UPPER TRIBUNAL (LANDS CHAMBER)

[2023] UKUT 156 (LC) **UTLC Case Number: LC-2022-606**

Venue – Royal Courts of Justice
Birmingham Civil Justice Centre

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

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

LANDLORD AND TENANT – SERVICE CHARGES – construction of the tenancy agreement – whether a "Scheme Based Support Charge" was a variable service charge – if so was it payable – whether costs reasonably incurred

BETWEEN

ORBIT HOUSING ASSOCIATION LTD

Appellant

-and-

ROBERT VERNON

Respondent

Re: Flat 86, Rosalind Court,
Brunel Way,
Stratford Upon Avon,
CV37 6EL

Upper Tribunal Judge Elizabeth Cooke
6 July 2023
Decision Date: 17 July 2023

Mr David Nuttall for the appellant, instructed by Shakespeare Martineau LLP
Mr Justin Bates and Mr Harley Ronan for the respondent, instructed by Advocate (the Bar Pro Bono Unit)

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Introduction

1. The appellant, Orbit Housing Association Limited, is the freeholder of Rosalind Court, a housing development for the over-55s where Mr Vernon, the respondent, holds a fully assured tenancy of a flat. The appeal is against the decision of the First-tier Tribunal ("the FTT") to strike out an application made by Mr Vernon for a determination of the reasonableness and payability of certain charges demanded of him pursuant to his tenancy agreement. The application was struck out because the FTT found that the charges were not a variable service charge within the meaning of section 18(1)(a) of the Landlord and Tenant Act 1985 and that therefore it had no jurisdiction to assess its reasonableness and payability.

2. It is startling that the FTT stated (at its paragraph 75) that Mr Vernon had "succeeded in his claim", and that the appellant is now challenging a decision apparently made in its favour (since the application made against it was struck out). These unusual aspects of the appeal are explained below.

3. The appellant was represented in the appeal by Mr David Nuttall of counsel, and the respondent by Mr Justin Bates and Mr Harley Ronan of counsel, both of whom generously acted pro bono as part of Advocate's panel. I am most grateful to them all. The hearing originally listed in June was adjourned because the bundle was found to be lacking important material, and so we reconvened a month later in July.

4. At the start of the hearing the Tribunal heard an application by the appellant to adduce further evidence, in the form of copies of agreements made with third parties for the provision of services to the residents at Rosalind Court. Mr Nuttall accepted that the material could have been produced to the FTT and was not, and asked the Tribunal nevertheless to exercise its discretion to admit it. I took the view that the evidential value of the material was low; there was no witness evidence to explain how it related to the issues in the appeal. Even if it was accepted (as the FTT seems to have done) that the appellant had contracts with third parties for the provision of care, that would not have any impact upon findings of fact made by the FTT about the availability of certain services to Mr Vernon. I therefore refused to admit the fresh evidence since no good reason had been put forward as to why it had not been produce to the FTT and since it was in any event unlikely to assist the Tribunal.

The factual and legal background

Rosalind Court, the tenancy agreement, and Support Agreements with the extra care tenants

5. Rosalind Court was described by the FTT as "a block of 102 Apartments in a five-storey complex… It is a mixed tenure scheme consisting of sheltered and extra care tenants, the extra care tenants having additional personal case and support needs. The scheme is restricted to tenants over the age of 55 years. Mr. Vernon … holds an Assured Shorthold Tenancy, which commenced on 22 April 2021, for 86 Rosalind Court… He is categorised as a sheltered housing tenant and does not receive personalised care in his home."

