UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2017] UKUT 228 (LC)
Case No: LRX/147/2016

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – qualifying long term agreement - whether agreement for one year which "will continue thereafter until terminated by notice" an agreement for not more than 12 months – whether cost of employing porters and incidental costs recoverable through service charge – appeal allowed in part

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

BETWEEN:

CORVAN (PROPERTIES) LIMITED

Appellant

and

MAHA AHMED ABDEL-MAHMOUD

Respondent

Flat 500 Clive Court,
Maida Vale,
London W9

Martin Rodger QC
Deputy Chamber President

Royal Courts of Justice, Strand, London WC2
on
24 May 2017

Mr James Sandham for the Appellant
Ms Nicola Muir for the Respondent

The following cases are referred to in this decision:

Paddington Walk Management Ltd v Peabody Trust [2010] L & TR 6

Poynders Court Limited v GLS Property Management Ltd [2012] UKUT 339 (LC)

Brown v Symons (1860) 8 C.B.(N.S.) 208

Langton v Carleton (1873) L.R. 9 Ex. 57

Costigan v Gray Bovier Engines Limited, The Times, 27 March 1925

Introduction

1. This appeal raises some short but not entirely straightforward points arising out of a decision by the first-tier tribunal (Property Chamber) ("the FTT") concerning service charges payable by the respondent, Ms Abdel-Mahmoud, to the appellant, Corvan (Properties) Ltd, under the lease of a flat in Maida Vale, London W9.

2. Clive Court is a substantial residential building comprising three interconnected blocks on eight floors containing 154 flats. The Appellant is the owner of the freehold interest.

3. The respondent occupies Flat 500 at Clive Court under a long lease granted by the appellant's predecessor in 1988 and which the respondent acquired in 2000. The lease includes conventionally drafted service charge provisions which require the respondent to contribute towards expenses incurred by the appellant in the provision of services including repair, maintenance and insurance of the building and other heads of expenditure set out in the Fourth Schedule.

4. The Building was formerly managed on behalf of the appellant by True Associates Ltd under a management agreement entered into on 17 December 2008. Responsibility for management was later assumed by Moreland Estate Property Management (JR) Limited on the same terms.

5. The proceedings before the FTT (which had been transferred from the county court) were in respect of service charges totalling £24,420.83 claimed by the appellant for the period 25 March 2010 to 24 June 2014. The total included a contribution towards the fees of the two firms of managing agents, the cost of employing a team of porters and a charge for payroll preparation.

6. The FTT's decision dealt with a large number of items which are no longer in issue. Of relevance, it disallowed part of the fees of both managing agents on the grounds that the management agreement between the appellant and True Associates (which also governed the services of Moreland Estate) was a long term qualifying agreement to which the consultation requirements of Section 20 of the Landlord and Tenant Act 1985 applied and had not been observed. The FTT also allowed costs claimed in respect of the services of the team of porters, but refused to allow the cost of payroll preparation.

7. Both parties sought permission to appeal, which was granted by this Tribunal on limited grounds.

The issues

8. The appeal raises the following issues:

1. Whether, the management agreement was a long term qualifying agreement.

2. Whether, properly construed, the lease permitted the appellant to recover the costs of porterage.

3. Whether the appellant is permitted to recover the costs of payroll preparation as a service charge expense.

Issue 1: Was the management agreement a qualifying long term agreement?

9. If certain statutory consultation requirements have not been satisfied, the contribution which a tenant may be required to make towards costs incurred under an agreement which is a qualifying long term agreement is limited by section 20, 1985 Act. It is common ground that the consultation requirements were not met in this case in relation to the appointment by the appellant of each of the managing agents.

10. By section 20ZA, 1985 Act, a qualifying long term agreement is "an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months."

11. The meaning and effect of section 20ZA was considered by Her Honour Judge Hazel Marshall QC (sitting in the County Court) in *Paddington Walk Management Ltd v Peabody Trust* [2010] L & TR 6. The agreement in question was a management agreement "for an initial period of one year from 1 June 2006 and will continue on a year-to-year basis with the right to termination by either party on giving three months' notice at any time". It was common ground between the parties that this meant the agreement could be terminated at the end of 12 months, and the question was whether it was therefore "for a term of more than twelve months." For the landlord it was argued that, although the term might be allowed to continue after the initial 12 month period, the only certainty was that it could be terminated at the end of that period, so could not be said to be for more than 12 months; for the tenant it was said to be enough that the agreement was capable, according to its terms, of continuing for more than 12 months.

