (2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.
>
> …….

44. *Yorkbrook Investments Ltd. v. Batten* was decided under different legislative provisions, but like His Honour Judge Matthews QC in *Criterion Buildings Ltd v McKinsey & Co Inc and Another* [2021] EWHC 216 (Ch), I consider that the decision in it, as further explained in the decision of the Upper Tribunal in *Enterprise Home Developments LLP v Adam* [2020] UKUT 151 (LC), by Martin Rodger QC, Deputy President, transcends its particular statutory context. It is, therefore, necessary to set out what that decision actually entails.

45. Wood J, giving the judgment of the court, in *Yorkbrook*, at 34-35, said

> "During argument on the issue of garden maintenance, it was indicated that registrars of county courts and those practising in this field were finding difficulty in dealing with the burden of proof when considering applications for declarations under the Housing Acts. Having examined those statutory provisions, we can find no reason for suggesting that there is any presumption for or against a finding of reasonableness of standard or of costs. The court will reach its conclusion on the whole of the evidence. If the normal rules of pleadings are met, there should be no difficulty. The landlord in making his claims for maintenance contributions will no doubt succeed, unless a defence is served saying that the standard or the costs are unreasonable. The tenant in such a pleading will need to specify the item complained of and the general nature - but not the evidence - of his case. No doubt discovery will need to be ordered at an early stage, but there should be no problem in each side knowing the case it has to meet, providing that the court maintains a firm hold over its procedures. If the tenant gives evidence establishing a prima facie case, then it will be for the landlord to meet those allegations and ultimately the court will reach its decisions. The question of a reasonable charge arises in claims for a *quantum meruit*, and the courts over the years have not been hampered by problems about the burden of proof."

46. In *Enterprise Home Developments LLP* the Deputy President said this:-

> "28. Much has changed since the Court of Appeal's decision in *Yorkbrook v Batten* but one important principle remains applicable, namely that it is for the party disputing the reasonableness of sums claimed to establish a *prima facie* case. Where, as in this case, the sums claimed do not appear unreasonable and there is only very limited evidence that the same services could have been provided more cheaply, the FTT is not required to adopt a sceptical approach. In this case it might quite reasonably have taken the view that Mr Adam had failed to establish any ground for thinking the sums claimed had not been incurred or were not reasonable, which would have left only the question whether any item of expenditure was outside the charging provisions."

47. His Honour Judge Matthews QC in *Criterion Buildings Limited* said this

> "33. In my judgment this is a decision on the true construction of that statutory provision (as both Lord Upjohn and Lord Wilberforce make clear), and does not assist me in the present context, where I have to construe the provisions of the underlease. I did wonder whether the same thing was true of *Yorkbrook*, that it was simply a decision on section 91A of the Housing Finance Act 1972. But I am persuaded that it was not, and that it expressed a more general proposition about the way

> in which claims for service charge are made and defended. Whereas reasonableness was in issue in that case (and in *Enterprise Homes*, which followed it), in the present case it is the 'due proportion' of the costs of the services and expenses specified. But the principle is the same. As Mr Trompeter said (day 5, page 8), if it were not so,
>
> > "it would mean that a landlord who brings a claim for arrears of service charge would need, … in advance of any defence being filed, to address any possible number of potential reasons or disputes as to why the service charge shouldn't be payable. Litigation could only become manageable in this situation if it's the tenant, the party disputing the charge in question, who identifies the grounds for the dispute."
>
> "34. Accordingly, in my judgment the defendants must establish a prima facie case that the first defendant has been charged more than a 'due proportion' of the cost, and therefore the service charges claimed are not payable, otherwise the claimant succeeds. The claimant does not have at this stage to prove that it has charged the "due proportion". I therefore go on to consider the question whether the defendants have established such a prima facie case."

48. I have referred above to the two cases referred to by His Honour Judge Simpkiss in establishing the principles which apply when considering what issues may be pursued at a remedy hearing after a default judgment has been entered: *Lunnun v. Singh* [1999] CPLR 587, and *Merito Financial Services v. Yelloly* EWHC 2067 (Ch). In *Lunnun* the claim was for damages for nuisance consequent upon a leaking sewer. No Notice of Intention to Defend was served by the defendant and a default judgment was entered. At the assessment hearing, the defendant sought to argue that some of the damage had not actually been caused by the leaking sewer. The judge held that this was not permissible, and the Court of Appeal allowed the defendant's appeal. All three members of the court gave judgments, but there does not appear to be any significant disagreement between them. Clarke LJ, agreeing with Jonathan Parker J, summarised the position in this way:-

> "In my judgment the relevant principles can be deduced from *Turner v Toleman* and *Maes Finance Limited and Another v A Phillips & Co* [two unreported decisions], to both of which my Lord, Mr Justice Jonathan Parker, has referred. They may be summarised as follows:
>
> 1 The ordinary form of judgment of the court entered in accordance with RSC Ord.13,r.9 (2) is that:
>
> "It is this day adjudged that the defendant do pay the plaintiff damages to be assessed."

