UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2019] UKUT 152 (LC)
UTLC Case Number: LRX/51/2018

LANDLORD AND TENANT – service charges – whether First-Tier Tribunal justified in excluding a question regarding major works from consideration – review of FTT's decision – redetermination by Upper Tribunal upon question of major works and other points (gardening, cleaning, window cleaning and insurance) - appeal allowed in part

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

BETWEEN: **PIERRE ROYAN** **Appellant**

and

RADSTOCK COURT MANAGEMENT COMPANY LIMITED

Respondent

Re: 128 Somerset Gardens
White Hart Lane,
London, N17 8HA

Before: His Honour Nicholas Huskinson and P D McCrea FRICS

Sitting at: Royal Courts of Justice
on
7 May 2019

The appellant appeared in person
The respondent did not appear and was not represented

No cases were referred to in this decision

DECISION

Introduction

1. This is an appeal from the decision of the First-Tier Tribunal Property Chamber (Residential Property) (the FTT) dated 28 March 2018 whereby the FTT gave a decision regarding certain aspects of the amount properly payable by way of service charge by the appellant to the respondent.

2. The appellant holds a long lease of 128 Somerset Gardens, Creighton Road, London N17 8HA from the freeholder pursuant to a lease granted in 1993. For present purposes it is sufficient to note that by the lease the freeholder demised the relevant flat to the appellant for a term of 99 years from 1 September 1990. The respondent namely Radstock Court Management Co Ltd was a party to the lease and was therein described as "the Company". The obligation of the freeholder as landlord included to insure the building (in fact a range of buildings) in which the flat was situated. The respondent covenanted both with the appellant and with the landlord to observe and perform the obligations in the fifth schedule, which dealt with services and service charges. These obligations in the fifth schedule included an obligation to pay to the landlord the amount which the landlord might from time to time expend in insuring the building in accordance with the lease. The fifth schedule also contained obligations on the respondent (putting it broadly) to maintain and repair the building and to provide the specified services. There was an obligation upon the appellant as lessee to contribute towards the costs incurred by the respondent in performing its obligations under the fifth schedule. The service charge percentage to be paid by the appellant to the respondent was 0.944% of the relevant costs incurred by the respondent. The building contained in total 106 flats.

3. In due course a dispute arose between the respondent and the appellant regarding the payment of service charge contributions. In 2016 the respondent commenced proceedings against the appellant in the Northampton County Court for the recovery of money said to be owing by way of service charge for 2015. The appellant served a defence and counterclaim. The matter was transferred to the FTT by the County Court.

4. In its decision the FTT only considered (so far as concerns service charges) the question of the amount payable by way of service charge under the final service charge amounts for the year ending December 2015. In summary the FTT found against the various arguments of the appellant in relation to the service charges. The FTT framed its decision by reference to the total amount in the relevant 2015 accounts for the matters in dispute (rather than by reference to 0.944% of those figures) and observed that the appropriate amount payable by the appellant could easily be calculated by applying that percentage to the relevant total amounts.

5. So far is presently relevant the FTT made the following findings:

(a) The FTT directed itself (pursuant to a ruling it had made at a preliminary hearing) that it was not concerned with any dispute regarding major works in the nature of external redecoration. Accordingly in its substantive decision it made no reference to the appellant's argument that there had been major works (external redecoration) which constituted works in relation to which there had been no proper consultation under section 20 of the Landlord and Tenant Act 1985 and that in any event these works of external redecoration were of poor quality and very overpriced with no rubbing down or undercoating which had led to an inevitable and rapid decline of the new paint.

(b) The FTT decided that the full amount claimed by the respondent in the service charge accounts, namely £18,729, was properly included in respect of maintenance, cleaning and gardening.

(c) The FTT decided that the full amount claimed by the respondent in the service charge accounts, namely £24,755, was properly included in respect of insurance premium.

6. The FTT refused to grant the appellant permission to appeal. However permission to appeal was granted by the Upper Tribunal (28 September 2018 – Deputy President) in relation to certain matters challenged in the FTT's decision. Permission to appeal was granted in relation to the costs of gardening, cleaning, window cleaning, insurance and the major works. It was ordered that the appeal should proceed by way of review with a view to a rehearing.

