IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2019] UKUT 193 (LC)
Case No: LRX/139/2018

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – variation of lease – whether lease fails to make satisfactory provision for payment for services provided for the tenant's benefit – appeal dismissed – section 35 of the Landlord and Tenant Act 1987

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

BETWEEN:

THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF CAMDEN

Appellant

- and -

MS E MORATH AND OTHERS **Respondents**

Re: Foundling & O'Donnell Court,
Brunswick Square,
London,
WC1N 1AW

Judge Elizabeth Cooke

Royal Courts of Justice
on
12 June 2019

Mr Jonathan Upton, instructed by Judge Priestley LLP, for the appellant
Mrs Andy Creer, instructed by Advocate (the Bar Pro Bono Unit), Mrs R Ramsaroop

The following cases are referred to in this decision:

Cleary v Lakeside Developments Ltd [2011] UKUT 264 (LC)
Triplerose Ltd v Stride [2019] UKUT 99 (LC)

Introduction

1. The appellant, the Mayor and Burgesses of the London Borough of Camden, holds a lease of part of the Brunswick Centre, which is a mixed use development of residential flats, shops and a cinema. The appellant's lease is for a term of 99 years from 5 December 1973; the demised premises are two buildings (Foundling Court and O'Donnell Court), containing 210 and 185 flats respectively which are let to residential sub-lessees. The appellant applied to the First-tier Tribunal ("the FTT") to vary the terms of some of the sub-leases pursuant to section 35 of the Landlord and Tenant Act 1987 ("the 1987 Act"), and Judge Vance in the FTT refused their application in a decision dated 15 August 2018.

2. The application was to vary 28 sub-leases. Of those, 12 have now been varied with the agreement of the sub-lessees in the context of the extension of those leases under the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act"). 10 more sub-lessees agreed to the variation prior to the hearing before Judge Vance, although no order has been made in respect of those sub-leases. 5 did not respond to the application. Only one respondent, Mrs R Ramsaroop who holds a sub-lease of flat 63 O'Donnell Court, took part in the hearing before the FTT. As to the appeal, two sub-lessees, Mrs Ramsaroop and Mr Grant (the sub-lessee of 209 Foundling Court), have served a respondent's notice.

3. I heard the appeal at the Royal Courts of Justice on 12 June 2019. The appellant was represented by Mr Jonathan Upton of counsel. Mr Grant attended the hearing but did not take part in it; Mrs Ramsaroop was represented by Mrs Andy Creer of counsel. I am grateful to both counsel for their helpful arguments. This was an appeal by way of review. On 29 March 2019 the Deputy President refused an application by the appellant to rely on additional evidence.

4. I have decided that the appeal must be dismissed, because there are no grounds to vary Mrs Ramsaroop's lease. In the paragraphs that follow I set out the factual and legal background and the reasoning of the FTT, before considering the submissions of counsel on the appeal and explaining my conclusions.

The factual background

5. The appellant's lease requires it to pay to the head lessor (the freeholder) 25% of the expenditure incurred by the head lessor in relation to the whole of the Brunswick Centre ("the Estate") in the provision of a wide range of services including repair, maintenance and insurance.

6. The appellant has granted 395 sub-leases, and they fall into three groups. Two groups, known in these proceedings as the Type B and Type C leases, require the sub-lessee to pay the appellant a proportionate part of what the appellant has paid towards the head lessor's expenditure. But the leases that the appellant applied to vary, known as the Type A leases,

do not. They provide, at clause 2(3), for the sub-lessee to pay to the appellant a proportionate part of its reasonable expenses incurred in meeting its obligations under the sub-lease, described briefly in that clause and then set out in detail in the Third Schedule thereto. Those obligations relate only to the building in which the relevant flat is situated (Foundling Court or O'Donnell Court as the case may be). There is no provision for the appellant to be reimbursed for what it pays to the freeholder under the terms of its own lease except insofar as the freeholder's expenditure relates to the individual building where the flat is situated.

