UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – qualifying long term agreements – qualifying works – reasonableness of service charges – First-tier Tribunal's reasoning

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

BETWEEN:

ASP INDEPENDENT LIVING LIMITED

Appellant

-and-

MRS JEAN BARBARA GODFREY

Respondent

Re: Flat 60,
The Gate House,
354 Sea Front,
Hayling Island,
Hampshire,
PO11 OAT

Upper Tribunal Judge Elizabeth Cooke
Decision by written representations

The Commercial Law Practice for the appellant

The following cases are referred to in this decision:

Corvan (Properties) Limited v Abdel-Mahmood [2018] EWCA Civ 1102
Daejan Investments Limited v Benson [2013] UKSC 14
Phillips v Francis [2014] EWCA Civ 1395
Schilling v Canary Riverside Development Ptd Limited [2005] EWLands LRX_26_2005

Introduction

1. This is an appeal from a decision of the First-tier Tribunal ("the FTT") about the reasonableness and payability of service charges. The appellant landlord has permission from the Tribunal to appeal three of the decisions made by the FTT, two about the reasonableness of charges for the provision of a warden and the other about a charge for gardening services.

2. The appeal has been conducted under the Tribunal's written representations procedure. The appellant has been represented by The Commercial Law Practice; the respondent has chosen not to participate in the appeal but the Tribunal has read the written representations made on her behalf in response to the application for permission to appeal by her son Mr Peter Godfrey, dated 15 June 2021, together with some emailed corrections. Because the appellant in the Tribunal was the respondent in the FTT, for the avoidance of confusion I shall refer to the parties as the landlord and the lessee.

The factual background

3. The lessee holds a long lease of Flat 60 in a block of 23 flats known as The Gate House, 354 Seafront, Hayling Island. The lease contains service charge provisions. It states that the flat must be occupied by someone over 60 years of age. The Gate House is part of a larger complex together with two buildings known as Gorseway Apartments, containing another 52 flats, and a care home. If I have understood correctly, Gorseway Apartments is also owned by the landlord, but not the care home which is the property of an organisation referred to by the parties and the FTT as Agincare; its title according to documents in the bundle is Agincare Homes Holdings Limited. The four buildings are managed together, and Agincare provides some of the services for the whole estate including the warden and the gardening service.

4. In 2020 the lessee made an application to the FTT for a determination of the reasonableness and payability of a number of items in the services charges for the years 2019/20 and 2020/21, demanded as payments on account rather than as final charges. She was represented in those proceedings by Mr Peter Godfrey; her case was that service charges had risen considerably since the freehold changed hands in 2018 and she regarded a number of charges as unreasonable. The landlord was represented by Mr David Jenkins of Daniells Harrison, the landlord's managing agents.

5. The FTT decided the reasonableness and payability of nine items for the year 2019/20 and ten for the year 2020/21. Its initial decision was dated 4 December 2021. The landlord applied to the FTT for permission to appeal, and as a result the FTT reviewed its decision and issued an amended one on 1 March 2021. The landlord then applied for permission to appeal the amended decision, which the FTT refused but which the Tribunal granted in respect of charges for the provision of a warden and for gardening services.

The legal background

6. Service charges demanded of a lessee by the landlord are payable only insofar as they are reasonably incurred, and for services or works of a reasonable standard: section 19 of the

Landlord and Tenant Act 1985. Section 27A of the 1985 Act gives the FTT jurisdiction to determine the reasonableness and payability of service charges.

7. It is well-established that where a lessee seeks to challenge the reasonableness of a service charge they must put forward some evidence that the charges are unreasonable; they cannot simply put the landlord to proof of reasonableness. See for example *Schilling v Canary Riverside Development Ltd* [2005] EWLands LRX_26_2005).

8. The 1985 Act provides further protection for lessees in respect of "qualifying works" and "qualifying long term agreements".

9. Section 20 of the 1985 Act, together with the Service Charges (Consultation Requirements) (England) Regulations 2003, provide that a tenant cannot be charged more than £250 for "qualifying works", or £100 in any accounting period for a "qualifying long-term agreement", unless consultation requirements have been complied with. The consultation process involves a sequence of notices, the circulation of estimates for work to be done, and the opportunity for tenants both to nominate a contractor to provide an estimate and to make observations on the landlord's plans.

10. Qualifying works are defined (in section 20ZA(2) of the 1985 Act) as works on a building or any other premises and are subject to the consultation requirements if they are going to cost the tenant more than £250 by way of service charge.

11. A qualifying long-term agreement is defined (again in section 20ZA(2)) as an agreement entered into by a landlord for a period of more than 12 months, and such an agreement falls within the consultation requirements of section 20 if the tenant is going to be charged more than £100 in an accounting period.