6. Mr Vernon made an application to the FTT for a determination of the reasonableness and payability of charges described in his tenancy agreement as a "Scheme based support charge" (the "SBSC"). This is a charge listed at the start of his tenancy, distinct both from

rent and from what is described as the "variable service charge" (which is not in dispute in this case). Those three separate items together make up what is labelled the "total weekly payment" which must be paid on Monday each week:

> **"General terms**
>
> The payment of Total Weekly Rent and other charges that form your Total Weekly Payment are due in advance on the Monday of each week…
>
> **Payment for the property**
> **…**
> The payments due weekly for your property are detailed below, or as varied from time to time in accordance with this Agreement.
>
> Weekly rent: £138.38
> Weekly variable service charge: £46.02
> **Total Weekly Rent: £184.40**
>
> Weekly support charges:
> - Scheme-based support charge: £18.00
> - Emergency Alarm charge: £0.00
>
> Weekly heating charge: £0.00
> Weekly water charge: £0.00
> Weekly Council Tax charge: £0.00
>
> **Total Weekly Payment: £204.30**
>
> The variable service charge is made up of the services listed in Appendix A.
>
> For the avoidance of any doubt, any rent, variable service charge, support charge or other charges which make up your Total Weekly Payment are your personal responsibility and you must make sure all such payments are made in full in accordance with this Agreement.
>
> The Total Weekly Payment must be paid in advance every Monday. We can change your Total Weekly Payment without your consent in line with the Variable Service Charge, Supporting Charge and other charges section of this Agreement.
> …"

7. The SBSC is the charge of £18 per week set out under "Weekly support charges".

8. Clause 1.1 sets out how the rent may be increased. Clause 1.3 is entitled "Variable Service Charge, Support Charge and other charges" and says this:

> "1.3
>
> (i) In addition to the rent, we may charge for variable service charges. The details provided in Appendix A have been calculated on the basis of how

much we expect the services provided to cost during this financial period taking into account the reasonable costs incurred during the previous year, estimates for future years, and allowing for any surplus or deficit from the previous accounting periods.

We may increase your variable service charge (if one applies to you) at any time if we give you at least one month's notice in writing, but we will not do so more than once a year unless there is a change in the services provided. We may vary, add to, suspend or cancel any service charge items listed in Appendix A (which may increase your variable service charge) but will provide you with notice of any changes to your services or charges.

(ii) In addition to the rent and variable service charge, we will charge for support services provided or other charges shown in this Agreement on the basis of reasonable costs incurred during the previous year and estimates for future years. We will give you one calendar months' notice of any changes to these charges by writing to you at the property.

(iii) If the property is subject to funding, for scheme based support services or emergency alarm (Lifeline) services, you agree to accept and pay for these services

9. Clause 1.4 of the agreement is headed "”Support and/or Furniture" and says:

> "(i) This tenancy is to facilitate the provision of support for you or a member of your household. The nature of this provision, and your obligation pay for it are set out in the separate Support Agreement.…
>
> (ii) This clause will only apply if you receive support and/or live in furnished accommodation."

10. It is common ground that clauses 1.3(iii) and clause 1.4 are relevant only to the "extra care tenants" who have a separate Support Agreement, and that they are therefore not relevant to Mr Vernon.

11. Clause 2 sets out the tenant's obligations; it says

> **You agree:…**
> **2.2 Weekly Payment**
>
> To pay the Total Weekly Rent and other charges that form your Total Weekly Payment in advance on the Monday of each week. …"

The application to the FTT

12. Mr Vernon applied to the FTT for a determination of the reasonableness and payability of the SBSC, in its jurisdiction under section 27A of the Landlord and Tenant Act 1985. That

section enables the FTT to determine whether a charge is payable, provided that it is a variable service charge within the meaning of section 18 of the 1985 Act:

> "(1) In the following provisions of this Act *"service charge"* means an amount payable by a tenant of a dwelling as part of or in addition to the rent—
>
> (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
>
> (b) the whole or part of which varies or may vary according to the relevant costs."

13. Where a charge meets the definition in section 18(1) the FTT has jurisdiction to decide, under section 27A, whether or not it is payable, by whom and in what amount; and that will generally require the FTT to decide first whether the charge is payable under the terms of the contract, and second whether it is payable under section 19 of the 1985 Act which provides (I paraphrase) that the charge is payable only if it is a reasonable charge for the service provided.