12. Judge Marshall QC preferred the landlord's construction of section 20ZA, and emphasised that the point of the provision was to bring long term contracts into the consultation regime, as she explained at [49] as follows:

> "49 In my judgment the whole flavour of the provisions extending to these agreements is "long-term". I cannot see how a periodic contract, for example, a month and thereafter from month to month, could be regarded as long term as a matter of impression, even though on Mr Bhose's analysis it would be caught. What seems to me to be the deciding factor is the length of the commitment. A line has to be drawn somewhere, and it has been drawn at a commitment which exceeds 12 months. A commitment of 12 months only is on the non-qualifying side of the "long term" line."
>
> 50. A contract initially for one year and thereafter on a year-to year basis subject to a right to terminate on three months' notice is terminable at the end of

> the initial period or any subsequent year on three months' notice, and does not entail a commitment for more than 12 months. There is thus no such commitment in this case and I conclude therefore that the Pembertons contract is not a qualifying long-term arrangement."

13. *Paddington Walk* was considered in this Tribunal by Judge Gerald in *Poynders Court Limited v GLS Property Management Ltd* [2012] UKUT 339 (LC) where it was distinguished. In that case an agreement for the services of a managing agent was of indeterminate duration but either party could terminate it on three month's written notice. The Tribunal focussed on the intention of the parties as deduced from the nature of the services to be provided under the contract:

> "10. The Management Agreement is silent as to its term or duration in the sense that it does not explicitly define how long it is to last. However, its effect is that Bells has contracted or agreed to provide the services therein defined forever, or indefinitely. Whether the provision of those services will be for more than 12 months depends upon the nature of the services to be provided under the terms of the Management Agreement. It is clear from those terms that they will or are intended to be provided for a period which extends beyond 12 months; they relate to the ongoing preparation and collection of the annual service charge, management and maintenance of the building, obtaining insurance, enforcement of leases and so on for an annual fee which is fixed for two years whereafter it will be reviewed annually with no provision for apportionment on early termination."

The Tribunal found that there was a distinction between the duration of an agreement and the opportunity to terminate it. This was an agreement of indefinite duration, unless and until terminated by three months' prior notice, and was therefore found to be for more than 12 months.

14. The reasoning of the Tribunal in *Poynders Court* is difficult to reconcile with the reasoning in *Paddington Walk.* Both concerned agreements for the management of residential premises which could be terminated at the end of 12 months. The difference in result depends on there being a meaningful distinction between a management agreement of indefinite duration, terminable by notice, and such an agreement for successively recurring periods of 12 months, terminable by notice. I find that a puzzling distinction, but it is not suggested to be critical in this case, and it is not necessary to consider it further. In this case the agreement was for a fixed initial term, and the issue is whether that term was one which could not be terminated until more than 12 months had expired.

15. The management agreement of 17 September 2008 between the appellant and True Associates included at clause 5, under the heading "Term" the following:

> "The contract period will be for a period of one year from the date of signature hereof and will continue thereafter until terminated upon three months' notice by either party."

16. The FTT held that the agreement was for a term of more than twelve months and was therefore a qualifying long term agreement. In reaching that conclusion it placed particular importance on the words "and will continue thereafter" which it considered meant that the agreement could not be terminated before the end of 15 months.

17. On behalf of the appellant Mr James Sandham submitted that the FTT's analysis was wrong and that the "term" of the agreement was expressly stated to be one year. That term could be brought to an end on the last day of the year by three months notice given during the year. Alternatively, the agreement could be terminated by reasonable notice given during the year. In either event it followed that the agreement was not for more than 12 months.

18. In support of his submissions Mr Sandham referred to a number of cases in which agreements for the provision of services or for employment expressed in a variety of different ways had each provided for a fixed term followed by a period of continuation and had been found to be terminable at the end of the initial fixed period.

19. In *Brown v Symons* (1860) 8 C.B.(N.S.) 208 a travelling salesman was engaged "for twelve months certain… to continue from time to time, until three months' notice in writing be given by either party". The court held that the contract could be determined at the expiration of the first year by giving three months' previous notice.

20. In *Langton v Carleton* (1873) L.R. 9 Ex. 57 an agreement (again for the services of a travelling salesman) was expressed to be "for twelve months certain, after which time either party should be at liberty to terminate the agreement by giving to the other a three months' notice in writing of his desire so to do." The court held that the engagement could be determined by either party at the end of 12 months, without giving any notice. Bramwell B said he preferred this construction "for otherwise I do not see that any meaning is given to the words "twelve months certain"."