7. At the hearing before the FTT evidence was given for the appellant about the costs passed on to it by the freeholder, which are for services including the provision of security, cleaning, health and safety risk assessments and legislative compliance, insurance of the common areas and plant, mechanical and engineering services, general repairs and maintenance, staff costs and the cost of utilities and of accounting and auditing. At the end of each service charge year the head lessor's managing agents send to the appellant accounts which break down the service charge expenditure into five schedules:

> Schedule A: payable by retail tenants only
>
> Schedule B: marketing costs, not payable by residential underlessees
>
> Schedule C: payable by all tenants
>
> Schedule D: basement car park, not payable by residential underlessees,
>
> Schedule E: payable only by residential underlessees

8. The appellant is required by the terms of its lease to pay a 25% contribution to the freeholder in respect of the expenditure in schedules C, D and E. It recovers most of those costs from its sub-lessees, but chooses not to pass on to them what it pays under Schedule D, because the appellant derives an income from the public parking in the car park.

9. There is no evidence as to what is the shortfall, for the appellant, as a result of the terms of the Type A sub-leases. It appears that there has been no shortfall in the past; the application to vary is prompted by proceedings ("the service charge proceedings") under section 27A of the Landlord and Tenant Act 1985 brought by some of the Type A lessees, who claimed that they had been overpaying, because they said their leases did not allow the appellant to recover what it pays to the freeholder in respect of services provided over the wider Estate outside the two residential blocks. The appellant responded to those proceedings by making an application to vary the leases. At first instance before the FTT it argued, first, that clause 2(3) of the leases did indeed allow it to recover those payments to the freeholder in respect of the whole Estate and, second, that if it failed on that point the leases should be varied. The FTT found for the sub-lessees on the construction of clause 2(3), and that finding is not appealed, so my explanation at paragraph 6 above reflects the FTT's finding.

10. Before I turn to the legal background to the variation application, I note that the service charge proceedings were transferred to the Upper Tribunal because of their complexity, and a decision was given about some of the preliminary issues in *Leaseholders of Foundling Court and O'Donnell Court v London Borough of* Camden [2016] UKUT 366 (LC). Those proceedings have settled, and it was as part of that settlement that the 10 sub-lessees to whom I referred in paragraph 2 above gave their consent to the variation sought.

The legal background

11. Section 35 of the 1987 Act reads, so far as relevant, as follows:

> "35(1) Any party to a long lease of a flat may make an application to the appropriate tribunal for an order varying the lease in such manner as is specified in the application.
>
> (2) The grounds on which any such application may be made are that the lease fails to make satisfactory provision with respect to one or more of the following matters, namely –
>
> (a) – (d)
>
> (e) the recovery by one party to the lease from another party to it of expenditure incurred or to be incurred by him, or on his behalf, for the benefit of that other party or of a number of persons who include that other party;
>
> (f) – (g)."

12. Section 38 provides that if those grounds are made out, the Tribunal may make an order varying the lease. It may order the variation applied for or some other variation. And it may make an order that one party to the lease should compensate the other for any loss or disadvantage to be suffered as a result of the variation.

13. To summarise, an application to vary will not succeed unless it can be shown that the lease "fails to make satisfactory provision" for various matters listed in section 35(2) (a)-(g), the relevant matter in this case being (e), namely the recovery by the landlord of expenditure incurred for the benefit of the tenant.

14. The word "satisfactory" is not defined in the statute. I have been referred to the Tribunal's decision in *Triplerose Ltd v Stride* [2019] UKUT 99 (LC). That was an appeal from the FTT's decision, on an application under section 35, to vary the lease of a basement flat in a

building divided into four flats. The other three leases required the tenants to contribute towards the cost of the repair and renewal of the building and the management of the building, whereas the lease of the basement flat required the tenant only to contribute to the cost of external painting. The tenant's appeal succeeded. At paragraph 39 the Tribunal observed that the terms of the four leases:

> "… demonstrate an astonishing lack of care and illustrate the dangers of cutting and pasting parts of a lease to another lease without checking the details. … The result is a mess. We … agree that a layman unversed in the jurisprudence surrounding section 35 of the 1987 Act might describe it as "unsatisfactory."
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> 40. However, in our view … the fact that the proposed variations are common or standard does not make the original terms unsatisfactory. Equally the fact that different tenants make different contributions does not make the lease unsatisfactory. There is a repairing covenant so this is not a case where there is no obligation to repair. … We accept that there might be circumstances where the lack of adequate contributions from Triplerose could render the lease unsatisfactory. However, that can only be established by evidence. If, for example, the building required a major roof or other structural repair beyond the means of [the other tenants] that might constitute the necessary evidence. But there is no such evidence at present."

