UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2009] UKUT 203 (LC)
LT Case Number: LRX/66/2008

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

IN THE MATTER OF AN APPEAL FROM A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

LANDLORD AND TENANT – service charges – construction of tenancy – whether landlord entitled to serve notice to increase charges for heating and hot water – whether earlier year's shortfall incurred during previous tenancy recoverable from current tenant – appeal allowed in part.

BETWEEN **CIRCLE THIRTY THREE HOUSING TRUST LIMITED** **Appellant**

and

MICHELLE SEGOVIA **Respondent**

Re: 22b Arundel Square
London N7 8AS

Before: Her Honour Judge Alice Robinson

Sitting at: 43-45 Bedford Square, London WC1B 3AS
On 11 September 2009

Christopher Baker instructed by Eversheds for the Appellant
Patricia Tueje instructed by Hopkin Murray Beskine for the Respondent

The following cases are referred to in this decision:

Investors Compensation Scheme v West Bromwich Building Society [1998] 1 WLR 896, HL
Gilje v Charlgrove Securities Ltd [2002] 1 EGLR 41, CA

DECISION

1. The Appellant appeals to the Lands Tribunal, with permission, from a decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel (hereafter "the LVT") dated 7 March 2008 whereby the LVT decided that (1) the Appellant was not entitled to increase the charges for heating and water pursuant to the Respondent's tenancy and (2) the Appellant was not entitled to charge the Respondent for heating and hot water provided during a previous tenancy when the charges for it had been underestimated resulting in a shortfall.

2. The Respondent is the tenant of a one bedroom flat known as 22B Arundel Square, London N7 8AS (hereafter "the Premises") pursuant to a tenancy dated 7 March 2005 (hereafter "the Tenancy") of which the Appellant is landlord. The Tenancy provides for weekly payment of £1.80 service charge and £1.42 for heating and hot water.

3. On 3 December 2005 the Appellant consulted the Respondent about an alteration in the weekly service charge and charge for heating and hot water to £1.02 service charge and to £17.39 for heating and hot water for the 2006/2007 financial year. The proposed new charges included balancing a surplus in service charge and a shortfall in heating and hot water charges made in 2004/2005. From 3 April 2006 the Appellant altered the weekly service charge and charge for heating and hot water to £1.02 service charge and to £17.39 for heating and hot water.

4. On 22 October 2006 the Rent Officer registered a fair rent for the Premises which included weekly charges for services of £18.41. From 3 April 2007 the Appellant altered the weekly service charge and charge for heating and hot water to £0.28 service charge and to £16.25 for heating and hot water.

5. On 16 August 2007 the Respondent applied to the LVT pursuant to section 27A of the Landlord and Tenant Act 1985 for a determination as to the reasonableness of the service charge and charge for heating and hot water in 2006/2007 and 2007/2008. On 7 March 2008 the LVT held that the failure to complete Appendix A of the Tenancy meant the Tenancy did not permit the Appellant to alter the service charge or charge for heating and hot water from those initial sums specified in the Tenancy. It also held that the Appellant was not entitled to recover from the Respondent a deficit made in earlier years in charges for heating and hot water before the Tenancy was entered into. The LVT stated:

> "Clearly this deficit arose before the tenancy was granted to the applicant since hers was a new tenancy granted by the respondent with no privity of contract existing between her and any previous tenant. As such this sum cannot be payable by the applicant."

6. Clause 1(1) of the tenancy sets out the rent and service charges payable:

> "The weekly payment for the premises at the date of this agreement shall be:

Net rent	£59.09
Service charge	£ 1.80
~~Credit~~ H & HW[1]	£ 1.42
Total payable	£62.31

For the purpose of clauses 1(2), 3(3) and 4(2) the term "rent" refers to the sum of the net rent and service charge (less any credit where appropriate) set out above or as varied from time to time."

Clause 1(4) provides

> "The Trust shall provide the services set out in Appendix A in connection with the premises for which the tenant shall pay the service charge which is included in the rent."

Appendix A has been left blank.