21. Finally, in *Costigan v Gray Bovier Engines Limited*, The Times, 27 March 1925, an agreement was expressed "to have commenced on September 11, 1922, and was to continue for a period of 12 calendar months from such date, and thereafter until determined by three calendar months' notice in writing given by either party at any time to the other". The Court of Appeal stressed that the agreement was terminable by notice given "at any time" and rejected the suggestion that the words "and thereafter" meant that such notice could only be given after the first twelve months had expired.

22. On behalf of the respondent Miss Nicola Muir warned against reliance on very old decisions concerning different language. In this case, the agreement was not for a term of 12 months but rather was indefinite, although terminable on notice. Clause 5 expressly provided that it was for a period of one year which "will continue thereafter". That indefinite duration was not altered by the fact that the agreement could be terminated on three months' notice after a year. No notice could be given during the initial 12 months as was clear from the fact that the provision for termination appeared in the clause after the word "thereafter", signifying that notice could only be given after 12

months had elapsed. The earliest date on which the agreement could be terminated was, she submitted and as the FTT found, at the end of 15 months.

23. Although I do not find this an easy problem to resolve I have concluded that the FTT came to the correct conclusion when it decided that the agreement was for a term of more than 12 months.

24. Although, as Mr Sandham points out, the contract period is expressly stated to be for a period of one year, clause 5 does not stop there, but goes on to provide that the same contract period is "to continue thereafter". The period of 12 months therefore represents only the start of the contract period. The critical question is whether the contract period can be brought to an end on the expiry of that initial period of 12 months or whether it must be allowed to continue for some further period, even if only for a single day.

25. It is not necessary to decide whether Miss Muir is correct in her submission that notice to terminate the agreement cannot be given during the initial period of 12 months. The statement that the agreement is to continue thereafter "until terminated upon three months notice" is ambiguous; the word "terminated" might be taken to signify either the act of giving the notice which will terminate the agreement three months later or the termination itself, on the expiry of the notice period. Depending on which meaning is selected the language might either permit a notice to be given during the first 12 months but terminating the agreement after the end of that period, or require that notice cannot be given until after the 12 months have elapsed.

26. What is reasonably clear, to my mind, however, is that the agreement is intended to continue until after the end of the initial period of one year: it "will continue thereafter." That continuation, for whatever further period, is not conditional on the absence of notice: it is a continuation "until terminated" not "unless terminated". Thus whether a notice may be given during the initial 12 months period, or only after it has expired, the notice may not bring the agreement to an end until a period of continuation after the end of the 12 months has first commenced. On that construction the agreement was for a period of at least a year and a day, and was therefore for a term of more than 12 months.

27. The authorities relied on by Mr Sandham all concern different types of agreement couched in different language and I do not find them of direct assistance. In *Brown v Symons* the language limiting the initial period was more definite ("twelve months certain") while the language of continuation was less so ("to continue from time to time, until three months' notice in writing be given by either party"). In *Langton v Carleton* the Court described the agreement as "a special contract" and held that it terminated at the end of the initial 12 months without any notice, and in effect that the continuation was conditional on the affirmative action of the parties rather than on the absence of notice. Mr Sandham did not suggest that was a tenable construction of clause 5. In *Costigan v Gray* notice of termination could be given "at any time" so there was no doubt that the contract could be terminated at the end of the initial period.

28. Nor is there any room for implying a term that the agreement may be terminated at the end of the initial 12 months by notice of reasonable duration, which was Mr Sandham's fall back argument. That would be inconsistent with the intention that the agreement was to continue after that date, and in any event would be a surprising term for the parties to have left unexpressed in a clause dealing explicitly with duration and termination by notice.

29. I am therefore satisfied for these reasons that the agreement of 17 September 2008 between the appellant and True Associates was for a term of more than 12 months and was therefore a long term qualifying agreement. The FTT found on the basis of the evidence advanced on behalf of the appellant that the agreement between the appellant and its next agent, Moreland Estate, was "on the same terms". It was not submitted that the FTT should have drawn any distinction between the two agreements and it was accepted, implicitly at least, that it had been correct to find that if the first was a qualifying long term agreement, then so was the second.

Issue 2: Can the costs of employing porters be included in the service charge?

30. This issue arises on the respondent's cross appeal. It has significant monetary and practical consequences as the appellant employs a team of two (previously three) full time porters at Clive Court whose employment costs in the five years in question varied from a little under £130,000 to a little over £170,000 a year.