7. The respondent has not participated in the present appeal. It made no written representations to the Upper Tribunal and it was not represented at the hearing. We consider it unfortunate that a management company for a large building (106 flats) should decide not in any way to participate in a case which is proceeding before the Upper Tribunal.

8. At the hearing the appellant represented himself. He had prepared a written statement of case and skeleton argument. He presented his case carefully and courteously and assisted us through the substantial documentation.

9. We indicated to the appellant that, if we were to decide that the FTT's decision could not stand, then it was for this tribunal to re-determine the case upon the issues in relation to which permission to appeal had been granted. We asked him whether he wished to give evidence. The appellant took the affirmation and gave us evidence and confirmed the accuracy of various matters he had put forward in his documentation. In particular he confirmed the factual matters contained in documents A and B in the bundle. He also confirmed his statements of fact regarding the low quality of the cleaning and window cleaning and the inadequacy of the external decorations as contained in his statement of case to the FTT.

Review of FTT's decision

10. The first question for this tribunal is whether, upon the review stage of this appeal, the FTT's decision can stand. We conclude that it cannot stand for the following reasons.

11. First it is of importance to note that the FTT gave no consideration at all in its decision to the question of major works (namely the external redecoration) and whether there had been any failure in section 20 consultation procedures and whether the external works were of a reasonable standard.

12. The FTT took this course because the position of the respondent (as stated in the relevant amended Scott schedule) was: "No decorating costs were incurred during the year in dispute. The accounts show that the sum of £25,000 was transferred from the service charge account to the reserve fund for future planned works". It was the appellant's case regarding these works that the £25,000 shown in the 2015 accounts as being transferred to reserve was money which related to actual works which were of low quality and overpriced.

13. It is notable that in the appellant's outline of defence and counterclaim in the county court proceedings (which had been transferred to the FTT) the appellant stated under the heading "Main Points" at the beginning of his document in paragraph 1 that he had had no notification of section 20 for major works that proved defective and overpriced. He went on to point out in the body of the document that he had not received any section 20 notice for major works costing £38,000 and that these works were substandard and/or overpriced. He gave further particulars of this in his statement of case to the FTT.

14. The FTT decided that it would not look at any question of major works. In its order made by way of directions on 10 October 2017 the FTT stated as follows:

> "The respondent argued that he disputed the cost of the "major works" carried out in 2015. However, the applicant stated there were no major works that were carried out as claimed by the respondent and the service charge did not include payment for any major works."

The FTT in its substantive decision reminded itself that external decorations were not an issue for determination because of the order it had made in these directions.

15. There was however a document before us (which was also before the FTT) which constituted a copy of an invoice dated 1 March 2015 and related to work carried out at the building in relation to external redecorating works. This invoice proclaimed that the contract price was £33,305 plus VAT plus PC sums. The invoice stated it was the seventh of eight monthly stage payment invoices. The total of the invoice including VAT was £4000.

16. In these circumstances we conclude that it was a central and important point of the appellant's case that the 2015 service charges were in effect charging him (through the item of

£25,000 which was said to be a transfer to reserve) for a portion of the costs of this ongoing external redecoration work; that this work constituted a major work (the costs of which were more than £250 per flat); that there was no consultation with him; and that therefore his contribution must be limited to £250. He also complained of the quality of these works.

17. The FTT was in error in that it gave no consideration to these points.

18. Separately from the foregoing, the appellant disputed the amount charged in the 2015 accounts in respect of "cleaning, window cleaning and gardening" in the sum of £18,729. He complained that these items had been lumped together. Separately from that he drew attention to the substantially smaller sum charged for these items in 2016, namely £13,656 (which he said was in fact an overstatement because of the duplication of one invoice). He also drew attention to the bad quality of the cleaning and window cleaning and the excessive price of gardening – as regards this latter point he included documentation (also before the FTT) from the then managing agents in 2011 suggesting a large saving could be made upon the costs attributable to gardening.