> 2 The defendant may apply for an order that the judgment be set aside.
>
> 3 The following propositions assume that the judgment is not set aside. They also assume that there has been no judicial determination of any of the issues because if there has that determination will of course bind the parties subject to any appeal.
>
> 4 On the assessment of the damages the defendant may not take any point which is inconsistent with the liability alleged in the statement of claim.
>
> 5 Subject to 4 the plaintiff may take any point which is relevant to the assessment of damages.
>
> 6 Such points will include the following:
>
> (1) Contributory negligence: see the passage quoted by Mr Justice Jonathan Parker from *Maes Finance*;
>
> (2) Failure to take reasonable steps to mitigate (see the same passage in *Maes*).
>
> (3) Subject to (5) below, causation.
>
> (4) Quantum.
>
> (5) Causation. As the Vice-Chancellor put it in *Maes*:
>
> "The defendant cannot thereafter contend that his acts or omissions were not causative of <u>any</u> loss to the plaintiff. [My emphasis] But he may still be able to argue, on the assessment, that they were not causative of any particular items of alleged loss."
>
> Moreover, he may do so even if the statement of the claim alleges a particular item was caused by the tort."

49. Peter Gibson LJ gave a concurring judgment, but his concluding paragraph added this sentence to the summary of the position:-

> "The fact that in *Turner* there had been summary judgment after the defendant had put in a defence whereas in the present case there was no defence does not seem to me to make a material difference."

50. All three judges agreed that the true principle is that on an assessment of damages any point which goes to quantification of the damage can be raised by the defendant, provided that it is not inconsistent with any issue settled by the judgment. The was the formulation of the principle by Peter Gibson LJ, but the other judges used similar words.

51. *Lunnun* therefore involved claims in tort where no question of any claim for a specified sum arises. *Merito Financial Services* was a case where a defence had been struck out for breach of an unless order, and an application was made for a default judgment. The issue required judicial assessment because some of the claims were obviously not claims for a specified amount of money, but other heads of claim arguably were to be treated as such. The claim form sought:

> "(1) damages and/or equitable compensation for breach of fiduciary duty and/or trust, (2) an account of all sums which the Defendant has caused the Claimant to pay and/or all sums which he had received in breach of fiduciary duty and/or trust, (3) an order for payment of all sums for which the Defendant is found liable upon the taking of the account, (4) further or alternatively restitution of all sums which the Defendant has received or is deemed to have received and by which he has been unjustly enriched, (5) restitution of sums advanced to the Defendant by way of unauthorised director's loan account, and (6) interest. All of these claims are alleged to arise from the Defendant's acts and omissions as a director of the Claimant between August 2011 and August 2014."

52. In a helpful analysis of the history of the current procedural rules, and of decisions about them, Master Matthews said this about the situation where a claimant seeks judgment in a particular sum after the entry of a default judgment:-

> "41. It is not necessary for the Claimant actually to *prove* his case. The nature of a default judgment is that his allegations are unchallenged, and therefore must be accepted as true for the purposes of the judgment: CPR 12.11. It is therefore necessary to examine the particular allegations made, to see if they amount to a claim for "a specified amount of money", or on the other hand an allegation of a breach of some duty which requires loss and quantum to be assessed before the court can award damages or equitable compensation.
>
> 42. There are three aspects to this enquiry. One is how the claim is formulated in summary terms in the Claim Form. The second is how it is set out in detail in the body of the particulars of claim. The third is what remedy is or remedies are sought in the prayer at the end of the particulars of claim. Each of these must be considered. I have already set out the substance of the claims in the Claim Form (see para 2 above). In my judgment it is not necessary that the *prayer* itself should contain an express claim to a specific sum of money, as long as the statements of case taken together do so. It is simply a question of what the Claimant's "statement of case" appears to the court to justify."