7. Clauses 1(5), (6) and (7) provide for increases in the rent and charges as follows:

> "(5) The Trust will consult the Tenant on any proposed alteration in the service charge. The notice shall specify the new service charge proposed and the date from which the alteration shall take effect. The notice may also add to, reduce, remove or vary the services provided by the Trust after consultation with the Tenant. The Tenant shall pay the new service charge proposed in the notice from the date specified. If the actual cost of providing the services cannot be determined at the time such notice is sent, any alteration shall be based upon the trust's estimate of providing such services during the coming year. An adjustment in service charge will, if necessary, be made at the time the next alteration is made to take account of actual costs incurred…."
>
> (6) The rent payable is the amount registered as a fair rent for the Premises by the Rent Officer and is fixed for two years from the date of registration. At the end of that two year period, the Trust may apply to the Rent Officer to register a new fair rent for the Premises. The Trust may then increase the rent up to the level of the new fair rent registered by the Rent Officer by giving the tenant not less than four weeks notice in writing of the increase. The Tenant shall pay the increased rent form the date specified in the Notice…
>
> (8) The Trust and the Tenant agree that the terms of this tenancy maybe varied by the same mechanism set out in Sections 102 and 103 of the Housing Act 1975. The Trust may change any of the conditions of this Agreement (other than those relating to payment of rent and service charges) either by agreement between the Trust and the Tenant or by the Trust giving 28 days' written notice of the variation. Before serving such a Notice the Trust will inform the Tenant in writing of the details of the proposed change and will consider the Tenant's comments, if any…"

8. In summary, sections 102 and 103 of the Housing Act 1985 provide that the terms of a tenancy may be altered either (1) by agreement, (2) where it relates to rent or payments in

[1] The word 'credit' has been deleted and the letters 'H & HW' have been added by hand.

respect of services, in accordance with a provision for variation in the tenancy or (3) by not less than 4 weeks written notice of variation and, where the variation does not relate to rent or service charges, the landlord must consult the tenant about the proposed variation first.

9. The Appellant submitted that the fact that Appendix A, listing the services to be provided, had not been completed was an obvious clerical error and did not mean the Appellant could not charge for services. The Tenancy has to be read as a whole and in accordance with the principles described by Lord Hoffman in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896, HL at pp.912H-913E. Provision of heating and hot water is a service for which a charge is made and is a service charge for the purposes of the Tenancy. Specific provision for payment is made in clause 1(1) and for it to be increased in clause 1(5). Insofar as the charge for heating and hot water is not a service charge in clause 1(1), the service can be introduced and charged for by variation pursuant to clause 1(5) or it can be increased pursuant to clause 1(8). The rent registered by the Rent Officer included a sum for services and the increase was also payable by virtue of clause 1(6).

10. It was also submitted that the entitlement to increase the service charge and heating/hot water charge meant the Appellant could include making good a shortfall. The initial payment is based on an estimate. Further, specific provision is made for balancing estimated charges with actual costs in clause 1(5). The Appellant could not recover the shortfall from the previous tenant and there was nothing wring with operating a continuing account for service and other charges which took into account a surplus as well as shortfall.

11. The Respondent submitted that heating and hot water charges are separately identified in clause 1(1) and on a natural reading of it are not service charges. If there is reasonable doubt as to the meaning of the Tenancy, the handwritten alterations should be accorded greater weight than the typed standard text. The notices of variation and other documents all separate the charge for heating and hot water from service charge. It is conceded the charges could be increased by the appropriate procedure by virtue of clause 1(8) if that has been followed. However, the Respondent's liability for charges for services cannot arise before the date of the Tenancy and there is no provision entitling the Appellant to recover charges retrospectively. The Appellant cannot charge the Respondent for heating and hot water supplied to her predecessor without express provision to that effect in the Tenancy.

12. I agree with the parties that the LVT has misconstrued the Tenancy by focussing on Appendix A without regard to other provisions. Clause 1(1) provides for payment of a charge for heating and hot water and by necessary implication the Appellant must provide that service if it is going to charge for it whether or not it appears in Appendix A. The same is true of the 'service charge.'

13. At first glance it does appear from the way clause 1(1) has been amended by hand that the heating and hot water charge is not a 'service charge' as defined in the Tenancy. However, this issue has to be considered in the context of the Tenancy as a whole. I agree with both parties that the Tenancy has to be read in a common sense way bearing in mind it adopts everyday language and the 'matrix of fact,' to quote Lord Hoffman in the *Investors*

Compensation Scheme at p.912H, is one of social housing. The reason heating and hot water is specified separately is because it does not qualify for housing benefit and that is background knowledge which would have been available to both parties. As the Appellant submitted, provision of heating and hot water is a service for which a charge is made. If it were not part of the service charge it would not be payable in advance under clause 1(2), unlike rent and the service charge, and it would be subject to the different regime for variation in clause 1(8) as opposed to 1(5). This would give the tenant less protection as there is no consultation requirement in clause 1(8) and there would be no mechanism for calculating the weekly amount. I do not believe this is what a reasonable person would consider to be the meaning of the Tenancy. Considering the Tenancy as a whole and against the background I have identified it is reasonably clear that the charge for heating and hot water is a 'service charge'.