19. The FTT's decision in relation to these point is contained in paragraph 27:

> "As with the challenge to the premium for buildings insurance, very little material of a properly specified, quantified, priced and therefore comparable nature to the existing contract for Cleaning and Gardening was made available. This made it difficult to justify any change from the sums shown as expended in 2015 for this combined service as shown in the 2015 accounts. Although the price for these services had fallen for 2016 there was no clear explanation as to whether the services were the same for this later year and therefore whether the charge for 2015 was wrong. The Tribunal therefore determines £18,729 is reasonable and payable."

It was pointed out in the grant of permission to appeal that this reasoning arguably reverses the usual burden of proof which requires the service charge provider to justify charges which, prima facie, are higher than might reasonably have been expected. Bearing in mind the substantial decrease in costs for 2016 we consider that some analysis and evidence from the respondent was required justifying the higher cost in 2015. Quite apart from the foregoing, the FTT gave no consideration to the appellant's evidence that the quality of the works was not of a reasonable standard. We conclude that the FTT's analysis of these topics (cleaning, window cleaning and gardening) was inadequate and that insufficient and unsustainable reasons have been given for its decision.

20. In the light of the foregoing the FTT's decision upon the points raised in this appeal must be quashed. It is therefore necessary for this tribunal to re-determine the matters in issue upon the evidence before us.

Re-determination – major works

21. As regards the major works there were transfers to reserve made as follows, namely 2014 £15,651; 2015 £25,000; 2016 £31,485. As we understand the position from such evidence as is before us the works of redecoration were carried out in 2014 and 2015 and were paid for from transfers to reserve made in 2014 and 2015. We understand the transfer to reserves in 2016 to be in relation to matters other than the payment for the external redecoration carried out in 2014 and 2015.

22. Accordingly on the evidence before us we find the following facts in relation to these major works:

(a) The works were carried out in 2014 and 2015.

(b) The works (namely these external redecoration works) constituted a single item of works to be treated as a major work – it is not correct to treat these works as two separate lesser items of work one within one year and one within another year.

(c) The total estimate for these works was about £38,000 (in fact it seems a little over £40,000 in total was spent on them).

(d) No proper consultation document under section 20 of the Landlord and Tenant Act 1985 was sent to the appellant.

(e) The appellant's total liability, through his service charge, for these major works is limited by statute to £250.

(f) We accept the appellant's evidence that the works were not carried out to a good standard.

(g) The transfers to reserve in 2014 and 2015 were expressly stated to be transfers for major works. We therefore conclude that these transfers were in respect of the external decoration works. There is no evidence before us of any other major works in the relevant period.

23. In the light of the foregoing findings we conclude that what in substance has happened is as follows. The appellant has been asked to pay through his service charges in 2014 and 2015 a contribution of 0.944% towards the external decoration. The total amount so transferred into reserve over those two years is £40,651, which is close to the £38,000 estimate and which we on the limited material before us find to be the total cost of the external decoration. The appellant's liability to contribute towards this amount is limited to £250. If he were required to pay 0.944% of £40,651 this would come to £383.75. We conclude that the difference between £385.75 and £250 properly reflects the poor quality of the work and that no further reduction is required on this score.

24. In the 2014 accounts the appellant was required to pay 0.944% of £15,601, i.e. £147.75. That means that his contribution in 2015, so as to make up his total contribution to £250, must be limited to £102.25. We therefore decide that this is the limit of the appellant's contribution to service charge for 2015 under the heading of "transfer to reserve fund for major works". He is liable under this head for £102.25 and not for £236 (0.944% of £25,000).

Re-determination – cleaning, window cleaning and gardening

25. The respondent's service charge was run on a calendar year basis. The accounts for each year were certified by accountants, and drawn up in a format such that the estimated on-account figure under each service charge head at the start of the relevant year was stated, along with the actual costs incurred under each head, and the comparative actual expenditure for the previous year. As far as material to this appeal, the amount incurred or proposed to be incurred for cleaning, window cleaning and gardening were aggregated to a total sum; buildings insurance was shown separately, as were any transfers to or from reserve funds for major works (a separate item was shown for car park and road surface repairs but is not the subject of this appeal).

