



A difficult question Determined?

Greenside Properties Limited ~v~ Faizi [2013]EWCA CIV1382

One of the more difficult questions in service charge litigation is whether a Default Judgment obtained in County Court proceedings is sufficient to amount to a “final determination” for the purposes of Section 81 Housing Act 1996. This question was considered by the Court of Appeal on 7 October 2013 in the case of Greenside Properties Limited ~v~ Faizi, albeit only as part of an application for permission to appeal.

As Leasehold Practitioners will know, Section 81 requires that before a Landlord can serve a Notice under Section 146 Law of Property Act 1925 (the forfeiture equivalent of a NoSP), the amount of the service charge must either be agreed or admitted by the tenant or have been the subject of a final determination by a Court or Tribunal, and at least 14 days has elapsed since the date that determination was given.

In Greenside Properties Limited ~v~ Faizi, Mr and Mrs Faizi were the Leasehold owners of a flat in a building owned by Greenside. In April 2009, Greenside issued proceedings in the County Court for arrears of service charges and interest, amounting to a little over £3,000. Mr and Mrs Faizi defended the claim and, amongst other things, asked for the proceedings to be transferred to the LVT (as it was then). For whatever reason the claim remained in the County Court and in May 2010 Greenside obtained Judgment. Mr and Mrs Faizi did not take any steps to set aside or appeal that decision and in September 2011, Greenside served Notice under Section 146 Law of Property Act 1925 relying upon the Judgment in May 2010 as evidence of the breach of covenant.

Mr and Mrs Faizi still took no action and by April 2012 the Landlord issued possession proceedings. Before a Deputy District Judge Mr and Mrs Faizi argued that the service charges could still be determined by the LVT. The Landlord argued that because the charges had already been the subject of a determination by the Court, the LVT did not have jurisdiction. The Deputy District Judge agreed and made an Order for Possession. Mr and Mrs Faizi appealed unsuccessfully and were given further time to pay the outstanding charges. Mr and Mrs Faizi chose not to pay the outstanding charges and instead sought leave to appeal to the Court of Appeal. That application was first refused on the papers and Mr and Mrs Faizi asked for that decision to be reconsidered at an oral hearing.

At the hearing before Lord Justice Kitchin, the Lessees contended that the Landlord could not rely on the Judgment as it was a Default Judgment and that there had been no determination of the reasonableness of the charges by the LVT.

In dismissing the application for leave to appeal, Kitchin LJ stated that if a Landlord has secured a final determination by a Court in his favour that particular sums by way of service charges or administration charges are due and payable, then it matters not whether that Judgment was obtained by default or following a contested hearing. In either case the requirements of Section 81 are fulfilled.

Comment

Leasehold Practitioners will be aware that there has for some time been a debate on whether a Default Judgment is a “final determination” for the purpose of Section 81. The White Book, Woodfall and one County Court case (Hillbrow (Richmond) Limited

-v- Alogaily 2005), say that a Default Judgment is not a final determination. The arguments in favour of this interpretation are numerous, not least because a Default Judgment does not involve any form of judicial determination or decision, as it is an administrative process which results from a failure to file a Defence, or acknowledge service, within the time limits. There is an earlier County Court decision (London Borough of Southwark -v- Tornaritis 1999) in relation to Section 81 as originally enacted, which held that a Default Judgment was enough to amount to a determination. Added to this another County Court case (Church Commissioners -v- Koyale Enterprises, Central London County Court 22 September 2011) also held that a Default Judgment was a final determination.

The Faizi case, although an application for permission to appeal, will nonetheless be citable in the County Court as the only Court of Appeal “decision” on this point. Mr Faizi appeared in person and one can only guess whether he was able to mount a forceful argument to the contrary. At some point this question is bound to be fully explored before the appellants courts and only then will it finally be laid to rest. Until then, this case provides reassurance that seeking a Default Judgment in the County Court is a perfectly acceptable means of obtaining a determination to fulfil the requirements of S.81.

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