UPPER TRIBUNAL (LANDS CHAMBER)

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Case No: LRX/85/2015

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – payments on account - section 20B of the Landlord and Tenant Act 1985- section 19 of the Landlord and Tenant Act 1985

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

BETWEEN:

MRS VAIRAVAN VALLIAMMAI

Appellant

and

MRS DENISE JORGENSEN & OTHERS

Respondents

Re: 19/21 Rendezvous Street,
Folkestone
Kent

Before: Judge Cooke
Sitting at Royal Courts of Justice, Strand London WC2A 2LL
on
19 April 2016

DECISION

Introduction

1. This is an appeal from a decision of the First-tier Tribunal (Property Chamber) ("the FTT"), dated 12 June 2015. The FTT decided that the service charges demanded on 12 August 2013 by the Appellant, Mrs Vairavan Valliammai, from her tenants, the Respondents, were not payable.

2. I heard the appeal at the Royal Courts of Justice on 19 April 2016. Mrs Vairavan did not attend but was represented by her husband, Mr P. Vairavan. Four of the Respondents attended: Mrs Jorgensen, Mr Blackett, Mr Smith and Mr Samuels. None of the parties had legal representation.

3. At the close of the hearing I announced to the parties that I would be allowing the landlord's appeal in part (as I shall explain below), but that I would be remitting the matter to the FTT so that the Respondents' challenge to the charges under section 19 of the Landlord and Tenant Act 1985 can be determined. Unfortunately that means that there is still no finality and that there may have to be a further hearing; however, I have also pointed out to the parties that the FTT operates a free mediation service, and I have recommended to them that they engage in mediation in order to bring matters to the conclusion that all parties need.

4. Following the hearing, and after I had written these reasons but before I had sent them to the parties, a number of items of correspondence from the parties have been brought to my attention. By a letter dated 3 May 2016 the Respondent has sought to address further argument to me; in an email dated 3 May 2016 Mr Samuels, on behalf of the Appellants, objected to his doing so. Mrs Jorgensen added a further email dated 4 May 2016, as did Mr Blackett on 5 May 2016. I have not taken any of this correspondence into account in writing my reasons; it is not open to Mr Vairavan to seek to re-open the decision I made on 19 April in this way.

Background: the head-lease and the sub-leases

5. The Appellant holds a lease of part of 19/21 Rendezvous Street, Folkestone ("the property"). The lease, dated 30 March 1989, is for a term of 125 years from 31 January 1989. The current landlord, Mr J. Godden, is the freeholder of the property.

6. The property comprises a number of flats, which the Appellant has sub-let. The Respondents to this appeal are her tenants; each holds a lease of one of the flats, granted for a term of 125 years less one day from 1 January 1989. I refer to the Respondents' leases as "the sub-leases" and to the Appellant's lease as "the head-lease".

7. The head-lease obliges the lessor to maintain the exterior of the building (of which the property forms part) (clause 4(iv)), and requires the tenant to pay 75% of the "Maintenance Charge", being

the cost to the lessor of that maintenance (clause 2). It also requires the tenant to pay an "Interim Maintenance Charge" on 1 January each year (clause 2), being a payment on account of the year's Maintenance Charge. If that creates a surplus, it is to be carried forward and credited to the tenant's account (clause 4(iv)(b)).

8. In the sub-leases, the Appellant as lessor covenants to repair, maintain and renew the structure and exterior of the building and the common parts (clause 5.3).

9. Each sub-lease requires the tenant to pay the "Service Charge". The "Service Charge" is defined as:

> "the proportion of the Service Charge payable to the landlord in respect of the demised premises and referred to in clause (h) of the Particulars".

10. Clause (h) of the particulars specifies a proportion – for example, the tenant of flat 6 has to pay 7.8%. But "Service Charge" itself is not defined.

11. The tenant also covenants

> "to observe and perform the covenants on the part of the tenant contained in the Head lease other than the payment of rents and other monies so far as they relate to the demised premises … and to indemnify the landlord against all damages claims costs and expenses arising from any breach of those covenants by the tenant but not further or otherwise."

12. The lessor covenants in each sub-lease, at clause 5.1,

> "To pay the rent and service charge and insurance premium and othe rents reserved by the Head Lease…";

13. At clause 5.6 the lessor covenants:

> "To use his best endeavours to ensure that the Head Landlord keeps the Building maintained renewed repaired and decorated in accordance with his covenants in the Head Lease".