31. The lease certainly contemplates the employment of staff, who may be provided with residential accommodation in the building clause (see for example clause 1(iii) where such accommodation is included as part of the property reserved to the lessor). The appellant's entitlement to recover the associated costs through the service charge depends on the proper construction of clause 4(iv) and the fourth schedule to the lease.

32. The respondent's payment obligation is at clause 4(iv), by which the lessee covenants to pay by way of further and additional rent a proportion of the following costs:

> "the expenses and outgoings incurred by the Lessor in the repair maintenance and renewal of the said buildings at Clive Court and the Reserved Property and the insurance of Clive Court and the provision of services in the said buildings and the other heads of expenditure as the same are set out in the Fourth Schedule."

33. The fourth schedule comprises a list of "Lessor's expenses and outgoings and other head of expenditure in respect of which the lessee is to pay a proportionate part by way of service charge". The list includes most of the costs one would typically expect to find in a service charge schedule including the costs and expenses of: maintaining, repairing etc the reserved property; insuring and periodically inspecting and maintaining the lift system and other plant and machinery; insuring the building and reserved property; cleaning, decorating and lighting the reserved property; paying rates, taxes etc; the managing agents fees for the collection of rent and the general management and administration of the building; accountancy costs in connection with the service charge;

the maintenance of tv aerials; the upkeep of the gardens; the making of representations in relation to planning matters; and finally:

> "The cost of employing staff for the performance of the duties and services referred to in this schedule and all other incidental expenditure in relation to such employment including (but without limiting the generality of the foregoing) the provision and maintenance free of rent or other payment of residential accommodation…"

34. The case for the respondent on the appeal was simple. The recoverable cost is the cost of employing staff "for the performance of the duties and services referred to in this schedule". Although the appellant employs a team of porters, they do not perform any of the duties or provide any of the services referred to in the fourth schedule; they are employed to perform different duties including, in particular, attending the main entrance to the building, recording the presence of visitors or tradesmen for security purposes, and receiving post and parcels for residents. Some lessees may regard these as valuable services but they are not services which the respondent is required to pay for.

35. For the appellant Mr Sandham submitted that the obligation under clause 4(iv) should not be construed restrictively and was not limited to heads of expenditure listed in the fourth schedule. It included as separate and general categories of expenditure to which the lessee was required to contribute both "the expenses and outgoings incurred in the repair maintenance and renewal of the said building" and "the provision of services in the said buildings" as well as the "other heads of expenditure as the same are set out in the Fourth Schedule".

36. I do not think that is a tenable construction of clause 4(iv), having regard to the fact that each of the categories of expenditure there mentioned is also included in the fourth schedule. That leads me to the conclusion that the lessee's obligation is to contribute to the cost of the repairs, services and other heads of expenditure, all of which are set out in the fourth schedule. That conclusion is strengthened by the introductory words of the fourth schedule itself quoted in paragraph 33 above.

37. Mr Sandham's alternative argument was that the duties undertaken by the porters included tasks which were necessary for the performance by the appellant of its obligation to repair, maintain and insure the building. These included inspecting the premises; dealing with any maintenance issues such as broken windows and damaged carpets; dealing with any contractors visiting the site; dealing with over 500 people a day coming in and out of the building; keeping a book of visitors, including contractors, for the purposes of monitoring the fire risk; announcing visitors; receiving packages; and monitoring CCTV cameras. He suggested that some of these duties were either required or expected as part of the insurance arrangements for the building.

38. Ms Muir responded by submitting that the function of opening the door to a contractor who attends the premises to service the lift, or to repair a broken window, and the function of recording the presence of that person in the building for security or insurance purposes, were materially different from performing the duty of repairing or

insuring, and that under paragraph 11 of the fourth schedule staff could only be employed "for the performance of the duties and services".

39. I regard that as too narrow an approach. Primary responsibility for performing the duties and services in the fourth schedule lies with the lessor under its covenants in clause 5 of the lease. It is free to perform those duties by using its own employees or by engaging independent contractors. If it chooses the latter approach it may nevertheless use its own employees to facilitate the carrying out by the contractors of their specific tasks, and in doing so it can reasonably be said that those staff are employed for the performance of the lessor's relevant duties. It may also rely on its own employees to alert it to the need to instruct a contractor to attend to a particular item of work. In my judgment, even if no work is currently required, the expense of having an employee on site whose responsibilities include keeping an eye on the condition of the building, notifying defects, and warning of problems, can properly be regarded as part of the cost of maintaining the building.