14. It was part of Mr Vernon's case that the SBSC was a variable service charge (and the appellant agreed that it was); there was some confusion about dates but the FTT treated the application as relating to the years 2021/22 and 2022/23.

15. Mr Vernon also asked the FTT to assess whether he was liable to pay a "Weekly activity charge" of £1.90 per week, not mentioned in the tenancy agreement. The FTT concluded that the weekly activity charge is not a service charge within its jurisdiction under section 27A, and that in any event the appellant had not incurred any costs in providing activities for the residents and was not providing any service beyond what was covered by the Weekly Variable Service charge which is agreed to be payable. There is no appeal from that finding.

16. Turning back to the SBSC, Mr Vernon – who was not legally represented – in his application to the FTT complained that he did not know what he was paying £18 a week for (and could get no information about that from the appellant), that he required no personal services, and should be allowed to opt out of the services whatever they were.

17. The appellant filed a statement of case in response, in which it said that the SBSC

> "is a provided service which relates to the well-being of residents and covers the overnight care service on site at Rosalind Court every night. The scheme is manned from 10pm until 7 am to answer any emergency lifeline calls check security of the building and report any emergency repairs in case of floods etc."

18. No witness statement was filed for the landlord. Nevertheless evidence was given to the FTT by Ms Jones, described as "an officer for the respondent" (that is, for Orbit Housing Association, now the appellant).

The FTT's decision

19. The FTT in its decision set out the factual background and defined the issues it had to decide as:

    a. Whether the SBSC was a service charge within the meaning of section 18(1)(a) of the 1985 Act;

    b. If so, was it a variable service charge within the meaning of section 18(1)(b);

    c. If so, was it payable under section 27A of the 185 Act;

    d. Finally whether orders should be made under section 20C of the 1985 Act and under paragraph 5 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 to prevent the tenant having to bear the landlord's costs of the proceedings as part of his service charge.

20. The FTT set out the relevant provisions of the tenancy agreement but did not embark on any analysis of its terms. Instead it focused on the evidence as to whether there were any services provided to Mr Vernon for which the SBSC was a payment. It began by stating that it was agreed that the SBSC relates to an overnight care service run from 10pm to 7am each night. It recorded the appellant's case that the service included answering emergency "Lifeline" calls, checking security and reporting emergency repairs. It recorded Mr Vernon's evidence that he had opted out of the Lifeline service (there is no dispute about that), and that that is why there is no charge recorded for the emergency alarm in his tenancy agreement (see paragraph 5 above). The FTT accepted his evidence that residents in his position would call the emergency services in the usual way if they needed emergency assistance.

21. As to the claim that the SBSC included the reporting of emergency repairs, the FTT noted that both parties confirmed that there was an out of hours emergency repair number, and that it was agreed that the SBSC did not include a charge for that. There was no record of the night staff reporting problems to that service on behalf of residents. The FTT noted that the day staff at Rosalind Court were paid for out of the general service charge, not the SBSC.

22. The FTT then recounted Ms Jones' evidence:

    > "… that the night staff were provided by a third party Care Provider … and it was her understanding that they delivered planned care calls for those residents with Service Agreements, assisted those who triggered the Lifeline system if they had a fall, provided unplanned extra care for those who required it and did general walk arounds and security checks of the scheme."

23. Mr Vernon's evidence was that there were no services available to him within the SBSC (nor did he want any); he also produced a letter from another tenant at Rosalind Court describing a situation where a vulnerable resident who needed assistance was not given any because, according to a member of the night staff, he was not on their list.

24. On the basis of that evidence at its paragraph 37 the FTT concluded that the SBSC was a charge for the provision of overnight personalised care for those residents who had a separate Support Agreement in place, and that it was not a charge for a service provided for all residents or for a service provided in connection with the occupation of Rosalind Court.

