IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2019] UKUT 344 (LC)
Case No: LRX/25/2019

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – CONSTRUCTION OF LEASE – LIQUIDATION OF MANAGEMENT COMPANY

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

BETWEEN:

ADRIATIC LAND 1 (GR3) LIMITED

Appellant

- and -

JASON MILLER AND OTHERS

Respondents

Re: All Saints Apartments,
Orrell Street,
Bury,
BL8 1PF

Upper Tribunal Judge Elizabeth Cooke

Manchester Employment Tribunal, Alexandra House, 14-22 The Parsonage, Manchester, M3 2JA
on
8 November 2019

Rebecca Ackerley for the appellant, instructed by JB Leitch

Introduction

1. This is an appeal from the decision of the First-tier Tribunal ("the FTT") that service charges demanded by the appellant from the respondents for the period 1 January 2018 to 31 August 2018 were not reasonable nor payable by the respondents.

2. I heard the appeal at Alexandra House in Manchester on 8 November 2019. The appellants were represented by Ms Rebecca Ackerley of counsel; I am grateful to her for her helpful submissions. The respondents chose not to participate in the appeal.

3. I have determined that the FTT's decision was made in error, because it misconstrued the provisions of the respondents' leases. In the paragraphs that follow I set out my reasons.

The facts

4. All Saints Apartments is a former church in Burnley, converted to 13 self-contained residential flats earlier this century, numbered (in accordance with the usual superstition) 1 – 12 and 14. The respondents to this appeal are the lessees.

5. The FTT was shown the lease of flat 6 and accepted that all the leases are in the same form. It is for a term of 125 years from 1 January 2003, reserving a ground rent of £100 per year. The lease is tripartite, made between the landlord WDI Properties Limited (defined in the lease as "the Freeholder"), All Saints Apartments Residents Association Limited ("the Company") and the lessee ("the Flat Owner"). I will look at the details of the terms of the lease when I come to the substance of the appeal; in summary, the Company was a management company and covenanted with the Freeholder and the Flat Owner to provide the usual services, maintenance, insurance, cleaning the common parts and so on. There is provision for the Freeholder to perform those covenants in certain circumstances.

6. On 20 June 2016 the Company went into liquidation, as a result of a dispute with a service provider and county court proceedings that it did not defend.

7. On 20 May 2016 there was incorporated All Saints Apartments Residents Limited. It was set up by Ms Heather Miller, one of the lessees of Flat 7, and was owned by the lessees. It appears to have managed the property from the date of its incorporation until 1 September 2018 when a Right to Manage Company formed by the lessees took over the management.

8. The appellant purchased the freehold of the property on 17 June 2017. Its officers became aware that the Company had gone into liquidation, and the appellant sent notices to the lessees on 24 July 2017 notifying them that it was taking over the management of the property. It used a managing agent, but nothing turns on that; the agent (Residential Management Group) acted for the landlord and was obviously not a party to the leases. This caused some confusion for the lessees, who understandably thought that a successor to the Company had been appointed and objected to that. There followed some acrimonious correspondence with the lessees. The appellant took over the management of the property in December 2017. It had considerable difficulty in gaining access to the property but, having

done so, on 5 February 2018 sent to the lessees a service charge demand on the basis of its budgeted expenditure for 2018.

9. No payments of that service charge were made by any of the respondents. Instead, these proceedings were brought by the respondents to determine the reasonableness and payability of the charge. The respondents to this appeal were therefore the applicants in the FTT; they were represented by one of their number, Mr Jason Miller. The application form simply stated "The leaseholders have self-managed this property for over 10 years." No statement of case was filed by the respondents; Mr Miller made a witness statement setting out the history of the management of the property and the liquidation of the Company. The only comments made about the 2018 service charge were that it was greatly increased from what the respondents had previously been paying, and that the appellant had only insured the property from April 2018. No reason was given as to why the charges might be unreasonable.

10. The FTT conducted a hearing on 15 October 2018, and issued its decision on 9 November 2018. It decided, and this is not challenged, to deal only with the £12,033.96 actually spent by the appellant before the RTM company took over on 1 September 2018. It gave no consideration to the reasonableness of the service charges. It determined that the respondents had agreed to pay £1,074 sums for electrical testing, an H & S and Emergency Plan, and an item labelled "Asbestos", and that it therefore had no jurisdiction in respect of those sums; that meant that its determination related to the sum of £10,958.58. The FTT then turned to the provisions of the lease and determined that no payments were due to the appellant by way of service charge for that period because the terms of the lease did not permit it to require a service charge payment from the respondents. The appellant appeals that decision.

The terms of the lease

11. The lease is in unsurprising terms. Clause 3 sets out the lessees' covenants, including 3(10):

> "If at any time during the subsistence of the Term any monies shall be expended by the Freeholder and shall be due and unpaid to the Freeholder under or by virtue of Clause 4(2) of the Lease The Flat Owner will on demand pay to the Freeholder the Flat Owner's Share of such monies as have been expended on or in respect of the Estate …"

12. Clause 4(1) sets out the Company's covenants to provide services. I do not need to set them out; they are all as one would expect for a property of this nature. Only the Company covenants to provide services, not the landlord.