14. The Respondent raised in its Skeleton Argument the question as to whether the Appellant had complied with the provisions for variation in the Tenancy but this is the first time she has done so and it was not supported by any particular submissions. The application to the LVT did not raise it, only the question of the reasonableness of the charges, and neither does the respondent's solicitors' letter dated 10 December 2008. In my view, if the Respondent wanted to take this point she should have produced evidence to support it and she has not done so. In those circumstances there are no grounds for the Lands Tribunal to hold that the correct procedure for varying the heating and hot water charge was not followed.

15. Although the variation of service charges (including heating and hot water) was put by the Appellant as simply a rolling balancing account, there is no doubt that the Appellant is asking the Respondent to pay for heating and hot water supplied to the former occupier of her flat. The guidance given by Lord Hoffman in the *Investors Compensation Scheme* is the starting point for the construction of a contract but it is also appropriate to look at the principles which apply more specifically to construction of a service charge provision in a lease. In *Gilje v Charlgrove Securities Ltd* [2002] 1 EGLR 41, CA an issue arose as to whether service charge provisions entitled the landlord to recover for the notional cost of a caretaker's flat in addition to the other costs of providing the caretaker. In deciding this question Laws LJ said at paragraph 27:

> "The landlord seeks to recover money from the tenant. On ordinary principles, there must be clear terms in the contractual provisions said to entitle him to do so. The lease, moreover, was drafted, or proffered, by the landlord. It falls to be construed contra preferentem."

In paragraph 28 he went onto say that:

> "I do not consider that a reasonable tenant or prospective tenant, reading the underlease that was proffered to him, would perceive that para 4(2)(1) obliged him to contribute to the notional cost to the landlord of providing the caretaker's flat. Such a construction has to emerge clearly and plainly from the words that are used."

Mummery LJ described as obvious the following proposition:

> "The draftsman should bear in mind that the courts tend to construe service charge provisions restrictively and are unlikely to allow recovery for items which are not clearly included." paragraph 32

16. There is no indication in clause 1(1) of the lease that the service charges fixed at the beginning of the Tenancy include any element of surplus or shortfall from previous years nor is there any evidence that this would have been within the background information or 'matrix of fact' available to the Respondent. Clause 1(5) makes it clear that any alterations to these figures may be based on estimates and if so, future alterations will take account of actual costs incurred. It says nothing about whether the initial charges are based on estimates or even if the first alteration in the charges will include a balancing exercise. It could be said that if a tenant is informed he or she is paying service charges based on an estimate then they would consider clause 1(5) permits a balancing exercise to be conducted so that any overpayment by them is credited to their account and any underpayment by them is recovered. There is no dispute between the parties that clause 1(5) permits this.

17. However, in my judgment a reasonable person reading clause 1(5) would not understand it to mean that that the Appellant is operating a continuous calculation exercise which includes balancing estimates with actual expenditure in years prior to the grant of the tenancy, whether a surplus or shortfall. I consider that if the Appellant wishes to be able to charge for services on this basis and in particular to charge a tenant for services supplied to a former occupier because the previous service charge estimate was too low then the Tenancy must clearly say so. It does not. I recognise that the shortfall cannot be recovered from the previous tenant under the terms of the Tenancy, assuming them to have been the same. However, that does not entitle the Appellant to recover them from the Respondent unless the Tenancy clearly provides for it. Any difficulties which the Appellant may face when a tenancy comes to an end should be expressly provided for in the terms of the Tenancy. In the same way that the Appellant is not entitled to recover from the Respondent a shortfall arising out of charges made to a former tenant, neither is it under any obligation to credit the Respondent's service charge with any surplus arising as a result of charges made to a former tenant.

18. Accordingly I consider that the LVT misconstrued the Tenancy and that the service charge, as well as the charge for heating and hot water which forms part of the service charge, may be increased pursuant to clause 1(5) of the Tenancy. However, the LVT was correct to conclude that the terms of the Tenancy do not permit recovery of a shortfall in service charge arising out of charges made to a former tenant which were too low to cover the cost of services supplied to that tenant. The appeal is therefore allowed in part.

19. There remains an outstanding issue as to whether the increase in service charge (including heating and hot water) for 2006/2007 and 2007/2008 is reasonable for the purposes of section 19 of the Landlord and tenant Act 1985. It was agreed at the hearing that I would decide the issues of principle and then ask parties how they wished to take forward the issue of reasonableness.

20. Having sought their views on this matter both parties consent to the case being remitted to the LVT. Therefore this case is remitted to the LVT for the purpose of determining the reasonableness of the service charge (including heating and hot water) for 2006/2007 and 2007/2008 in accordance with this decision.

21. Neither party made any application for costs.

Dated 15 October 2009

Her Honour Judge Alice Robinson