25. The next section of the FTT's decision was about the activity charge. At paragraph 57 it reverted to the SBSC, and noted that it is a separate and distinct charge from the variable service charge. It reiterated that some residents have separate and additional Support Agreements in place, and observed that there is no obligation in the tenancy agreement for residents without such an agreement to pay for the services provided for those who do.

26. At paragraph 61 the FTT stated that since the overnight care provision is only for the residents with a separate Support Agreement, the SBSC is not a service charge within the meaning of section 18(1)(a) of the 1985 Act.

27. Even if it was, the FTT continued at paragraph 62, whilst it is reasonable for the appellant to incur the costs of overnight care for the residents with a Support Agreement, it was not reasonable for it to commission those services on behalf of all tenants including those who do not have Support Agreements and do not have access to or benefit from that service. Therefore even it were considered to be a service charge the charge would not be reasonable.

28. So the FTT found that the SBSC failed at the first fence; it was not the type of charge that fell within its jurisdiction under section 27A. That meant that Mr Vernon could not have the determination he sought under section 27A as to whether the SBSC was payable under the lease or was reasonable within the meaning of section 19 of the 1985 Act.

29. As I noted at the outset, nevertheless the FTT regarded Mr Vernon as the successful party, and it made orders under section 20C of the 1985 Act and paragraph 5 of Schedule 11 to the 2002 Act to ensure that he would not have to pay the landlord's legal costs by way of a service or administration charge (and there is no appeal from those orders). For Mr Vernon the decision appeared to be a success because he had succeeded in his argument that he was not being provided with any services in return for the SBSC.

30. For the landlord, even though the application made against it was struck out, the decision was unwelcome for the same reason. The landlord appeals with permission from this Tribunal.

The arguments in the appeal

31. The appellant has permission to appeal on two grounds:

    a. that the Tenancy agreement makes provision for services to be provided for the tenant and for the tenant in return to pay the SBSC, which is therefore a variable service charge within section 18 of the 1985 Act, and

b. that the costs incurred in providing those service were reasonable.

32. The FTT, and this Tribunal, have jurisdiction to decide whether service charges are reasonable and payable only if they are variable service charges as defined by section 18 of the 1985 Act (set out above at paragraph 11). The appellant concedes that they are, but jurisdiction cannot be conferred by a concession and so before looking at the grounds of appeal I have to decide whether the SBSC fell within the definition in section 18.

33. The FTT approached this as a practical question, and decided that since no services were provided in return for the payment it could not be a charge that is "payable … for services" as that section requires.

34. There are two difficulties with that approach. The first is that it may not yield a stable answer; the answer will vary depending upon practical arrangements in place at Rosalind Court from time to time. Imagine a tenancy agreement that provided for the tenant to make a monthly payment for window-cleaning once a month, in a sum to be calculated by reference to the previous year's costs. That would be a variable service charge, even if for some months no window-cleaning was done. The question whether a charge is a variable service charge is about the nature of the charge and the intentions of parties to the tenancy agreement, and should be answered by an examination of the terms of the agreement.

35. The second problem with that practical approach is that it led the FTT to make factual findings about services provided and the reasonableness of charges that it had no jurisdiction to make if the SBSC is not a variable service charge. For that reason also it is essential to start from the terms of the agreement and work out whether the charge concerned is a variable service charge; only if it is does the FTT have jurisdiction to move on to the practical issues arising from particular service charge demands.

36. Accordingly I turn to the terms of the tenancy agreement.

37. The calculation of the total weekly payment in the opening pages of the agreement lists its components as rent, "variable service charge" and the SBSC. There is nothing at that point in the agreement to say what, if anything, the SBSC is a payment for except its name. A "Scheme-based support charge" sounds very much like a charge for support.

