UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – management fees – whether the respondent's system of charging was as required by the leases

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

BETWEEN:

HOWE PROPERTIES (NE) LIMITED

Appellant

-and-

ACCENT HOUSING LIMITED

Respondent

Re: 84 and 134 The Meadowrings, and
23 and 67 Sheepfoote Hill,

Yarm,
TS15 8QH

Judge Elizabeth Cooke

Heard on: 11 October 2022

Mr Anthony Verduyn for the appellant, instructed by DWF Law LLP
Mr Justin Bates for the respondent, instructed by Trowers & Hamlins LLP

Introduction

1. The appellant, Howe Properties (NE) Limited, holds four long leasehold flats on an estate at Yarm owned by the respondent, Accent Housing Limited. The appeal is from a decision of the First-tier Tribunal ("the FTT") that service charges in respect of management fees were reasonable and payable in the sum of £300 in respect of each of the four flats for the years ending 31 March 2017, 2018 and 2019.

2. The appellant was represented in the appeal by Mr Anthony Verduyn and the respondent by Mr Justin Bates, both of counsel, to whom I am grateful.

The factual background

3. The respondent's estate at Yarm in Cleveland contains 138 properties, ten of them being houses that have been disposed of as freeholds. The rest are flats; 31 flats are held on long leases, one was formerly used by a caretaker but has been let as an assured tenancy for some time,and the rest of the flats are let on assured tenancies. The estate was laid out in the 1970s on steep land with a stream flowing through it; the original idea of having all the outdoor areas as communal space has been compromised over the years as some residents have enclosed gardens, but the estate is still managed as a whole by the respondent.

4. The appellant holds four of the long leases:

   134 The Meadowings: lease granted in 1987, purchased in January 2018

   84 The Meadowings: lease granted in 1989, purchased in March 2016

   67 Sheepfoote Hill: lease granted in 1993, purchased in May 2016

   23 Sheepfoote Hill: lease granted in 1994, purchased in May 2017

5. The leases are in very nearly identical form; there are some differences in the earliest of the leases, that of 134 The Meadowings, which I need not mention because they are not relevant to the appeal, and one difference which is relevant as follows. The lease of 134 The Meadowings requires the lessee:

   > "to pay to the Lessor annually a 1/137th part of the Annual Service Charge as hereinafter defined"

6. The underlining has been added to indicate where the other leases differ. The lessee of 84 The Meadowings has to pay "a proportionate part", and the lessees of 23 and 67 Sheepfoote Hill have to pay "a fair proportion", of the Annual Service Charge.

7. Thus each lessee has to pay a proportion of the Annual Service Charge, although the leases differ in how they describe or define that proportion.

8. The Annual Service Charge is then defined in clause 5(2) as:

> "the total of all sums actually expended or provided either directly or as in the case of service by the Lessors own staff indirectly by the Lessor during the period to which the relevant Service Account relates in connection with the management and maintenance of the Buildings … and in particular but without limiting the generality of the foregoing shall include the following:"
>
> a) [the cost to the lessor of performing its covenants to repair and maintain the estate]
>
> b) [the cost of maintaining communal television and radio aerials]
>
> c) [the cost of the lessor's compliance with notices from the local authority]
>
> d) "All fees charges expenses and commissions … payable to any agent or agents whom the Lessor may from time to time employ for managing and maintaining the Buildings and all salaries and other payments made to staff and employees of the Lessor where works are undertaken by the Lessor without employment of an agent including an element of profit to the Lessor"
>
> e) [fees charged by the lessor's solicitor, accountant, surveyor etc]"

9. The respondent has calculated the Annual Service Charge for all four properties by aggregating the sum of the lessor's expenditure (and salary costs etc where work is done in-house) under heads (a), (b), (c) and (e) and charging each property 1/138 (rather than 137 to reflect the fact that the caretaker's flat is now let on an assured tenancy) and that figure is used for all four properties even though only one stipulates an arithmetical percentage. There is no dispute about that calculation.

10. As to item (d), the freeholders are charged £150 per annum, and the long leaseholders pay £300 per annum (per lease, obviously, in the case of this appellant). The assured tenants are charged a percentage of the rest of the service charges (presently 15%).

11. In November 2019 the appellants made an application to the FTT pursuant to sections 19 and 27A of the Landlord and Tenant Act 1985, which so far as relevant read as follows:

> "19. (1) 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.

27A(1) An application may be made to [the appropriate tribunal] for a determination whether a service charge is payable and, if it is, as to—

(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable."