14. As the FTT put it at paragraph 28 of its decision,

> "The underleases are not clear in the manner in which the [Appellant] was to pass on her service charge liability under the headlease, but it seemed clear that there was an intention to do so."

15. At any rate, it is not in dispute that the Respondent tenants are obliged by their leases to pay to the Appellant a service charge reflecting money spent either by her on the interior of the property or by the freeholder on the exterior pursuant to the head-lease.

The service charge demands

16. To explain the service charge demands made in respect of the sub-leases, which are the subject of these proceedings, I have to go back to the head-lease. The freeholder of the property demanded an Interim Maintenance Charge from the Appellant, as tenant under the head-lease, in each of four consecutive years, as follows (and as set out in paragraph 16 of the FTT's decision):

a. For the year ending 31 March 2008, £5,840.
b. For the year ending 31 March 2009, £6,215.63.
c. For the year ending 31 March 2010, £6480.
d. For the year ending 31 March 2011, £6,716.25.

17. Mr Vairavan showed to me and the Respondents, at the hearing on 19 April, break-downs provided by the freeholder's agents, Fell Reynolds, which showed that the sums demanded from the Appellant related to insurance, a management fee, and repairs.

18. The Appellant withheld payment of these sums, because she did not consider that they were all due to the freeholder. There was no litigation over the first sum, relating to the year ending in 2008. She challenged the second sum, relating to the year ending in 2009; the Leasehold Valuation Tribunal ("the LVT") on 8 July 2009 determined that she should pay £6,215.63 (less what she had by then already paid). The other two sums were also the subject of proceedings before the LVT; at a hearing on 11 January 2012 a determination was made, with the agreement of the parties (that is, the freeholder and Mrs Vairavan), that the sum of £12, 463.19 was payable (I have taken that figure from the decision of the FTT of 12 June 2015).

19. That agreement was made in the absence of the Appellant and her husband, by the Appellant's agent Mrs Frost. The Appellant was unhappy about it, and sought to appeal the LVT's order. Permission to appeal that decision was refused by the Upper Tribunal on 10 April 2012. It was only after the freeholder commenced possession proceedings that the four sums demanded on account as Interim Maintenance Charges for those four years were paid by the Appellant to the freeholder on 1 August 2013.

20. On 8 August 2013 the appellant issued to each of her tenants a demand for service charges, requiring each tenant to make a payment, being the appropriate proportion (stated in each lease, see paragraph 9 above) of the payment on account that the Appellant had now at last paid to the freeholder in relation to the four years ending 31 March 2008, 2009, 2010, and 2011.

21. To give an example, in relation to flat 2, the demand addressed to Mrs Jorgensen set out the sums due as follows:

"Service charge … 01.04.07 to 31.03.08 – 6.8% share 397.16
Service charge … 01.04.08 to 31.03.09 – 6.8% share 451.56
Service charge … 01.04.09 to 31.03.010 – 6.8% share 440.64
Service charge … 01.04.10 to 31.03.11– 6.8% share 456.71"

22. The demands made of each tenant were different, depending upon the appropriate proportion; so, for example, I was shown the demand relating to Flat 7, for Mr Smith, where the figures were higher because he pays a 7.8% share.

23. The Respondents were not willing to pay the sums demanded. The Appellant brought a County Court action for payment and on 14 April 2014 a District Judge ordered that the case be transferred to the FTT "to determine the issue of whether the service charges claimed are recoverable".

The FTT's decision and the appeal

24. The FTT decided that the service charges demanded on 12 August 2013 were not recoverable because they were payments on account, and there is no provision in the sub-leases for payments on account. This is the Appellant's appeal from that decision.

25. The FTT also held that if, contrary to its view, the payments demanded were not payments on account and were payable as service charges, the first two years' payments demanded would have been irrecoverable pursuant to section 20B of the Landlord and Tenant Act 1985, because the relevant costs were incurred more than 18 months before the service charge was demanded from the tenant. That decision has not been challenged by the Appellant, and indeed it could not have been as it was obviously correct. There does not appear to have been any sufficient forewarning to the tenants of this future liability; it came to them "out of the blue".

26. Accordingly the Appellant's appeal is refused in relation to the two components of the service charge demands dated12 August 2013 that related to the years ending 31 March 2008 and 31 March 2009, because even though they were (as I shall explain) demands for a service charge and not for a payment on account, they were made too late. Accordingly, the appeal is refused insofar as it relates to the sums mention in paragraphs C and D of paragraph 16 of the FTT's decision; put another way, the first two items on the demand set out at paragraph 20 above are not payable by the tenant of Flat 2, and the corresponding amounts in the other demands made on that date are likewise not payable by the tenants.