38. That impression is confirmed when we look at clause 1.3(ii), which indicates that the charge is calculated by reference to costs incurred in the preceding year and estimates of future costs. The agreement is not specific about the services provided, but it seems clear that the charge is a payment to the landlord for costs it has incurred or will incur in the provision of services.

39. That being the case, the SBSC is "an amount payable by the tenant of a dwelling … in addition to the rent, which is payable … for services … the whole or part of which varies or may vary according to the relevant costs."

40. I find that the SBSC is a variable service charge within the meaning of section 18 of the Landlord and Tenant Act 1985. The FTT therefore had jurisdiction under section 27A to

decide whether it is payable both pursuant to the contract and pursuant to statutory requirements, in particular section 19 of the 1985 Act. And so I turn to the grounds of appeal, which relate to the FTT's decision on those two matters.

Ground 1: is the SBSC a service charge payable under the tenancy agreement

41. Mr Nuttall took a very different approach on appeal from that taken by the appellant in the FTT (where Mr Nuttall did not appear); he began by focusing on the provisions of the tenancy agreement in order to demonstrate that the SBSC is, quite simply, a charge for services that the tenant is obliged to pay.

42. Therefore Mr Nuttall began with the material on the opening pages of the agreement which defines the "total weekly payment" made up of rent, variable service charge and SBSC, and provides unambiguously that the total weekly payment is "due in advance on Monday of each week". Clause 2.2 is equally unambiguous: the tenant covenants to pay the total weekly payment every Monday. He observed that the FTT appeared to have ignored this provision.

43. Mr Nuttall argued that clause 3.1(iii) is not relevant to Mr Vernon; it applies only to tenants with a separate Support Agreement. But clauses 3.1(i) and (ii) set out the context for the rent 1.3(i) and for the SBSC 1.3(ii), and say how they can be added to or changed. They do not make payment of the SBSC conditional on services being provided to the tenant; and they do not make any difference to the obligation in clause 2.2.

44. Accordingly the SBSC is a recoverable contractual charge.

45. Mr Bates agreed that the relevant part of clause 3.1 is 3.1(ii). But he took a different view of its function; he argued that it defines the tenant's obligation to pay. It enables the landlord to charge both for "support services provided" and for "other charges shown in the Agreement", and it goes on to further define both those limbs as payable "on the basis of reasonable costs incurred during the previous year and estimates for future years." The obligation is not simply to pay "other charges shown in the Agreement" but to pay them on the basis of costs incurred and future estimated costs. If there are no services provided, and no costs incurred nor estimated costs, nothing is payable.

46. In my judgment the obligation to pay the SBSC at £18 per week is clearly and unambiguously stated in the opening definition of the total weekly payment and in the covenant at clause 2.2. That obligation is not qualified, nor in any way defined, by clause 1.3(ii), whose function is to explain how it is calculated and may be re-calculated in the future by reference to the cost of services. The obligation to pay is not expressed to be conditional upon those services being provided.

47. That being the case the charge is payable under the tenancy agreement.

Ground 2: that the costs incurred in providing service in return for the SBSC were reasonable

48. Section 19 of the 1985 Act provides:

> " Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—
>
> (a) only to the extent that they are reasonably incurred, and
>
> (b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;
>
> and the amount payable shall be limited accordingly.
>
> (2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise."

49. It is not entirely clear whether the SBSC falls to be assessed under section 19(1) or section 19(2), since it appears to be calculated both by reference to costs incurred and by reference to estimated future costs. In view of the requirement to pay the total weekly payment in advance it may be better to regard it as a charge for costs not yet incurred, in which case the statute requires that the charge be reasonable; if that is not right then the question is whether the relevant costs were reasonably incurred.

50. The FTT decided this point on the basis of the evidence it heard about the services provided. Having determined that it could not identify any services provided to Mr Vernon in return for the SBSC it determined at its paragraph 62 (see paragraph 26 above) that it was not reasonable for the landlord to incur costs on behalf of all residents in order to provide services only for those with a Support Agreement, and therefore that the charges were not reasonable.