12. The applicants challenged a number of items within the Annual Service Charge for the three years in question. Only one of those is relevant to the appeal, namely the management fee described in item (d) and charged as just explained. Before the FTT the appellants said that the £300 they had to pay was excessive; it did not represent value for money and was inequitable compared with the 15% being charged to the assured tenants (which, Mr Verduyn told me, came to about £50 per annum).

13. In its decision the FTT considered the disputed items one by one, going through the grounds maintenance, the tree management, the insurance (which does not seem to have been really in dispute by the time of the hearing) and finally the management fees, which it dealt with in four paragraphs as follows:

"31. The Applicant claimed that annual management fees charged by the Respondent should not exceed 15% of the service charges payable for that year. Ms Burns [the director of the Applicant/appellant] stated that the services she received were not worth £300 per year, and also argued that the services provided to all residents on the estate were identical and therefore the long leaseholders and every other resident should pay the same management fee.

32. The Respondent produced an explanation of its five-tier system of charging fixed annual management fees to long leaseholders in accordance with current RICS guidelines. The Applicant has not demonstrated that a lower fee would be charged by any alternative manager of the estate, The Tribunal notes that the statutory framework governing social tenants is not the same as that for leaseholders and finds that an annual management framework governing social tenants is not the same as that for leaseholders and finds that an annual management fee of £300 per long leaseholder on the Yarm estate is within the spectrum of reasonable charges for the work undertaken.

33. The Applicant further claimed that the level of service provided by the Respondent was unreasonable. [The FTT set out brief particulars of what Ms Burns said about the standard of service] …

> 34. … the Tribunal find that the Respondent manages the Yarm estate generally to a high standard…"The appellant appeals, with permission from this Tribunal, on the ground that the flat fee of £300 for management was not payable because clause 5 of the four leases each require the lessee to pay a single proportion of the entire Annual Service Charge, made up of items (a) to (e); it is not open to the respondent to charge a management fee that is not calculated in that way, nor to charge different management fees according to the tenure of the property.

The arguments on the appeal

The construction of the lease

14. Mr Verduyn went through clause 5(1) and (2), which I have set out above. He pointed out that the Annual Service Charge is very carefully and comprehensively defined; the lessee is to pay the specified proportion of the whole Charge and there is nothing to suggest that the management fee at item (d) should be treated any differently. The respondent's practice is not in accordance with the requirements of the lease.

15. Moreover, it is unfair; it results in 60% of the entire management fee being paid by the long leaseholders, who represent 22% of the properties on the estate.

16. Mr Bates, for the respondent, agreed that the Annual Service Charge is defined as comprising a number of "streams". He pointed out that the definition of the charge allows for a profit element and therefore there will not be an exact equivalence between the lessor's expenditure and the charge to the lessees. Where he differed from Mr Verduyn was in arguing that the lessees could be required to pay a different proportion of each stream. He referred to the lease of 67 Sheepfoote Hill, which requires the lessee to pay "a proportionate part" of the Annual Service Charge, and said that the lessor is at liberty to charge, say, 4% of the total costs described at 5(2)(a), 6% of the total under 5(2)(b), a flat rate for another element, and so on. The cost of management for different types of properties might be different and so it is permissible to apportion the streams differently; that is why the streams are separately identified so that this can be done.

17. The FTT's role in the process, said Mr Bates, was to look at each stream – as indeed it did – and ask whether the cost was reasonably incurred (section 19(1)(a)) and whether the standard of service was reasonable (section 19(1)(b)). If the charge for each of the components of the Annual Service Charge is found to have been reasonable, then the entire charge will have been a "fair proportion" or "a proportionate part" of the whole as required in the lease.

18. Mr Bates acknowledged that that construction does not work for the lease of 134 The Meadowings, which states what fraction of the whole charge the lessee must pay. He asked, however, how the Tribunal knows that £300 is not 1/137th, or the agreed 1/138^{th,} of the whole. In any event he said that because this issue was not argued before the FTT the appeal must fail. The construction of clause 5(1) and 5(2) was not in issue before the FTT which was asked to determine, and did determine, a pure value for money challenge, which it properly assessed at its paragraphs 31 to 34. Accordingly he submitted that the appellant was

entitled only to a narrative judgment in its favour as to 134 The Meadowings, which would determine the issue for future service charge demands.

The conclusion on construction

19. Mr Bates is right about the lease of 134 The Meadowings. It requires the calculation of a global sum made up of items (a) to (e) and its division by 137. There is no scope at all for the application of different proportions to different items, let alone to the charging of a flat fee that does not appear to be a proportion since the respondent's own publicity material indicates that the rate of £300, and other flat fees for management depending on tenure of property and size of estate, is imposed on a number of the respondent's estates.