53. The relevant rules and practice directions appear to be:-

CPR Part 3: Power to strike out a statement of case

3.4

(3) When the court strikes out a statement of case it may make any consequential order it considers appropriate.

……

Practice Direction 3A to CPR Part 3, rule 3.4

General provisions

4.2 Where a judge at a hearing strikes out all or part of a party's statement of case he may enter such judgment for the other party as that party appears entitled to.

CPR Part 12 – Default Judgment

Meaning of 'default judgment'

12.1 In these Rules, 'default judgment' means judgment without trial where a defendant –

(a) has failed to file an acknowledgment of service; or

(b) has failed to file a defence.

Procedure for obtaining default judgment

12.4

(1) Subject to paragraph (2), a claimant may obtain a default judgment by filing a request in the relevant practice form where the claim is for –

(a) a specified amount of money;

(b) an amount of money to be decided by the court;

(c) delivery of goods where the claim form gives the defendant the alternative of paying their value; or

(d) any combination of these remedies.

Supplementary provisions where applications for default judgment are made

12.11

(1) Where the claimant makes an application for a default judgment, judgment shall be such judgment as it appears to the court that the claimant is entitled to on his statement of case.

Practice Direction to CPR Part 26

> **Determining the amount to be paid under a judgment or order Scope**
>
> **12.1**
>
> (1) In the following paragraphs –
>
> (a) a 'relevant order' means a judgment or order of the court which requires the amount of money to be paid by one party to another to be decided by the court; and
>
> (b) a 'disposal hearing' means a hearing in accordance with paragraph 12.4.
>
> (2) A relevant order may have been obtained:
>
> (a) by a judgment in default under Part 12;
>
> (b) by a judgment on an admission under Part 14;
>
> (c) on the striking out of a statement of case under Part 3;
>
> (d) on a summary judgment application under Part 24;
>
> (e) on the determination of a preliminary issue or on a trial as to liability; or
>
> (f) at trial.
>
> (3) A relevant order includes any order for the amount of a debt, damages or interest to be decided by the court (including an order for the taking of an account or the making of an inquiry as to any sum due, and any similar order), but does not include an order for the assessment of costs.
>
> **Directions**
>
> **12.2**
>
> (1) When the court makes a relevant order it will give directions, which may include –
>
> (a) listing the claim for a disposal hearing;

The submissions

54. Mr. Petts, for Mr. Gell, advanced the submission summarised at [42] above. He submits that there is an important issue of principle about the proper meaning of section 19 of the Landlord and Tenant Act 1985. He says that Judge Simpkiss's approach was wrong because it was not consistent with underlying function of section 19 of the Landlord and Tenant Act 1985, which is the protection of tenants. The

requirement to plead that service charges are unreasonable would exclude from the protection of the Act tenants who could not defend the claim, including those such as Mr. Gell who suffer from a disability and cannot afford legal representation. He agrees that it would be sensible for the tenant to raise the issue of the reasonableness of the service charges, but it is not necessary. He draws a comparison with the Consumer Credit Act 1974 which requires the court to consider certain matters, and contends that the effect of section 19 is similar. On the facts of this case, he says that the decision to consider reasonableness was taken when judgment was entered for an amount to be assessed in August 2017, and the failure of the landlord to appeal against it means that this appeal should fail. Mr. Petts says that paragraph 4 of that order permitted Mr. Gell to file evidence if he wished, which is not the same as directing him to file a pleading: the issue was at large whether he filed any statement or not. In relation to the obligation of the court when assessing service charges, Mr. Petts relies on a decision of the Upper Tribunal (Lands Chamber) in *County Trade Limited v. Noakes*, [2011] UKUT 407 (LC) at [13]-[17]. This, however, is a case about how the First Tier Tribunal should proceed when assessing the reasonableness of service charges, and not about whether a court may be required to undertake that exercise following a default judgment. Everything in it is also *obiter*, given that the appeal was allowed by consent. Mr. Petts relies on *Yorkbrook*, cited above at [45], for the proposition that there is no burden of proof in this exercise, from which he says it must follow that there is no requirement on a tenant to put the matter in issue before it is determined. He says that the observations of Wood J about the need for the question to be pleaded are not part of the decision, and should not be followed. He refers to CPR PD 3A, Para 4.2, cited above, which deals with what judgment may be entered when striking out a party's statement of case: it is such judgment as the other party "appears entitled to". This is contrasted with the wording of CPR 12.11(1) which deals with default judgments and relates the judgment specifically to the statement of case. He says this contrast means that the court when striking out a statement of case must consider the issue more widely.