7. A landlord can apply under section 20ZA of the 1985 Act for dispensation from the consultation requirements.

The FTT's decision about the charge for the warden

12. A warden is provided by Agincare for The Gate House and Gorseway Apartments, by agreement with the landlord. The charge is apportioned between them in proportion to the number of flats (23:52) and therefore each flat pays 1/75 of the whole cost to the landlord. The charge demanded of the lessee for 2019/20 was £436.65, and for 2020/21 was £521.74.

13. There were before the FTT two documents relating to the provision of a warden, or "scheme support officer". A one-page agreement dated 7 May 2019 between the landlord and Agincare required the latter to provide "warden costs including emergency cover". It stated that "the cost" was £32,748.27 per annum, and that Agincare would invoice the landlord monthly in the sum of £2,729. The period of the agreement was stated to be 364 days from 1 April 2019, and said "Agreement to be renewed annually on 1 April".

14. A further document dated 21 November 2019 is headed "Gorseway Park, 354 Seafront, Hayling Island: Schedule of tasks for the warden" and goes on to list the warden's duties. It states that the annual charge is £36,000. It does not give the names of the parties but is signed by a "Simon Luckhurst", whose capacity is not identified.

15. It will be seen that the payment required of the lessee in 2019/20 was 1/75 of the £32,748.27 required by the April agreement, and the charge for 2020/21 was 1/75 of the £36,000 referred to in the November document.

16. The FTT's decision was, as I said above, reviewed by the FTT. So what I have is the original decision of 4 January 2021, with underlined paragraphs added on 1 March 2021. In setting out what the FTT said in its decision I refer to the original paragraphs except where I say otherwise.

17. The decision first addressed the charge for the warden in 2019/20, from paragraph 58. The FTT introduced the two documents and said that Mr Jenkins confirmed that the April agreement had "run on" at the end of March 2020. In paragraph 62 the FTT said:

> "The cost per resident is clearly shown on the budget for 2019/20 as exceeding £250 per lessee so there should have been consultation on what was effectively a qualifying long term agreement and Mr Jenkins accepted there was none."

18. The FTT noted at paragraph 63 that the landlord had applied for a dispensation from the consultation requirements, and it refused that application. It noted that there was no excuse for the landlord to have failed to notice that consultation was required, unless the contract was genuinely intended to be revised after 364 days, which had not happened. At 64 it said:

> "The Respondent's liability to contribute towards the cost of providing the warde is capped at £250 for 2019/20."

The same paragraph continued, in underlined words added on review:

> "[The Tribunal referred to the wrong limit in that the legislation caps the amount recoverable in respect of a qualifying long term agreement in respect of which there was no consultation at £100.] However, it considers that it is reasonable nevertheless to allow the Respondent to recover this amount for the service provided as the Applicant has no complaint about the service provided but is only concerned by the increase in the costs of that service when compared with the costs during previous years."

19. In paragraphs 66 to 69, all additional paragraphs added on review, the FTT explained that the landlord had sought permission to appeal on the basis, first, that this was not a qualifying long term agreement and, second, that the FTT had got the amount wrong. It referred to the decision of the Court of Appeal in *Corvan (Properties) Limited v Abdel-Mahmood* [2018] EWCA Civ 1102, where it was said that a qualifying long term agreement to which section 20 applies is one where the agreement "mandates continuation beyond the first year". It referred again to the provisions of the April agreement which was said to be for 364 days

but said that it was "to be renewed annually", which it said were contradictory. It concluded that the reference to 364 days was "effectively a sham" and that the agreement was intended to be renewed annually. However, it accepted the landlord's argument that the agreement could have been terminated at 364 days, even though it was intended to last longer. It said at paragraph 72 that therefore it could not limit the charge to £100 and must instead consider whether the charge of £436.65 was reasonable.

20. The FTT said at paragraph 74:

> "The essential question is whether the amount charged to the Applicant is reasonable. The Tribunal has concluded that it was not. The reason for the Tribunal's error in relation to the limitation of the charge to £250, on the mistaken assumption that the limit applied to a QLTA, was because it considered that that amount was a fair and reasonable amount for the Applicant to pay for the service provided."

21. I pause there to note that it seems that the FTT originally thought that the April agreement was a qualifying long term agreement and therefore limited the charge to £250. On review it concluded, first, that it had made an error of law and that the April agreement was not a qualifying long-term agreement and, second, that the reason it made the further error of law about the limit applicable to qualifying long term agreements was that that figure was in fact the reasonable charge for that service. No explanation is given for this remarkable coincidence.