13. Clause 4(2) reads as follows; the underlining is added and its purpose will be made clear below.

> "It shall be lawful for the Freeholder or its agents at any time during the Term on giving reasonable notice (except in case of emergency[)] with or without workmen to enter on The Estate to view the state of repair and condition of the same and for The Freeholder to serve on The Company written notice of all defects and wants to

repair then and therein found and which The Company shall be liable to make good under the covenants hereinbefore contained and The Company shall within a period of three months or sooner as requisite repair and make good the same according to such notice and the covenants in that behalf hereinbefore contained PROVIDED ALWAYS that if The Company shall at any time make default in the performance and observance of any of the covenants on its part herein contained or if The Company shall cease to exist it shall be lawful but not obligatory for The Freeholder (without prejudice to any other right or remedy of The Freeholder against the Company or The Flat Owner or any other person) to enter and perform and observe the same covenants respectively and the expenses thereof shall be repaid by The Company to The Freeholder on demand or otherwise as provided by Clause 3(10) hereof."

14. Clause 6 sets out the landlord's covenants, including the following:

> "6(5) The Landlord will carry out the obligations of the Company pursuant to this Lease in the event of the Company failing to do so for whatever reason including liquidation."

15. The overall structure is thus for the Company to provide the services needed to maintain the building, with provision for the freeholder to step in if it fails to do that.

The FTT's decision

16. The FTT in its decision set out the terms of clause 4(2) but omitted the words underlined above. It decided that since the appellant had not given notice to the Company under this provision it was not entitled to do the work; nor was it entitled to recover the service charge under clause 3(10) because the money spent was not due under clause 4(2) for want of notice to the Company.

17. The FTT was clearly aware of the underlined wording, referring to it in its paragraph 31. It found that the Company had not ceased to exist despite being in liquidation because it had not yet been struck off the companies register. It took the view that the words of clause 4(2) required the Company to pay for the freeholder's work, even if it had ceased to exist (which it regarded as illogical).

18. Turning to clause 6(5) the FTT found that because this clause referred to "the Landlord", which was not a defined term in the lease) it was "by no means clear" who was to carry out the Company's obligations in the event of its liquidation, but said that the appeal did not turn on that question.

The construction of the lease and the outcome of the appeal

19. The FTT reminded itself of, and set out, the guidelines given by the Supreme Court in *Arnold v Britten* [2015] UKSC 36. Those guidelines are important where a lease is ambiguous or leads to problematic consequences. This one is neither, and the FTT misconstrued its plain words.

20. Clause 4(2) of the lease, in the wording that was not underlined in my quotation above, enables the Freeholder or its agents, on notice to the Company, to enter the property, to give notice to the Company of any defects or any need for repair, and for the Company to make good within three months. It continues with a proviso, introduced by the words "PROVIDED ALWAYS", that if the Company fails to perform its covenants or ceases to exist the Freeholder can enter, perform the covenants, and either charge the Company or recover the cost under clause 3(10).

21. I simply fail to see a difficulty here. The Company has failed to perform its covenents so the Freeholder has entered and performed them. The first part of the clause assumes a functioning Company to which the freeholder can give notice, but the second half does not. It caters for circumstances where notice to the Company is not going to work, because it has ceased to exist or is not doing its job. The words "provided always" indicate an independent provision, so that work done under the proviso does not require the giving of the notices required under the first half of the clause. Ms Ackerley referred me to *Woodfall's Law of Landlord and Tenant*, vol 1, 5.090 as authority for the proposition that the words suggest that the second part of the clause is not conditional upon the first; in this case the meaning is obvious without the need for authority. It means something like "but in any event". Work done in these circumstances can be paid for by the Company or pursuant to clause 3(10), and of course following the liquidation clause 3(10) is the relevant provision.

22. The proviso gives two circumstances where the freeholder can enter the property to do the work – one where the Company has failed to do it, and one where the Company has ceased to exist. A company in liquidation has ceased, for all practical purposes, to exist and I find that on this basis also the freeholder was entitled to do the work.

23. Finally the lease at paragraph 6(5) requires the landlord to carry out the Company's obligations if the Company fails to perform "for whatever reason including liquidation". I fail to see any ambiguity arising from the inconsistent drafting. There is only one candidate for the term "landlord", namely the freeholder, and whilst the change of label is inelegant it is certainly not ambiguous. That being the case the freeholder landlord was not only entitled under Clause 4(2) but also obliged under clause 6(5) to step into the shoes of the defunct management Company. That does not quite get the landlord home in terms of service charges, because there is no payment provision alongside that obligation; but as I have already said the matter is completely catered for under clauses 4(2) and 3(10).

24. The appeal succeeds; the FTT's decision is set aside and since this is purely a question of construction I can substitute the Tribunal's own. The service charges for the period 1 January to 31 August 2018 in the sum of £10,958.98 were clearly payable for the reasons I have given. Nothing said in the respondents' application or in the witness statement of Mr Miller amount to a challenge to their reasonableness, and therefore I find that they were both reasonable and payable. The balance of the appellant's expenditure for that period, in the

sum of £1,074, is the subject of the FTT's finding that the respondents have agreed to pay it (from which there is no appeal) and therefore falls outside the Tribunal's jurisdiction but is payable as a matter of contract.

Upper Tribunal Judge Elizabeth Cooke

8 November 2019