55. The Respondent's Notice claims that the judge erred in taking into account the consultation obligation under section 20 of the 1985 Act when no notice of any kind had been given of any intention to reply on it. Mr. Petts says that the section 20 consultation only goes to reasonableness in this case, and he says that it follows from his earlier submissions that it was proper for the judge consider it if there was evidence about it.

56. Mr. Petts then relies on *Brown v. AB* [2018] EWHC 623, and this Note in the White Book at 3.4.22:-

> "Where an order of strike out has been made the court may enter such judgment for the other party as that party appears entitled to (PD 3A para.4.2, see para.3APD.4). Whilst it will often be appropriate to make an order dismissing the claim or giving judgment upon it (as the case may be) the court may instead merely give further directions. In *Brown v AB* [2018] EWHC 623 (QB) Pepperall J struck out an unwieldy and unnecessarily complex defence which ran to 55 pages. However, having ruled that giving judgment on the claim would be disproportionate (because the defendant nevertheless

> had an arguable defence) the learned judge directed the defendant to file a fresh defence which was no longer than 25 pages in length and printed on A4 paper in not less than 11-point font and 1.5-line spacing. The giving of directions permitting the filing of an amended claim or defence are expressly provided for by PD 3A paras 2.4 and 3.2 in the case of strike outs made by the court when acting on its own initiative (see paras 3APD.2 and 3APD.3).
>
> "Where a strike out relates to only part of a statement of case the court may also give directions for the management of the remaining parts of the proceedings, for example, allocating them to a case management track."

57. It is submitted that the Deputy District Judge in effect adjourned the matter to see whether the landlord could dispel her doubts as to whether there was a triable issue on the reasonableness of the service charges and, when it transpired that it could not, she transferred that issue. This was a means of addressing the justice of the case which was within her discretion and Judge Simpkiss should not have simply ignored that consequence of the way she had chosen to proceed in August 2017.

58. Mr. Ryan Kohli, for the landlord, supports the decision of His Honour Judge Simpkiss for the reasons he gave.

59. He adds that, having struck out the defence in August 2017, the Deputy District Judge should have entered judgment as if in default of defence, and applied CPR 12.4(1)(a). This was a claim in debt for a specified amount of money, and in the ordinary way if no defence is filed judgment is entered administratively for the sum claimed on the request of the claimant under that rule. No judicial consideration is given to the claim in that case. The Deputy District Judge did not take that course because she was not satisfied that debt claimed was consistent with sums demanded from Mr. Gell. There was a conflict between two different statements of account covering the same period. She decided to set it down for a disposal hearing, under the Practice Direction to Part 26, paragraph 12.4(2) to decide the amount payable. He accepts that this was appropriate, given the problem with the documentation evident at the time when judgment was entered. His complaint is about what the judge did at the disposal hearing, when she should have entered judgment in default because the conflict between the two statements was entirely resolved by the landlord's evidence. He says that the judge went far beyond what she should have done, and allowed Mr. Gell to run any defence without any formal application to set aside the judgment and plead a defence raising issues properly. He should have been required to file a fresh defence, if she wanted him to be able to defend the claim as to the amount of the charges. Acting as she did meant that the landlord was actually disadvantaged by the judgment it had secured since it was thereby denied the procedural fairness which requires issues to be pleaded so that it has the opportunity to deal with them. He submits that while it stands the 2017 judgment shuts out the issue of reasonableness since that must be pleaded and allowing a defence to be served would be inconsistent with the judgment.

60. Mr. Kohli says that any other approach leads to lack of discipline, he used the word "chaos", in proceedings of this kind, causing uncertainty and delay. A party could file

a hopeless defence and then defend the claim anyway. He submits that there is no pleaded dispute between the parties which can be referred to the First-tier Tribunal. Mr. Kohli submitted that CPR 12.4(1)(a) applies when a defence is struck out in a claim for a specified amount of money, and there should be judgment for that specified sum. He informed the court, on instructions, that most claims for service charges result in a default judgment for a specified sum of money without any assessment of reasonableness, or any other judicial consideration of the merits.