15. The Tribunal in *Triplerose* referred to and quoted from the decision of the President of the Lands Tribunal in *Cleary v Lakeside Developments Ltd* [2011] UKUT 264 (LC). This was another case where the various leases in a building did not match, with the result that the management fees were paid for by the landlord and only 2 of the six leaseholders. The President said:

> "27 … at present the cost[s] to the lessor of employing a manager are borne by the lessor, with contributions from two of the lessees. There is, however, nothing unsatisfactory about that in itself. It is the result of the contractual arrangements freely entered into between lessor and lessees. … There is, in my judgment, nothing arguably 'unsatisfactory' in the fact that two lessees pay a contribution to the lessor's costs of management and four do not. It simply reflects different contractual provisions that do not appear to cause any difficulty in interpretation or application. …
>
> 30 … I can see that there may be circumstances where the financial position of the lessor may make the absence of a lessee's covenant to pay for the cost of management unsatisfactory. This could be the case, for instance, where there was an RTM company with no other source of income. But evidence would be needed to show that there was a particular need in the circumstances of the case. In the present case, in my judgment, there was no evidence on which the LVT could conclude that the absence of such a provision was unsatisfactory."

16. What I take from those decisions is that the Tribunal will consider whether the wording of the lease as it stands is clear, and whether the term sought to be varied is workable. If it is

clear and workable then it is not unsatisfactory. Obviously the question whether the bargain as it stands works in practice has to be considered on the basis of the evidence in each case. But section 35 does not enable the Tribunal to vary a lease on the basis that it imposes unequal burdens, or is expensive or inconvenient. It would be very strange if it did, in view of the law's general resistance to the temptation to interfere in or improve contractual arrangements freely made.

The decision in the FTT and the grounds of appeal

17. In the FTT the construction of the respondent's lease was in issue. The primary argument made for the appellant, as applicant, was that the respondent *did* have to make the contributions sought, without the need for any variation of her lease. The argument for a variation under section 35 was a secondary argument, relevant only if the appellant failed on construction.

18. Unsurprisingly Judge Vance devoted the bulk of his decision to the appellant's primary argument on construction of the sub-lease. He rejected it, and found that the lease clearly stated that the respondent was to pay a service charge in respect of her own building, rather than a contribution to the appellant's payment of the head lessor's expenditure on the wider Estate. That decision is not appealed.

19. He then turned to the appellant's secondary argument and addressed it briefly at his paragraph 57 and following. He said that the provision was "clear and perfectly workable". He went on, in paragraph 58, to say that this meant that the subtenants with Type A leases would not have to contribute to some of the costs that those with Type B and C leases had to pay, and that the appellant would therefore have a shortfall. He accepted that "it may be" that Mrs Ramsaroop and the other Type A lessees derive some benefits from the freeholder's expenditure on the wider Estate, but said that the extent of any benefit was uncertain (paragraph 59). However, at paragraph 60 he went on to say that it was likely that Mrs Ramsaroop derives a benefit from the security service across the wider Estate and from the wider Estate being kept in repair. He reiterated that, nevertheless, he did not agree that the Type A leases failed to make satisfactory provision for the recovery of Camden's expenditure. "There is nothing inherently 'unsatisfactory' in that arrangement". At paragraph 61 he added that it would make commercial sense to vary the lease, but noted that that would be contrary to the bargain the Type A lessees were offered. He noted that Mrs Ramsaroop is an original lessee of her flat.