22. However, the FTT then continued, again in underlined text added on review:

> "77. The Tribunal accepts that the two agreements, when read together, indicates that the Respondent always intended to put in place an agreement to provide warden services for a period in excess of a year. If that is correct, the Respondent may only recover £100 from the Applicant for this service in 2019/20. If, however, the Respondent is correct that the agreement for the provision of services is the agreement signed on 7 May 2019 and that it is not a QLTA, the accounts are incorrect. Furthermore the Respondent terminated that agreement and replaced it with a QLTA on 21 November 2019. It has already acknowledged that there was no prior consultation. The Tribunal accepts that a reasonable charge for the provision of the Warden … would be £5,750 per annum. However, from 21 November onwards, there is another agreement for which there has been no consultation. Therefore the Tribunal is minded to allow the equivalent of an annual charge of £5,750 for the period between 1 April 2019 and 21 November 2019 (234 days) plus £100 being the statutory limit applicable to a QLTA for the period between 220 November 2019 and 31 March 2020. The Respondent can therefore recover £260.27."

23. £5,570 is of course 23 x £250. Why the FTT thought that the April agreement had been terminated is not explained. There does not appear to have been any evidence that the November schedule of tasks was a fresh agreement superseding the April one, rather than a list of tasks to be undertaken pursuant to that agreement and a price for the following year. The landlord's evidence was that the April agreement had "run on" for 2020/21. If the

November agreement was a fresh agreement, why was it a qualifying long term agreement when it gave no period for its own duration?

24. The FTT then went on to discuss the charge for the warden in 2020/21, in four unreviewed paragraphs where it stated that the charge for the year was £521.74, that the landlord should have "undertaken an appropriate consultation process", and that "the Tribunal has no alternative but to limit the amount it considers reasonable to £250 per leaseholder." The FTT added that the landlord could still undertake a proper consultation before the accounts for 2020/21 were finalised.

The appeal about the charge for the warden

25. The landlord's grounds of appeal sets out the FTT's findings and challenges its reasoning both about qualifying long term agreements and about the reasonableness of the charges.

26. The representations made on the lessee's behalf express suspicion about family connections between the landlord and Aginacre. That was not a matter to which the FTT could give any consideration; the only issue before it was the reasonableness and payability of the service charges. More relevantly, Mr Godfrey on behalf of the lessee questions whether the contract for the provision of a warden really was for 364 days; was there a day each year when there was no warden, and why were the residents not told? He argues that the reference in the agreement to an annual charge reveals the true nature of the agreement.

27. I agree that the April agreement was ambiguous, but the crucial question was whether it was bound to go on beyond 365 days. It does not appear that it was, and to that extent I agree with at least paragraph 72 of the FTT's decision. But it will be clear from what I have said above that it is impossible to understand why £250 was a reasonable charge for the warden for 2019/20, under the April agreement, because no reasons are given for that finding. It is equally impossible to understand why the November agreement is said to have superseded the April agreement in 2019 and why it was regarded as a qualifying long term agreement.

28. Turning to the following year, it is not clear which agreement the FTT thought governed the provision of the warden in 2020/21; the paragraphs that deal with that agreement are unreviewed and appear to refer to the April 2019 agreement as if it was a qualifying long term agreement for which no consultation had taken place, so that the FTT had "no choice" about a figure of £250 – which of course was the wrong figure again, and in any event the FTT had in its paragraph 72 concluded that the April agreement was not a qualifying long term agreement (although it then expressed some doubt about its own finding in paragraph 77).

29. The FTT's decisions about the charges made for the provision of a warden in 2019/20 and 2020/21 are incoherent and are set aside. The two issues are remitted to the FTT for fresh decision. The FTT will need to determine what was the agreement that governed the provision of service in the two years in question, whether it was a qualifying long term agreement and, if it was, whether the landlord's application for dispensation should be granted in accordance with the well-known principles in *Daejan Investments Limited v Benson* [2013] UKSC 14. If it was not, the FTT will have to decide whether the charge was reasonable. In dong so it will need first to consider whether a sufficient challenge to the

reasonableness of the charge has been made, in light of the fact that the lessee's only complaint appears to have been the increased price.

The FTT's decision about the charge for gardening

30. The gardens for the whole complex including the care home are maintained by Agincare, and the cost apportioned so that The Gate House, and Gorseway Apartments pay 50% of the cost. The residents in the flats do not have access to the care home gardens but have access to the grounds around their building – although according to the lessee the actual garden area is very limited.

31. There was before the FTT an agreement between Agincare and the landlord for the provision of garden maintenance, dated 7 May 2019. It says that it is for "50% of the gardening contract at the premises", and is in the same format as the agreement of the same date for the provision of a warden, stating the term to be 364 days but imposing an "annual" charge of £26,040, and "to be renewed annually on 1 April".

32. There was also a schedule of garden tasks, entitled "Details of works to be undertaken", including cutting grass and dead-heading flowers; no parties or term are given, but states that the price is £16,640 plus VAT.

