IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2019] UKUT 146 (LC)
Case No: LRX/70/2018

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – construction of tenancy agreement – tenancy agreement specifying in schedule the services to be provided by landlord and paid for by tenant through service charge - whether terms of agreement permitted the landlord to add to these services so as to provide (and charge for through service charge) a service not specified in the schedule

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

BETWEEN:

ROBERT WILCOCK

Appellants

- and -

THE GUINNESS PARTNERSHIP LIMITED **Respondent**

Re: 12 Portland Street,
Swinton,
Mexborough, S64 8NQ

His Honour Nicholas Huskinson

Determination on written representations

There are no cases referred to in this decision.

DECISION

1. This is an appeal from the decision of the First-Tier Tribunal Property Chamber (Residential Property) (the FTT) dated 26 April 2018 being a decision regarding the recoverability of certain disputed items of expense claimed by way of service charge by the respondent as landlord from the appellant as tenant in relation to 12 Portland Street, Swinton, Mexborough, S64 8NQ (the flat).

2. The appellant holds the flat from the respondent upon an assured weekly tenancy which commenced on 3 March 1997.

3. In its decision the FTT was concerned regarding various items of disputed service charge over various years. The only point upon which permission to appeal to the this tribunal has been granted is in relation to the sums claimed by way of service charge to meet the costs incurred by the respondent of effecting bulk refuse removal from the car park area to the rear of the building.

4. The appellant's flat is a first floor flat within a building comprising eight flats built in early 1997. The building comprises four ground floor flats, each having their own entrance from the front garden side and four first floor flats which have an entrance from the rear. A car park is sited to the rear of the building. At the front of the building there are three small lawns with hedging to the front boundary.

5. There has arisen a problem regarding fly tipping of waste in the car park.

6. During one of the relevant service charge years (it does not matter which for the purpose of the present decision) the respondent decided it was necessary to ensure that steps were taken from time to time to remove bulk rubbish from the car park. Thereafter the respondent included the cost of doing so as an element of the total costs which were to be recovered through the service charge – with the appellant being asked to pay his proportion of these total costs by way of service charge.

7. The tenancy agreement provides for the payment of a weekly rent (which can be varied in accordance with the agreement and the relevant statutory provisions). The tenancy agreement also made payable a service charge which initially was £2 per week. The agreement provides that the expression "Rent" refers to the sum of the net rent and service charge set out in the agreement or as varied from time to time in accordance with the agreement.

8. Clause 1(3) of the tenancy agreement provides so far as presently relevant as follows:

"The Association shall provide the services in connection with the Premises which are itemised in the attached schedule for which the Tenant shall pay a Service Charge.

(a) The Service Charge will be variable and reviewed annually when the net rent is reviewed as described in Clause 4 of this Agreement.

(b) At that time the Service Charge may be increased or decreased. This will be done according to the costs incurred during the Service Charge account period in the provision of services and any known or reasonably anticipated increase in costs.

Annually the Association will consult with tenants regarding the services provided.

Any increase, or decrease will be notified by the Association to the tenant in writing by giving at least four weeks notice."

9. The schedule to the tenancy agreement was entitled Service Charge Schedule and stated as follows:

"The Landlord shall provide the following services in connection with the above property address for which the Tenant shall pay a Service Charge as stated on page 1 of this Agreement, to be included in the Rent.

DETAILS OF SERVICES

GARDEN MAINTENANCE
LIGHTING (STAIRWAYS)
LANDLORDS LIGHTING EXTERNAL"

10. The tenancy agreement contained an agreement on the part of the respondent to keep in good repair the structure and exterior of the premises et cetera and also:

"To take reasonable care to keep the common entrances, halls, stairways, lifts, passageways, rubbish chutes, and any other common parts, including the electric lighting, in reasonable repair and fit for use by the Tenant and other occupiers and visitors to the Premises."

11. The tenancy agreement contained various covenants on the part of the appellant as tenant including a covenant not to cause or permit any belongings to be left in various locations including upon the common parts, but to keep such belongings in the flat.

12. In its decision the FTT noted the provisions of clause 1(3) of the tenancy agreement. In paragraphs 53 and 60 of its decision the FTT stated as follows:

> "53. The tenancy agreement provides for a variable service charge and consequently the Tribunal determines the Respondent is entitled to charge the services in addition to those specified within the original tenancy agreement. The Tribunal, pursuant to Section 27A of the 1985 Act, must determine whether such charges are reasonable."
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> 60. The Tribunal considered the Applicant's submission that because the tenants did not have exclusive use of the car park, they should not be responsible for the cost of bulk rubbish removal. The Tribunal did not accept this. The car park forms part of the common parts of the tenancy for which the Applicant and other tenants are liable under the terms of their agreements. The Tribunal did not consider the removal of the rubbish, nor the costs associated with this to be unreasonable. It was not a service that would be included in the normal bin collection provided by the local authority. Whilst it was regrettable that this charge had become necessary, it appeared to be unavoidable, unless those responsible could be caught."