20. Moreover, Mr Bates' construction of the other three leases is unarguable. None gives any scope for the lessor to charge a different fraction of its total expenditure (etc) on item (d) from the fraction it charges in respect of the aggregate of items (a), (b), (c) and (e); had the parties to the leases intended that the wording would have been quite different. Clause 5(2) would have had to read something like "a fair proportion of each of the following…"; but in fact each of the clauses 5(2) requires the Annual Service Charge to be calculated as a single proportion (or fraction, or percentage, or any other synonym) of a global sum. There is certainly no basis on which the lessor can charge a flat rate for item (d) that is determined by the tenure of the property.

21. I am unimpressed by the idea that for all the Tribunal knows the £300 is 1/137 or 1/138 of the whole of the lessor's expenditure (etc) on item (d). If it were, the respondent would have said so. It is manifestly not calculated by reference to expenditure since it is advertised as a flat rate on several estates.

22. So the appellant is correct that the management fee of £300 per annum for these four flats is not payable because it is not charged in accordance with the terms of the lease.

A further ground?

23. At the hearing Mr Verduyn pointed out that the Tribunal had neither given nor refused permission to appeal on the further ground argued by the appellant, namely that the FTT's decision as to reasonableness of the £300 charge for management, under section 19(1)(a) and (b), was made without consideration of the evidence. I agreed, and Mr Bates was content, that that point should be argued at the hearing on the basis that if I was persuaded by it I would grant permission to appeal and determine the appeal on that further ground.

24. In the event there is no purpose in my doing so. £300 is not payable, and therefore the question whether it passes the tests in section 19 does not arise.

The outcome of the appeal

25. I do not agree that the issue of construction of the lease was not part of the appellant's case before the FTT, although it does not seem to have been clearly articulated. The disparity in

the management fee for properties of different tenure on the estate is mentioned several times in the annexe to the appellants' application to the FTT, and that disparity and the terms of clause 5 are clearly raised in the appellant's statement of the case in the FTT. Mr Verduyn did not appear for the appellant in the FTT; counsel for the appellant raised the point in her skeleton argument (at her paragraph 40: "it is simply not open to R to charge different sums given the terms of Clause 5."). How counsel presented her argument before the FTT I do not know, and the FTT did not address the construction point in its decision; but the point was plainly in issue before it and I take the view that the appellants are entitled to succeed on appeal rather than merely to have, as Mr Bates suggests, a narrative judgment in their favour.

26. What are the consequences of that successful appeal? Mr Verduyn explained that the appellant would be content to pay a management fee of 15% of the rest of the service charge just as the assured tenants do, and as the FTT decided was a reasonable charge in decisions it made in 2005 and 2007 about the respondent's nearby Hemlington estate. In effect the appellant is content to use 15% as a proxy for the (d) stream in the Annual Service Charge. But it is not open to me to substitute the Tribunal's decision to that effect, because that is not how the lease says item (d) is to be calculated, and there is no evidence before me to provide the information on which it would have to be calculated. The parties may be able to agree a proxy figure, of course, but I cannot impose one.

27. If agreement cannot be reached then the respondent will have to calculate the Annual Service Charge for each of the leases by adding its direct and indirect management costs to the figures it already has for items (a), (b), (c) and (e) and then dividing the whole amount by one figure, namely the figure already determined for the rest of the Annual Service Charge which appears to be agreed at 1/138 for all four properties; I take it that that is agreed by the parties to be a "proportionate part" in respect of 84 The Meadowings and a "fair proportion" in respect of the two Sheepfoote Hill properties, and it is in any event not open to the respondent to change that denominator now nor to the appellants to challenge it in the FTT. Once it has done so, if the appellants wish to pursue their challenge to payability and/or reasonableness the FTT will be able to determine that challenge.

28. Accordingly the matter is remitted to the FTT for it to determine the payability and reasonableness, for the three years in question, of that element of the Annual Service Charge that represents the management fee under clause 5(2)(d).

29. I hope of course that the parties will be able to reach agreement so that a further hearing is not necessary. I direct that if no agreement has been reached within 56 days of the date of this decision the respondent shall disclose to the appellant and to the FTT the amount of the Annual Service Charge for the three years in question together with the information that indicates how the management fee element of that charge has been calculated, so that the FTT can then assess whether it has been calculated correctly if payability is still challenged and can determine whether the management fee element of the Annual Service Charge meets the requirements of section 19(1)(a) and (b) of the 1985 Act. The FTT will then give directions. If that information is not provided to the FTT and the appellant within that period, the appellant may apply to the FTT for directions.

Judge Elizabeth Cooke

18 October 2022

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.