51. In appealing this decision the appellant is challenging a finding of fact that none of the services that the SBSC was supposed to represent were in fact available to or provided for Mr Vernon. The Tribunal will only rarely interfere with findings of fact made by the FTT, and only where the FTT made an error of law or the finding was in some way irrational.

52. Accordingly Mr Nuttall sought to persuade me that the FTT could not have reached that conclusion on the basis of the evidence it heard.

53. The appellant did not provide any witness statements for the FTT. The Tribunal knows what Mr Vernon's evidence was, since it has the narrative he provided with his application to the FTT, as well as the letter that he referred to from other residents (see paragraph 22 above). The Tribunal has the landlord's statement of case in the FTT which said that the SBSC was a charge for "answering emergency "Lifeline" calls, checking security and reporting emergency repairs". It has the FTT's record at its paragraph 31 of the unchallenged evidence that Mr Vernon has opted out of the "Lifeline" call service. It has the FTT's finding at paragraph 32 that there was no evidence of the night staff making

calls about repairs; Mr Nuttall suggested that the staff were still there to provide that service but the appellant did not lead any evidence about that and the Tribunal cannot make a guess as to what service was in fact available to residents in relation to repairs.

54. The Tribunal also has the FTT's summary of Ms Jones' evidence, which I repeat here:

> "… that the night staff were provided by a third party Care Provider … and that it was her understanding that they delivered planned care calls for those residents with Service Agreements, assisted those who triggered the Lifeline system if they had a fall, provided unplanned extra care for those who required it and did general walk arounds and security checks of the scheme."

55. Mr Nuttall argued that it was not open to the FTT to find on the basis of that evidence that that the "general walk arounds and security checks" were only for the residents with Support Agreements. The difficulty with that argument is that all we have is the FTT's summary. The paragraph set out above cannot be read as a witness statement, nor as a transcript of the words Ms Jones said. As it stands, the natural reading of what the FTT said that Ms Jones said was that the night staff deliver services for the residents with Support Agreements. One would have to know the exact words she said in order to conduct any sort of analysis as to whether she really said that the "general walkarounds and security checks" were not in fact for everyone.

56. What the FTT drew not only from what Ms Jones said but also from the evidence of Mr Vernon was set out in paragraph 37: "that the SBSC is a charge for the provision of overnight personalized care for those residents who have a separate Support Agreement in place. It is not a service provided for the benefit of all residents."

57. Without written evidence from Ms Jones it is impossible to say that the FTT drew an irrational or impossible conclusion from her evidence. When her evidence is taken together with Mr Vernon's evidence it is clear that the FTT reached a conclusion that was open to it on the evidence. The FTT's decision that the SBSC was not a reasonable charge is upheld (whether that is taken as a finding under section 19(1) or section 19(2)).

Conclusion

58. To summarise, the SBSC is a variable service charge within the meaning of section 18 of the Landlord and Tenant Act 1985. It is payable by the tenant under the terms of the tenancy. It does not meet the requirements of section 19 of the 1985 Act because, as a matter of fact, in the years in question (2021/22 and 2022/23) no services were provided to Mr Vernon in return for the payment of the SBSC.

59. The FTT made orders under section 20C of the Landlord and Tenant Act 1985, and under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002, so as to ensure that the appellant's legal costs could not be passed on to Mr Vernon by way of service or administration charges under the tenancy agreement (without making any decision as to whether the agreement permitted such charges). There was no appeal from those orders. The same orders are now sought in respect of the costs of the appeal. The

appellant is to confirm within seven days of the date of this decision whether those orders can be agreed and, if not, to file and serve brief written submissions on the point.

Upper Tribunal Judge Elizabeth Cooke

17 July 2023

Right of appeal

Any party 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.