27. The rest of my decision is about the other two components of the demands made on 12 August 2013, namely the sums due in respect of the years ending 31 March 2010 and 2011.

28. It is not in dispute that the sub-leases contained no provision for payments on account in respect of the service charge. The service charge, as we have seen, was not well-defined, but on any reading there is no provision for an advance and estimated payment to be made, with adjustments to be made later for over- and under-payment, as there is in the head-lease.

29. What is less clear is why the FTT decided that the service charge demands of 12 August were for payment on account. The FTT's decisions says that "on the Applicant's own case" these were payments on account. But the demands themselves make no reference to payment on account; they

are headed "Service Charge Demand". The Applicant's statement of claim in the County Court refers to "service charges". The applicant's Statement of Case in the FTT refers to service charges. There is no mention of payments on account.

30. It may be that in discussion in the hearing before the FTT the Appellant – through her husband, Mr Vairavan – referred to the payments as payments on account. And of course they were indeed a reimbursement to the Appellant of payments on account that she had made. But as Mrs Vairavan says, she had no control over the level of these charges. So far as she was concerned – and her challenges in the LVT having failed – these were sums that she had to pay and did pay to the freeholder. More to the point, they were imposed as service charges, not payments on account, upon the sub-lessees. These were reimbursements of what the Appellant had had to pay; they were not advance payments representing what she might have to pay.

31. I find that the demands made of the Respondents on 12 August 2013 were for service charges, under the terms of the sub-leases and accordingly I allow the appeal insofar as those demands relate to payments made by the Appellant to the freeholder in respect of the years ending 31 March 2010 and 2011.

The tenants' challenge

32. However, in the FTT proceedings the Respondents challenged the payments on a different basis. They argued that the sums demanded were not payable by them for a number of reasons, which can be summed up by saying, in the words of section 19 of the Landlord and Tenant Act 1985, that they were not reasonably incurred and that, insofar as they related to the provision of services or the carrying out of works, the services and works were not of a reasonable standard.

33. I have not, of course, heard evidence about that in detail, although I believe that the FTT did. The Respondents at the hearing on 19 April 2016 explained that they believed that they had already made to the Appellant's agents, Maltbys, payments on relation to the work covered by the sums demanded on 12 August 2013; that some of their payments had not been passed on to the freeholder; that the freeholder had not made proper insurance claims in respect of earthquake damage; and that the Appellant had not properly pursued her challenge to the payments on account in the LVT proceedings.

34. The FTT in its decision did not explore the tenants' challenges because of its decision that the demands were for payments on account. At paragraph 50 of its decision the FTT explained that because these were payments on account, the FTT had to decide only whether the estimated sums were reasonable, not whether the actual work carried out was of a reasonable standard nor whether the cost was reasonably incurred.

35. However, because I find that the sums demanded on 12 August 2013 were service charges, section 19 has to be considered in full and the arguments and evidence put forward by the Respondents has to be considered. Accordingly I am remitting the matter to the FTT to determine

afresh the payability of the service charges demanded on 12 August 2013, insofar only as they relate to the sums paid by the Appellant to the freeholder as payments on account in respect of the years ending 31 March 2010 and 2011.

36. Accordingly the FTT will have to apply section 19 to a sum which is final as far as the sub-tenants are concerned, but was only a payment on account so far as the Appellant is concerned. Accordingly the Respondents as sub-tenants are challenging their liability on grounds which were not available to the Appellant vis-à-vis her landlord, although if they succeed it may be possible for the Appellant then to rely on the FTT's finding in any future proceedings against the freeholder. These are difficulties that would not have arisen if the sub-tenants had been joined as parties to the LVT proceedings between the Appellant and the freeholder; likewise in the current proceedings it would have been helpful for the FTT to consider at an early stage when directions were being given whether the freeholder should have been joined.

37. In paragraphs 47 to 50 of its decision dated 12 June 2015 the FTT made a rulings about further sums claimed from Ms Roberts and Mr Samuels and demanded from them prior to 12 August 2013. For the avoidance of doubt I observe that there have been no cross-appeals from these rulings, and they were not discussed at the hearing of this appeal on 19 April 2016. Mr Samuels sought permission to appeal, but permission was refused by the FTT on 12 August 2015 and no further application for permission was made to the Upper Tribunal.

9 May 2016

Judge Cooke