61. Mr. Kohli says that the decision to transfer to the First-tier Tribunal was an unlawful exercise of discretion. It is plain from the transcript of the hearing, and from the extract cited above, that the Deputy District Judge was influenced by two matters raised in Mr. Gell's late served documents. These were the section 20 consultation (which was mentioned in passing in that document) and the relationship between the building surveyor who had determined that the works were required and Carlton, the managing agents. He says that these complaints were irrelevant and misconceived, and in any event raised far too late. In fact, he says, there is no obligation under section 20 of the 1985 Act to consult about works where section 19(2) applies, and if proper notice had been given of any objection this would have been pointed out.

62. Mr. Kohli pointed to section 84(2) of the Housing Act 1985 as an example of the wording used by Parliament when it intends to require the court to consider an issue whether it is raised by a party or not. The following extract is enough to illustrate the point being made:-

> **84.— Grounds and orders for possession.**
>
> (1) The court shall not make an order for the possession of a dwelling-house let under a secure tenancy except on one or more of the grounds set out in Schedule 2 or in accordance with section 84A (absolute ground for possession for anti-social behaviour) or section 107D (recovery of possession on expiry of flexible tenancy).
>
> (2) The court shall not make an order for possession—
>
> (a) on the grounds set out in Part I of Schedule 2 (grounds 1 to 8), unless it considers it reasonable to make the order,
>
> (b) on the grounds set out in Part II of that Schedule (grounds 9 to 11), unless it is satisfied that suitable accommodation will be available for the tenant when the order takes effect,
>
> (c) on the grounds set out in Part III of that Schedule (grounds 12 to 16), unless it both considers it reasonable to make the order and is satisfied that suitable accommodation will be available for the tenant when the order takes effect;

> and Part IV of that Schedule has effect for determining whether suitable accommodation will be available for a tenant.

63. In reply, Mr. Petts says that this court could avoid any procedural chaos in other cases by giving guidance. The guidance he suggested included a rule for what he called "points of defence" setting out a tenant's case as to reasonableness. He accepts that it is a consequence of his submission that the practice of entering judgment in default for service charges under CPR 12.4(1)(a) is unlawful. In all such cases, he says, there must be consideration by a judge of whether there is an issue about reasonableness on the material before the court and, if so, that issue must be determined at a hearing.

Discussion

The first submission on this appeal: the entry of judgment in the sum claimed was wrong in law

64. It appears to me to be obvious that a party whose defence has been struck out cannot raise anything after that point which must be pleaded in a defence before it can be relied on. That the defence must raise the issue of the reasonableness of service charges appears from the passage in *Yorkbrook Investments* at [45] above. On the facts of the present case, I consider that the issues which dominated the discussion at the February hearing should have been raised in the defence if they were to be considered at all. These could be formulated in this way:-

    i) That the service charges were unreasonable, and that one reason why this was so was that they were based on the opinion of a building surveyor who was a shareholder in Carlton, the landlord's agent. Mr. Gell's case here appears to be that it is unreasonable for a landlord to rely on the opinion of a surveyor who has a commercial interest in, or relationship with, its managing agent.

    ii) That the service charges were unreasonable because the consultation requirements under section 20 of the Landlord and Tenant Act 1985 applied, and were not complied with. The pleading would have to say why they applied and to identify the respects in which they were not complied with.

65. I therefore consider that it is incumbent on a tenant who contends that service charges are irrecoverable in part by reason of section 19 of the Landlord and Tenant Act 1985 because they are unreasonable, to plead that case in the Defence. In this respect I follow the decision of the Court of Appeal in *Yorkbrook,* quoted above. I agree with the Deputy President of the Upper Tribunal in *Enterprise Home Developments LLP*, and also with the acceptance by His Honour Judge Matthews QC of the submission by Mr. Trompeter on this issue. I have set out the material extracts above at [46]-[47].

66. I do not accept Mr. Petts' submission that section 19 of the 1985 Act places an onus on the court to investigate the issue of reasonableness in all cases, whether they are defended or not. The mere fact that its purpose is to provide protection for a tenant is not enough to justify reading in the necessary words. There are many legislative provisions designed to provide protections of one kind or another, and the general rule is that a party wishing to rely on them must invoke them. That rule may be changed by Parliament in particular cases, as for example section 84 of the Housing Act 1985, but that was not done in section 19 of the Landlord and Tenant Act 1985.

67. Section 19 seems to me to adjust the contractual rights arising under a tenancy as between the parties to that tenancy. It prevents the landlord from demanding unreasonable service charges under a provision in the lease. It does not direct that court how it should proceed in the event that it is claimed that a landlord has charged unreasonable service charges. In contrast to section 84 of the Housing Act 1985, it says nothing at all about the role of the court. The court will proceed in the same way that it does in any other debt claim. If a defence is raised that the debt is not properly due because of the terms of the contract between the parties as adjusted by the Act, it will adjudicate on that issue. Otherwise, it will not.