40. It is common ground that the schedule of objections filed by the respondent identifying the points she wished to raise before the FTT included an explicit challenge to the recoverability of the costs of employing the porters both in principle and on the grounds of the reasonableness of the charge. It is also clear that written and oral evidence was received by the FTT on the issue of the porter's duties. These were described in very general terms by Ms Redway, an employee of the managing agents, in a witness statement provided to the FTT on which she was cross examined by the respondent. Unfortunately the parties have been unable to agree a note of the questions or answers given by Ms Redway in cross examination, but I have been provided with separate notes which each side has prepared. It is clear from both notes that she confirmed that the porters were not employed to undertake cleaning, gardening or maintenance tasks (other than the simplest) and that their duties are more in the nature of providing a reception and security presence in the building. It is less clear what, if any, explanation she gave about the relationship between the porters' functions and the obligations of the appellant recorded in the fourth schedule. Mr Sandham's submissions on the relationship between them has been based largely on inference or speculation.

41. The FTT did not deal with the issue of the scope of the porters' duties in its decision, but only with the question of whether the cost of employing them was reasonable. Mr Sandham (who appeared before the FTT) explained that it had had to consider a very large number of items in the respondent's schedule of objections (more than 70) and that the respondent had not drawn any particular attention to the issue of whether the costs of portage were included in the fourth schedule. In fact the FTT appears to have been given the impression that there was no issue of principle for it to resolve, noting in its decision that "the respondent accepted the desirability of porterage for the blocks but queried the reasonableness of staff costs". Despite this statement (which might in any event be seen as ambiguous) Mr Sandham did not suggest that any specific concession had been made by the respondent.

42. This issue is of considerable monetary value, and affects the practical arrangements at the building and the service provided to all of its residents. I understand

why the FTT may not have felt it necessary to tackle the issue of principle and to make specific findings of fact on the duties which the porters perform and the contribution they make to the performance by the appellant of its own duties. Nevertheless, I am satisfied that the recoverability of the costs of porterage remained a live issue and I consider that there has been an inadvertent but nonetheless significant omission in the fact finding necessary to enable a proper conclusion to be reached on that issue.

43. This appeal has proceeded as a review of the decision of the FTT, and it would not be fair to either party, nor would it be possible, for this Tribunal to make satisfactory findings of fact based on the incomplete and fragmented record of the evidence given to the FTT. I therefore propose to allow the respondent's cross appeal on the issue of the costs of porterage and to remit that issue to the FTT for further consideration, on the basis of such additional evidence and argument as the parties may wish to adduce.

Issue 3: Payroll preparation

44. The final issue is a short one. Included as one component of the total employment costs shown in the appellant's annual service charge accounts was an item representing the cost of payroll services. This became clear only after the hearing when the FTT asked for an explanation of the total shown in the accounts, which it could not reconcile with the invoices which had been produced. The cost of this expenditure was between about £1,400 and about £1,600 a year.

45. No explanation was given to the FTT on what this expenditure covered, but Mr Sandham has explained that it represented the cost incurred by the appellant in out-sourcing the preparation of payroll preparation for the team of porters (and not for other staff employed by the appellant in its own business). Ms Muir accepted that if the cost of employing porters was properly recoverable, then the ancillary expenses of that employment, including calculating national insurance and preparing pay slips, could also be recovered if the expenditure was reasonably incurred and reasonable in amount.

46. The FTT disallowed this item on the ground that the respondent was not "liable to contribute to a separate head of expenditure of "Payroll Prep" in addition to the managing agents' fees". It is not clear to me whether the FTT understood what this head of expenditure was referable to and considered that it should have been undertaken by the managing agents as part of their general management fee, or whether it did not consider that the cost was recoverable in principle. If the latter, then I would respectfully disagree as I consider that Ms Muir's concession was properly made. If the cost of employing porters to is found not to be recoverable at all, nor will the cost of preparing their payroll.

47. This item is of only modest value and if it was not already necessary to remit the proceedings to the FTT for further consideration I would deal with it on the basis that the appellant had produced insufficient evidence to the FTT to explain and justify the expenditure. As the matter is to be remitted on the issue of principle, however, I will allow the appeal on the grounds that the basis of the decision is unclear, and remit this issue as well for further consideration.

Disposal

48. For the reasons given above, I dismiss the appeal on the question whether the management agreement was a qualifying long term agreement, and I allow the cross appeal on the recoverability of the costs of employing porters (including payroll preparation) and remit those issues to the FTT for further consideration.

Martin Rodger QC

Deputy Chamber President

2 June 2017