26. The accounts for 2015 and 2016 showed the following amounts for cleaning, window cleaning and gardening:

2014	**2015**		**2016**	
Actual	Budget	Actual	Budget	Actual
£24,489	£25,093	£18,729	£13,751	£13,656

27. Before the FTT, the respondent's breakdown of the 2015 budget figure for cleaning, window cleaning and gardening was, £6,625 for cleaning, £3,665 for window cleaning and £14,803 for gardening. The FTT awarded to the respondent the sum of £18,729 which was the actual figure shown in the final 2015 accounts, but did not appear to analyse how this figure was calculated.

28. The appellant had submitted the invoices for that year which the respondent had relied upon at the FTT. An analysis of these documents reveals the following:

(a.) A single contractor, Aztec Maintenance Ltd, provided cleaning, window cleaning and gardening services. It appears that cleaning was carried out weekly, gardening fortnightly, and window cleaning monthly.

(b.) The cleaning and window cleaning costs were the same each month, at £539.51 and £299.98 respectively, including VAT.

(c.) Gardening costs varied from £721.26 to £1,201.26 per month, again including VAT.

(d.) Only ten invoices were submitted in evidence. Each invoice was dated 1st (or in one case 2nd) of the month. It appears that either no invoices were rendered by the contractors at the start of March and May, or if they were, the respondent did not include them in the 2015 service charge. We calculate that the ten months of cleaning and window cleaning, if rounded, aggregate to £5,395 and £3,000. The gardening invoices aggregate to £10,333 and we calculate total expenditure over the ten invoices of £18,728. The amount in the service charge, as noted above, was £18,729.

29. We outline the appellant's case on each of the disputed items in turn.

Cleaning

30. The FTT summarised the appellant's complaint as follows (at 13):

> "The [respondent] explained that the contract from 2016 onwards had been for work to be provided to a higher standard and that as a result the cost was higher. For example the interior carpets were required to be washed in the earlier specifications The [applicant] explained that the contract for such work was overpriced; that the previous contractors were cheaper and that the work should have been left with them. He complained that he had to do a lot of the cleaning work inside the communal areas himself. He explained that he would have referred the Tribunal to a series of documents about cleaning, but which unfortunately he had lost and did not form part of the bundle."

31. The FTT's conclusions (in its paragraph 27) are already set out in paragraph 19 above.

32. It is therefore clear that the appellant's complaints as to standard of cleaning and the level of the work specified were live points before the FTT. Before us, the appellant reiterated these points in his unchallenged evidence. As to quantum, he referred to the figure stated in the 2016 accounts for cleaning, window cleaning and gardening of £13,656 but submitted that these should be the subject of adjustment. He calculated that the invoices for gardening totalled £3,585.60, and those for window cleaning £2,148. Of the remaining £7,922.40, he submitted that amounts charged for cleaning and gardening in December 2015 had been duplicated in that they featured in both the 2015 and 2016 accounts. Deducting £539.50 and £961.26 respectively, he submitted that the proper figure for cleaning in 2016 that should form the basis of comparison for 2015 was £6,421.64, and that the correct total figure for the three items was £12,155.24. He submitted that the service charge account for 2015 should be at a lower amount because the cleaning specification was lower, and the standard of services was poor.

33. The appellant reiterated his complaint that the standard and level of cleaning in 2015 was inferior in comparison with 2016.

Window cleaning

34. As we indicate above, window cleaning was carried out monthly, and invoiced by Aztec at £298.98 per month, or just short of £3,000 for the ten months charged during 2015. The appellant's complaint is that the window cleaning was overpriced and carried out to an unsatisfactory standard – he had to clean the windows himself to remove bird marks, etc

35. In 2016, window cleaning was carried out by a different contractor, "All Clean Services Ltd", which charged £358.80 every two months. Six invoices were in evidence, aggregating to £2,152.80, as opposed to the £2,148 calculated by the appellant.