20. There are two paragraphs in the grounds of appeal. First, it is said that having found that Mrs Ramsaroop derives some benefit from some of the works and services provided by the freeholder, the FTT ought to have found that the test in section 35(2)(e) was satisfied, namely that the lease fails to make satisfactory provision with respect to the recovery of expenditure incurred by one party to the lease for the other party's benefit. Paragraph 2 of the grounds states that the FTT took into account irrelevant considerations, namely:

(i) the meaning of the words used in clause 2(3) of the Type A leases;

(ii) the intention of the parties; and

(iii) whether the proposed variation was contrary to the bargain to which the Type A lessees agreed.

21. At the hearing before me Mr Upton provided a copy of the variation of clause 2(3) that the appellant sought in the FTT, which is underlined in the text below. This is the variation that has already been put into effect for 12 Type A lessees, and to which 10 of those lessees have indicated their consent (paragraph 2 above). However, the Tribunal can substitute a different variation from that requested; the words that he has added in bold represent a suggested alternative wording to meet some of the concerns raised on behalf of Mrs Ramsaroop:

> "to pay to the Corporation without any deduction by way of further and additional rent a proportionate part of the reasonable expenses and outgoings including all VAT incurred by the Corporation in the repair maintenance renewal decoration and insurance and management of the said building and the provision of services therein and the other heads of expenditure as the same are set out in the Third Schedule hereto AND to bear a reasonable part of the costs incurred by the Corporation [Camden] in contributing towards the costs incurred by the Superior Lessor (if any) in discharging its obligations under the Head Lease or Superior Leave as the case may be **provided such expenditure is incurred for the benefit of the Tenant or a number of persons who include the Tenant** such further or additional rent (hereinafter called the "Service Charge") being subject to the following terms and conditions."

The arguments made on appeal, discussion and conclusion

22. At the hearing before me there was some discussion of the details of the service charges imposed by the freeholder, and the extent to which they benefit the sub-lessees.

23. Mr Upton took me through the certificate and accounts for the year ending 29 September 2013, by way of illustration of the appellant's arrangements with the freeholder and in further explanation of the evidence that I summarised at paragraph 7 above. Mr Upton acknowledged that the figures in the certificate of expenditure sent to the appellant by the freeholder's managing agents on 29 January 2014 do not match those in the more detailed service charge statement enclosed with it. Mrs Creer expressed concern about this, but I take the view that it has no bearing on what I have to decide. Those documents were provided simply as a sample and relate just to one year; it is unlikely that it is impossible to ascertain what the freeholder charges the appellant.

24. Mr Upton also acknowledged that at paragraph 59 of his decision Judge Vance expressed uncertainty at the extent to which some of the services provided by the freeholder benefited Mrs Ramsaroop and the Type A lessees. That uncertainty, he said, is a matter for another

day; it would be open to the sub-lessees, if the variation is made, to challenge charges made in future under section 19 of the Landlord and Tenant Act 1985. I agree that such issues are not relevant to this appeal. This appeal is about whether, having found that there were services that benefited the sub-lessees, Judge Vance was right to find that nevertheless the lease made satisfactory provision for the recovery of costs paid by one party for the other's benefit.

25. Mr Upton argued that the FTT's decision that the current provision in the sub-leases was satisfactory was made on the basis of the three matters mentioned in paragraph 60, namely the meaning of the words in the lease, the intention of the parties objectively ascertained from the terms of the sub-lease, and whether the proposed variation would be contrary to the bargain made between the parties.

26. If those were the only reasons given for the FTT's decision then I would agree that the FTT's decision was open to criticism. But they were not. Judge Vance's decision is made squarely on the basis of the well-established meaning of the term "satisfactory" in section 35(2); he says at paragraph 57, to which I have already referred, "I consider the provisions, and the extent to which the underlessees are obliged to pay towards costs incurred by Camden and the Head Lessor, to be clear and perfectly workable." A clearer reflection of the meaning of "satisfactory" as established in *Cleary* and *Triplerose* could hardly be imagined.