68. *A fortiori* that position applies to any reliance on any breach of the consultation requirements of section 20 of the 1985 Act. It may just be possible to conceive of a court deciding whether service charges are reasonable without the benefit of any pleading setting out the facts which are said to render them so, but it is quite impossible to envisage that exercise being conducted in relation to the consultation requirements. The Defence would have to set out what was done, and not done, what was wrong with it, and what the suggested consequence should be. The landlord would then plead to that case and the issue addressed by disclosure and evidence in the usual way.

69. I do not accept Mr. Petts' submission that because there will be some tenants who cannot afford legal representation, and who may be unable to articulate their case themselves, the ordinary rules of civil procedure should simply be abrogated. I have rejected this submission as a matter of statutory construction above, but would also base my conclusion more broadly. The Supreme Court in *Barton v. Wright Hassall LLP* [2018] UKSC 12 considered the relevance of the status of a party as a self-representing party to the application of the Civil Procedure Rules. Lord Sumption, in the majority, said this at [18]:-

> "In current circumstances any court will appreciate that litigating in person is not always a matter of choice. At a time when the availability of legal aid and conditional fee agreements have been restricted, some litigants may have little option but to represent themselves. Their lack of representation will often justify making allowances in making case management decisions and in conducting hearings. But it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. The overriding objective requires the courts so far as practicable to enforce compliance with the rules: CPR r 1.1(1)(f). The rules do not in any relevant respect distinguish between represented and unrepresented parties. In applications under CPR 3.9 for relief from sanctions, it is now well established that the fact that the applicant was unrepresented at the relevant time is not in itself a reason not to enforce rules of court against him: *R (Hysaj) v Secretary of State for the Home Department* [2015] 1 WLR 2472, para 44 (Moore-Bick LJ); *Nata Lee Ltd v Abid* [2015] 2 P & CR 3. At best, it may affect the issue "at the margin", as Briggs LJ observed (para 53) in the latter case, which I take to mean that it may increase the weight to be given

> to some other, more directly relevant factor. It is fair to say that in applications for relief from sanctions, this is mainly because of what I have called the disciplinary factor, which is less significant in the case of applications to validate defective service of a claim form."

70. At paragraph [42], Lord Briggs, in the minority, did not express disagreement with this approach. The requirement for a party to set out its case in writing within a particular time of service of the claim form is not a complex concept. In that respect it may be contrasted with the rules about service which fell for consideration in *Barton.* The rule is summarised in the documentation and forms which a defendant receives with the claim form. I therefore reject the submission that fairness requires that all claims for unpaid service charges should be assessed by a judge for any sign that they may be unreasonable even where there is no defence at all, or no defence which raises the issue.

71. This is not to say that the fact that a tenant appears in person or is disabled in some relevant way is immaterial. The court will make reasonable adjustments, by allowing time if necessary, by reading the documents produced by that party in a non-technical way to decide if they are clear enough to put the landlord on notice of the issues it has to deal with, and in any other way which the justice of the case requires. The court has a wide discretion in procedural matters to ensure fairness. It is not, however, a reasonable adjustment to conduct the litigation on the basis that the landlord is required to deal with the case without any notice of the tenant's objections to the service charge. On the facts of this case, the documents produced by Mr. Gell show that he has understood the need to set out his case and has done so, first in his Defence and Counterclaim, and then in his "statement" of 20 February 2019. He was given generous extensions of time in respect of the latter document. The documents taken together show a knowledge of the relevant law, and of civil procedure. They do not show any substantial challenge to the reasonableness of the service charges.

72. I do not find the cases about general damages, such as *Lunnun,* of assistance in the present case. This is a claim in debt. Neither do I consider that there is anything to be deduced from the slight difference in wording between CPR 12.11(1) and CPR PD 3A4.1. The latter provision does not tie the judgment to be entered to the claimant's statement of case, because the power to strike out statements of case under CPR 3.4 is not limited to Defences. It may be the claimant's statement of case which has been struck out under that rule, and the Practice Direction is designed to reflect that. Where the statement of case which is struck out is the Defence, then the position is precisely the same as if there had never been one in the first place, and CPR 12.11(1)(a) applies. I therefore agree with Peter Gibson LJ in *Yorkbrook Investments* cited at paragraph [49] above on this issue.