Gardening

36. It is this aspect of the dispute in which the most radical change between the two service charge years was seen. As we indicate above, of the ten invoices rendered by Aztec during 2015, the total amount for gardening was £10,333. The amount charged per month varied between three levels - £721.26, £961.26 and £1,201.26. Puzzlingly, the highest level was charged in January and February and one of the lowest month levels was charged in July.

37. In 2016, the gardening charge reduced notably. The new contractors, Chequers Contract Services Ltd, charged £298.80 per month, or £3,585.60, for bi-weekly visits. This is comparable to a quote which the appellant had obtained, albeit in May 2018, at £144 per visit. The appellant's evidence was that the standard of gardening in 2016 was marginally better than that in 2015.

38. Before the FTT, the respondent had argued that the reduction in costs was owing to a reduced number of visits by the contractors. Before us, the appellant submitted that this was obviously incorrect by reference to the invoices.

Conclusions as to cleaning, window cleaning and gardening

39. For a reason unknown to us, the Scott Schedule prepared by the parties for the FTT was based on the on-account budget figures, rather than the actual amounts shown in the accounts which the FTT correctly took as the basis of its determination. It seems to us that what the FTT did not do was interrogate how the sum of £18,729 was arrived at. The appellant wasn't able to provide a breakdown but we are satisfied that it was simply an aggregation of the invoices submitted. As we indicate above, it is not clear whether only ten invoices were received by the respondent, or that invoices for the two missing months were simply not included in the service charge.

40. We agree with the appellant that the amounts charged in 2016 can be useful in assessing the reasonableness or otherwise of the 2016 account. Again, there is no breakdown of the final figure of £13,656 shown in the accounts. We do know that the budget figure of £13,751 was made up of cleaning £8,000, window cleaning of £2,153 and gardening of £3,598. The final

figures for window cleaning and gardening can be calculated by reference to the invoices, with both being on budget, after rounding. Before any deduction for duplication, therefore, the cleaning costs could be fairly assumed to be at £8,000.

41. Is there any merit in the appellant's submission as to duplication? The invoices rendered by Aztec in 2015 appear to have been submitted monthly in arrears. While not all of the invoices state the period of work, the invoice dated 1 July 2015 states that the invoice was "for June 2015", and the invoices dated 1st of September to 1st December are each for work done during the previous month. The service charge accounting was therefore based on when the invoice was paid rather than when the work was done, with the first invoice dated 1 January 2015 being for work done in December 2014, and the final invoice dated 1 December being for work done in November. Turning now to 2016, this pattern appears to continue – Chequers' first window cleaning invoice dated 31 December 2015 was "for the month of December 2015" and was paid on by the respondent on 14 January 2016 – and included in the 2016 accounts.

42. The appellant's adjustment stems from a visit he made to inspect the 2016 accounts. He says that the final Aztec invoice (dated 1 December 2015 "for November 2015") was included in the 2016 service charge, as well as the 2015, and produced a photograph which he said showed this invoice in the 2016 accounts file.

43. We think there is some merit in the appellant's claim, in that the same invoice, dated 1 December 2015, appears to have been included in both years' accounts, marked "M1" in 2016 but not marked so in the 2015 accounts. In the absence of any contrary evidence to the contrary, we accept the appellant's contention that this is the case, and that the proper costs in 2016 appear to be somewhere in the region of £6,500. We stress that the 2016 service charge is not in issue before us, and our conclusion above serves merely to identify the figure at which the 2016 cleaning cost can be compared with that for 2015. What we are left with is an amount invoiced in 2015 of £5,395 (albeit it appears for ten months), and a figure for 2016 of something in the region of £6,500. It was common ground before the FTT that the cleaning specification in 2016 was higher.

44. Both in the accounts, and as determined by the FTT, the cost of cleaning, window cleaning and gardening were shown as one sum. We are satisfied that we can do the same. We are satisfied from the appellant's evidence and submissions that there is merit in his claim that the amounts included in the 2015 service charge for these items was unreasonable. We consider that the costs of gardening and window cleaning, whilst perhaps not exactly the same, would be at levels comparable to those in 2016. As for cleaning, a comparison is more difficult as it was common ground that the contract for cleaning was to a higher specification from 2016 onwards. But we have unchallenged evidence from the appellant that the cleaning in 2015 was not to a satisfactory standard.