13. Accordingly the FTT concluded that the respondent was entitled to include as part of the service charge, which the appellant was required to pay, the costs of this bulk rubbish removal.

14. Permission to appeal to the Upper Tribunal was granted by the Deputy President on 28 September 2018 in relation only to the issue of bulk refuse removal costs – the appellant had sought to appeal on various other grounds as well but permission was refused in relation to those grounds. The points to be addressed, as identified by the Deputy President, were whether the FTT's decision in relation to the costs of bulk rubbish removal was correct bearing in mind the terms of the tenancy agreement. It was pointed out that the tenancy agreement made provision in the schedule for the details of the services to be provided by the respondent (and for which the appellant was to pay through the service charge) and that these items did not include the maintenance or cleaning of the common parts. Accordingly it became necessary to examine the correctness of the FTT's decision the effect that the fact that the tenancy agreement made provision for a variable service charge entitled the respondent to charge for the service of bulk refuse removal in addition to those services originally specified in the schedule to the tenancy agreement.

15. The tribunal has ordered, with the agreement of both parties, that this matter should be decided upon written representations.

16. I have considered the written representations which have been made by both parties.

17. The respondent in its document of 31 October 2018 advances the following points:

(a) The tenancy agreement provides that the service charge may be increased or decreased, see clause 1(3)(b). This is to be done according to the costs incurred during the relevant service charge account period.

(b) The introduction of bulk refuse removal costs was introduced in accordance with this provision.

(c) Proper notice of the alteration was given to the appellant. No consultation was required under the tenancy agreement for the purpose of introducing this charge.

(d) The respondent had accumulated substantial evidence that the appellant has issues with hoarding excessively. Reference was made to numerous anonymous reports provided to the respondent that the appellant had abandoned items at the property.

(e) It was pointed out that the respondent as landlord was responsible for the repair and maintenance of the common areas of the scheme. It was only fair and just on all of the customers of the scheme to contribute towards the costs of this maintenance.

(f) The letter also stated that the appellant was aware of the problem regarding hoarding and had been working with the respondent's tenancy enforcement team to keep the hoarding under control, but unfortunately problems had still arisen.

18. Having regard to the complaints that the respondent appears to make regarding hoarding and other conduct on the part of the appellant, it is possible that the respondent has cause to contend that the appellant is in breach of his obligations under the tenancy agreement and that this gives rise to various rights in the respondent, including a right to claim damages for breach of covenant. However no such claim on the basis of damages for breach of covenant is (or could be) before this tribunal. The only matter before this tribunal is the appeal from the decision of the FTT that the respondent was entitled to include within the service charge the costs of bulk refuse removal.

19. In my view it is clear that, unless the provisions of the tenancy agreement confer upon the respondent the right to add to the services for which a service charge is to be paid, the respondent is not entitled to charge the cost of bulk refuse removal as part of the service charge. This is because the tenancy agreement as it stands makes clear that the landlord is to provide the services itemised in the schedule and that the appellant shall pay a service charge for those services. Those services do not include the maintenance (whether by bulk refuse removal or otherwise) of the car park or other parts of the common parts. It is not suggested that the bulk refuse removal is part and parcel of the" garden maintenance".

20. The question therefore arises as to whether the provisions of the tenancy agreement permit the respondent to charge through the service charges for the provision of services other than those set out in the schedule. The FTT concluded in paragraph 53 that the respondent was entitled to do this because the tenancy agreement provides for a variable service charge.

21. I am unable to agree with this conclusion. The tenancy agreement does indeed contain provisions to the effect that the service charge will be variable and reviewed annually and that the service charge may be increased or decreased. This is to be done according to the costs incurred during the service charge account period in the provision of services. However what is contemplated is a variation in the amount payable by way of service charges to reflect the variation in costs in providing the specified services (i.e. specified in the schedule to the tenancy agreement) for which a service charge can be claimed. I cannot read the provisions of the tenancy agreement as entitling the respondent to add to the scheduled services, for which a service charge can be made, by including items which were not previously there. The tenancy agreement contains a covenant by the respondent to take reasonable care to keep the common parts in reasonable repair and fit for use by the relevant occupiers. It appears that in order to comply with this covenant the respondent is required to clear bulk refuse from time to time from the car park. When the tenancy agreement was entered into no provision was made for the appellant to contribute through his service charge towards the cost of the respondent of complying with its obligations under this covenant.

22. In summary I consider that the opening words of clause 1(3) to be clear and provide that the respondent is to provide by way of services those matters which are itemised in the schedule. The appellant is obliged to pay a service charge for those services (not for those services plus some other matters, especially matters which the respondent is already liable to perform pursuant to the covenants in the lease).

23. It follows that the appellant's appeal must be allowed. I conclude that the respondent is not permitted to include within the service charge the costs of clearing bulk refuse from the car park.

His Honour Nicholas Huskinson

7 May 2019