73. As a general rule, a litigant should not be permitted to raise issues without pleading them, and by the date of Judge Simpkiss's decision the time for service of a Defence had expired by over 2½ years. His decision was not, therefore, wrong in law, in that the court is not required to assess the reasonableness of service charges in every case following judgment for the landlord where the tenant has failed to put them in issue by serving a defence. Section 19 of the 1985 Act affords a defence or partial defence to a claim which must be put in issue by a tenant before the court is required to consider it. This kind of claim is not like a claim for damages for matters such as pain

and suffering, or trespass, or defamation, which can only result in a judgment sum following a judicial determination as to their amount, unless they are agreed. It is a claim for a specified amount of money. This conclusion does not dispose of this appeal because of the particular facts of the case.

The second submission on this appeal: the reasonableness of the services charges was put in issue by the Deputy District Judge's order of August 2017

74. Having struck out the Defence in its entirety in a claim for a specified amount of money, the Deputy District Judge should have gone on to consider what issues remained open to Mr. Gell in relation to the amount of that sum. He had failed to plead clearly any case in relation to the reasonableness of the charges, and the pleading he had served had been struck out. He had failed to mention the consultation requirements at all. Those lines of defence were therefore not open to him. Everything else he had offered by way of dispute had been properly struck out. Accordingly, it was open to the Deputy District Judge to do as the judge did in *Brown* and to direct a proper defence addressing just the amount of the recoverable service charges. Instead, she adjourned to enable evidence to be served on Mr. Gell and to enable him to file evidence, and to attend a further hearing and make submissions. It is perhaps unsurprising that the bundles which resulted were very voluminous, given that there was no pleaded issue on which those compiling them for the landlord could focus when deciding what to include. In the result, they included documents concerning the section 20 consultation requirements which, as appears above, set that hare running at the subsequent hearing.

75. It does appear from the judgment which the Deputy District Judge gave on 7 August 2017 that her purpose in giving directions for a further hearing as to the amount of the judgment was limited. The relevant paragraphs are set out at [16] above and mean that she was *requiring* the landlord to serve evidence which explained the problems in its documents she identified, and *permitting* Mr. Gell to serve evidence about the works which were to be done to the property. It appears that she intended that if he raised any significant issues, they would be transferred to the First Tier Tribunal.

76. Having made the decision to allow Mr. Gell an opportunity to file and serve material, the result was a new document (submitted at 4.24pm on the night before the hearing). Leave had been given for him to file a "statement" if he wished to do so, and presumably the Deputy District Judge had envisaged a witness statement, rather than a statement of case, given that judgment had been entered. What arrived was in truth a new Defence which repeated many of the abusive fraud allegations from the first Defence about the 2001 deed. He claims that the way in which the first action was dealt with was unfair and discriminatory, and that the conduct of the current action was too. He claims that the evidence of Mr. Buckland on the basis of which the demand for service charges had been calculated was not independent. He claims that his Defence should not have been struck out because he did mention his allegations of fraud at the time of the first action, although he does not suggest that he pleaded them by way of defence. He says:-

> "Estoppel exists only in equity; estopping denial of Deed of Variation prevent defendant from legal redress. Issue estoppel does not work with fraud."

77. The judge should have considered what the consequences were of the fact that this document was served far too late, and contained much material which was a further abuse of the process of the court. She was perhaps indulgent to Mr. Gell in having regard to its contents, as the passage quoted above at [29] above clearly shows that she did. She was wrong to say, as she there did, that:-

> "I have to be absolutely clear that section 20 has been complied with, that estimates have been obtained which they haven't in this particular instance. All I have is a building surveyor's report and it happens to be the same man who is the director and shareholder of the management company [the judge means the landlord's agent] and the consequences of me dealing with this are that Mr. Gell could lose his property, so it is a matter which concerns me"

78. It was a consequence, in this case, of the striking out of the Defence that most of these problems were not properly before her at all. She certainly did not have to be "absolutely clear" that section 20 of the 1985 Act had been complied with, since no one had ever suggested it had not been. What she should have done, in my judgment, was to consider whether Mr. Gell's new document should be considered at all, bearing in mind it was very late. If so, she should have decided whether it raised any properly triable issues. Most of it should have been struck out as a yet further abuse of the process and she should have focussed on what remained. She should then have made a judicial determination of what issues arose and how they should be disposed of. The issues which might have been identified were:-

i) Whether it was reasonable for the landlord to assess service charges on the basis of a surveyor's estimate of the cost of the works he had decided were required in order to comply with the landlord's covenants. Section 19(2) of the Landlord & Tenant Act 1985 expressly provides for the situation where service charges are payable before the cost of the works is incurred, and provides for an adjustment after the event to reflect any difference between the service charge and the actual costs incurred.

ii) Whether that approach is rendered unreasonable because there is a commercial relationship between the building surveyor and the managing agent. The intention was that once the landlord was in funds to commission the work, the contracts would be put out to tender and the actual costs ascertained.