33. The FTT at paragraph 109 said that a 50% contribution from the 75 apartments was "excessive and it results in the Applicant's contribution exceeding the consultation limit." It went on to say at paragraph 111:

> "The draft accounts show the cost of gardens and ground maintenance as £8,962. The Tribunal determines that the maximum reasonable cost of maintaining the limited grounds and gardens at The Gate House is £5,750, equivalent to a payment of £250 per flat per annum. This charge is also consistent with the figure in the budget for 2020/21/ The contract for the supply of gardening is a contract which has resulted in a charge of in excess of £250 to the leaseholder. Therefore the Respondent should have consulted with the leaseholders before committing to the cost of these works. There has been no prior consultation regarding this charge so whatever the actual charge, that is the maximum the Respondent can recover from the Applicant."

34. The underlined text was added on review. It will be seen that the unreviewed text is incomplete and there must be something missing, but since only the reviewed decision can be appealed I do not need to go into that.

35. £250 was allowed for gardening in £250. For 2020/21 a charge of £221 was allowed. There is no discussion of this figure; it is said to be derived by "applying the same principles as for the previous year" and to be "based on the budgeted figures".

The appeal about the charge for gardening

36. The landlord in its grounds of appeal challenges the limitation of the gardening charge to £250, since there was no finding either that there was a qualifying long term agreement or that the gardeners were carrying out qualifying works. And it asks how, if there was no qualifying long term agreement or qualifying works, the FTT arrived at the figure of £250 as a reasonable charge.

37. There is no mention in the grounds of appeal of the charge for gardening in 2020/21, and therefore I consider only the charge for the previous year.

38. For the lessee, it is argued that if it was intended that the contract should "run on" then it was a qualifying long term agreement. That is not the law. There is a qualifying long term agreement only if the agreement *must* continue beyond a year, so that the landlord would be in breach of contract if it terminated the arrangement before a year has elapsed. That does not appear to be the case with this agreement. Nor is it the case that the lessee and other residents have any free-standing right to be consulted about whether a 364-day agreement should have been made, as Mr Godfrey suggests. However desirable consultation may be, it is required by law only in limited circumstances.

39. Like the landlord I am unable to understand the FTT's findings. There appears to be an assumption that anything costing a lessee more than £250 has to be consulted upon, yet that is not the case. It may be that the FTT thought that the gardening agreement was a qualifying long term agreement, in view of its similarity to the agreement relating to the provision of a warden, about which it took that view prior to review. If it did, it dd not say so; and if that is what it thought, then again it got the permitted charge wrong. It may have thought that any charge over £250 amounted to qualifying work and triggered the consultation requirement; but that is not the case, and the FTT would have had to identify a "set of works" that brought gardening within the definition in section 20ZA(2) of the 1985 Act (*Phillips v Francis* [2014] EWCA Civ 1395). In any event, if that is what the FTT thought, it did not say so. In either case, if it thought that consultation was required the FTT should have given consideration to the landlord's application for dispensation, but it made no mention of that application in the context of the gardening charge.

40. If what the FTT intended to do was to find that £250 per annum was a reasonable charge for the gardening services, then it did not explain why. The FTT was clearly unhappy with the apportionment of garden costs between the care home and the rest of the complex. It is difficult to see on what evidential basis it made that judgment, but in any event that was not an issue before the FTT. It was for the FTT to decide whether the sum demanded of the lessee of flat 60 was a reasonable charge for the gardening services of which she had the benefit.

41. Again, the FTT's decision about the charge for gardening in 2019/20 is unexplained and is set aside. It is remitted to the FTT for decision.

Conclusion

42. I have summarised the arguments made by the landlord and for the lessee quite briefly, because the reason why the three appealed decisions (as to the charge for a warden in

2019/20 and 2020/21, and for gardening in 2019/20) are set aside is that they are unexplained and impossible to understand.

43. There is insufficient material for the Tribunal to substitute its own decisions and so all three matters have to be remitted to the FTT for proper consideration.

44. I would urge the parties to try to come to an agreement about these charges rather than going through a further round of directions and a hearing before the FTT. Many of the issues about which the lessee understandably feels strongly are simply not ones that the FTT has jurisdiction to consider – for example, the contractual or any other relationship between the landlord and Agincare. A rise in prices does not in itself mean that a charge is unreasonable. Nor does the fact that a service charge costs a large fraction of the lessee's pension. Nor does the absence of consultation if the precise statutory conditions that trigger a consultation requirement are not met. The parties may be able to make progress if they can give some thought to, and find out about, what would be a reasonable charge for the service received, by looking at other similar properties and getting some information about charges made for similar services. If they can focus on what the FTT is empowered to decide they may be able to reach an agreement about these charges and about future arrangements, to the benefit of everyone involved.

Judge Elizabeth Cooke

14 December 2021

Right of appeal

Any party to this case has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.