27. The attention devoted in the FTT's decision to the meaning of the words in the current lease was a necessary consequence of the appellant's primary submissions on construction. The Judge's conclusion on the secondary submission is at paragraph 57. Paragraphs 58 to 61 of the decision expand on that; they necessarily refer to the construction of the lease and to the bargain made by the parties, because those are essential elements in the factual matrix to be considered. The meaning of the words as they stand is crucial, as is whether they are clear and reflect the bargain made. That is not the end of the FTT's reasoning, of course, and any variation may disturb the contractual bargain, but the FTT had to consider what that bargain was before deciding whether or not to vary it.

28. So I am not persuaded by the second paragraph of the grounds of appeal. In the first paragraph of the grounds is the main thrust of Mr Upton's argument, which is that the FTT should have departed from the established meaning of "satisfactory" and reached a conclusion at odds with the results in *Triplerose* and *Cleary*, because of the facts of this case.

29. Mr Upton explored the factual background, observing that the appellant took its lease in 1982 at a point when it was providing social housing; it has granted long leases only as a result of the right to buy legislation. Its intention, objectively ascertained, must have been to recover from the sub-lessees any costs it had to pay to the freeholder. It could not have intended to pick up a shortfall. The omission, in clause 2(3) of the Type A leases, of the wording now sought to be inserted must have been a drafting error. The Type B and Type C

leases were granted later, with the desired wording, because the error must have been spotted. There is a clear inequity for some but not all of the sub-lessees to contribute to the freeholder's costs; it is not fair, particularly when the appellant has to pick up the shortfall.

30. Furthermore, Mr Upton said that an important factor of the decision in *Cleary* was that new leases had been granted in the building which did not contain the variation sought; here, by contrast, the variation sought in the Type A leases has been put into effect in twelve leases in the context of their extension under the 1993 Act.

31. Mrs Creer pointed out that the factual background is not known here. There is no evidence that there was a drafting error. The Brunswick Development today is a large mixed-use complex but there is no evidence as to the position in the 1980s. As to the meaning of "satisfactory" she relied on the decision in *Triplerose.*

32. I do not agree with Mr Upton's argument that it was important, in *Cleary*, that leases had been varied consensually without the variation sought in the proceedings being made. That was certainly a relevant circumstance, but it was not essential to the Tribunal's decision. The fact that in this case consensual variations of the kind sought after have been made does not assist me. The fact that they have been made does not mean that the existing provision is unsatisfactory in the sense found in *Triplerose* and *Cleary*.

33. It has not been argued that those two decisions were made in error, and I see nothing in the facts of this case that might persuade me to depart from the construction of "satisfactory" adopted in them. Exactly as in those cases there is here a perceived inequity in the bargain made between the parties. Why it was so made is not known, but it was clearly made and the provisions are workable. There has been no evidence to show that they are not. There is no suggestion that the appellant cannot meet its contributions. Mr Upton criticises the FTT for taking into consideration the intention of the parties, objectively ascertained from the clear wording of their bargain, but seeks to rely on the appellant's intention, "objectively" ascertained from the surrounding circumstances that it must have made a mistake and cannot have intended the provisions to be as they are. That is speculation and of no value in assessing whether the provision made in the Type A sub-leases was satisfactory within the meaning of section 35(2)(e).

34. I take the view that the decision of the FTT was unarguably correct and the appeal is dismissed.

Two further matters

35. Mr Upton addressed me on two further points.

36. First, he argued that the variation – if I granted the appeal - should be retrospective. The reason for that submission was that if the variation takes effect from the grant of the sub-leases the sub-lessees will not be able to bring a claim in restitution in respect of over-payments in the past. Mrs Creer resisted that argument for the same reason. Because the appeal has been dismissed I do not have to consider this point.

37. Second, Mr Upton asked me to make an order by consent varying the 10 sub-leases whose lessees have agreed to the variation. No application has been made to the FTT for a consent order. I take the view that the correct procedure would be for such an application to be made, and therefore I decline to make that order.

Dated: 25 June 2019

Elizabeth Cooke, Judge of the Upper Tribunal