79. I do not consider that the passing references to the section 20 consultation notices in Mr. Gell's late document could properly be understood as an allegation that there had been any breach of the requirements of that section which was capable of reflecting on the reasonableness of the service charges. The Deputy District Judge was in error in paying any regard to the consultation.

80. Having identified those potential issues, the judge should then have considered whether she could fairly resolve them at that hearing. In my judgment she could only do that by deciding them in favour of the landlord. On the face of it, there is nothing unreasonable in a landlord employing an agent who seeks an opinion from a building surveyor and acts on that opinion. The building surveyor is not being asked to act as an expert witness in litigation. Many managing agents are firms of surveyors who

may use in-house expertise for this kind of work, knowing that the subsequent tendering process will reveal actual costs which will be the basis of what is finally paid by the tenants. Nothing Mr. Gell alleges takes this case out of this category.

81. If she had felt unable to resolve those issues at that hearing, she should have dealt with the fact that this was because Mr. Gell had only raised them at 4.24pm the night before, in breach of the permission to file evidence she had granted 18 months before. There was no proper basis for allowing him an extension of time, given that most of his new document was simply vexatious, and what little remained had no obvious merit. The Deputy District Judge erred, in my judgment, in failing to analyse the situation in this way, and to decide what issues really arose for decision. Instead, she approached the matter on the basis that any conceivable defence to the service charges was open to Mr. Gell. This was not what she had ordered in August 2017, but it is what happened.

82. The solution to the problem, to transfer the whole case to the First-tier Tribunal was not one which was properly open to the Deputy District Judge. Section 176A of the Commonhold and Leasehold Reform Act 2002 provides:-

> **176A.— Transfer from court to First-tier Tribunal**
>
> (1) Where, in any proceedings before a court, there falls for determination a question which the First-tier Tribunal or the Upper Tribunal would have jurisdiction to determine under an enactment specified in subsection (2) on an appeal or application to the tribunal, the court—
>
> (a) may by order transfer to the First-tier Tribunal so much of the proceedings as relate to the determination of that question;
>
> (b) may then dispose of all or any remaining proceedings pending the determination of that question by the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal, as it thinks fit.
>
> (2) The enactments specified for the purposes of subsection (1) are—
>
> (a) this Act,
>
> (b) the Leasehold Reform Act 1967,
>
> (c) the Landlord and Tenant Act 1985,
>
> (d) the Landlord and Tenant Act 1987,
>
> (e) the Leasehold Reform, Housing and Urban Development Act 1993, and
>
> (f) the Housing Act 1996.

> (3) Where the First-tier Tribunal or the Upper Tribunal has determined the question, the court may give effect to the determination in an order of the court.
>
> (4) Rules of court may prescribe the procedure to be followed in a court in connection with or in consequence of a transfer under this section.

83. This section requires the court to identify a "question" which "falls for determination" which it may then "transfer". The question identified by the judge in her order as drawn up was "the reasonableness of the service charges".

84. In my judgment, the position was reached in February 2019 where the Deputy District Judge had allowed Mr. Gell the opportunity to raise a defence to the reasonableness of the service charges. It would have been better had she expressly acknowledged what she was doing, and required him to set out his case in a defence, as Mr. Pepperall QC did in *Brown*, but in substance that is what she did. In the event, he produced a document which was far too late and which failed to set out a case which was sufficiently meritorious to justify its admission at that stage. The only appropriate course open to the Deputy District Judge was to decline to have regard to it and to enter judgment for the claimant in the sum claimed plus interest calculated under the relevant provision in the lease, and to make an order for costs. This is what Judge Simpkiss did on appeal and, in my judgment, that was the right course and certainly one which was reasonably open to him.

Conclusion

85. For these reasons, I would dismiss this appeal.

Arnold LJ

86. I agree.

Lewison LJ

87. I also agree.