45. Doing the best we can, with a tenant representing himself, and in the absence of any evidence or submissions from the respondent, we consider that the correct level of service charge for cleaning, window cleaning and gardening should be £11,500 and that the appellant's contribution at 0.966% should be £111.09.

Building insurance

46. As regards insurance, upon this point we are unable to agree with the appellant.

47. It is true that in 2015 the amount charged in the accounts for insurance for the building was £24,755. In the accounts the 2016 the insurance premium is shown as £19,429. However the matter does not end there because in 2017 it appears the respondent had concluded some successful negotiations with the landlord to the following effect as reported in document 44 in our bundle:

> "Insurance - MN has explained the success of reducing the costs for building insurance renewal with a considerable saving of over £12K per annum. It has been also proposed for a long-term plan of action to pay the Freeholder a one-off, set fee in order to waiver their rights of placing the building insurance – if this option was progressed, then Radstock Court MCL would have the right to place the building insurance in future."

Also a document of May 2017 (document 14 in our bundle) recognises that there has been a building insurance valuation survey to establish an up-to-date rebuild value of the building and to assist in negotiating the correct premium for buildings insurance. It was pointed out that competitive building insurance quotes had been obtained on the valuation mentioned and "this also was never performed in the past, which is another possible reason why the building insurance premium spiralled out of control unchecked. In future this should be performed annually". It was recorded that a saving of approximately £12,000 per year without any reduction in cover had been achieved and that a refund of about £6,000 had been negotiated for the year 2016/17 again with no reduction in cover.

48. The fact however remains that, upon the evidence before us, what happened in 2015 was as follows. The landlord, as it was entitled and required to do under the lease, did insure the building, did provide proper insurance with a reputable insurance company (there is no evidence to the contrary), did incur an insurance premium of £24,755, did pay this premium and did require the respondent management company, in accordance with the terms of the lease, to reimburse the landlord with this sum.

49. Section 19 of the Landlord and Tenant Act 1985 provides that relevant costs shall be taken into account in determining the amount of the service charge payable for a period only to the extent that they are reasonably incurred.

50. It is beneficial for the various lessees and the respondent that the respondent was in 2016 able, through negotiation it appears with the landlord, to review and revise the insurance arrangements including obtaining a building insurance valuation survey. However the fact that this was done in 2016 does not mean that the reimbursement by the respondent to the landlord of a premium actually incurred by the landlord in 2015 involved the respondent paying out a premium that was (to some part) not reasonably incurred. In the light of the matters recorded in paragraph 47 above the respondent effectively had no option but to pay to the landlord by way of reimbursement the premium which the landlord had incurred.

Conclusion

51. In the result we quash the decision of the FTT upon the points which are the subject of the present appeal (for the avoidance of doubt the decision of the FTT remains in place as regards the other matters) namely we quash the decision so far as concerns its decision regarding major works (where it omitted to make any decision) and regarding cleaning window cleaning and gardening and also regarding insurance. We re-determine the amount of the service charge properly payable by the appellant to the respondent for the year to 31 December 2015 in respect of these items in the following amounts:

(a) As regards the appellant's liability to contribute towards "transfer to reserve funds for major works" (i.e. effectively in respect of the external decoration) the defendant's contribution is £102.25.

(b) As regards the appellant's liability to contribute towards "cleaning, window cleaning and gardening" the defendant's contribution is 0.944% of £11,500, namely £111.09

(c) As regards insurance the appellant's liability to contribute towards building insurance is 0.944% of £24,755 namely £233.69.

52. This decision should not be taken as any form of precedent in relation to any other flat in the building. Our decision in this case has been reached upon the evidence placed before us in this particular case and has been reached after a hearing in which the appellant appeared in person. The respondent did not participate in the appeal.

His Honour Nicholas Huskinson

P D McCrea FRICS

10 May 2019