UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2009] UKUT 186 (LC)
LT Case Number: LRX/81/2008

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

SERVICE CHARGE-whether there is jurisdiction to vary as unsatisfactory the computation of service charges payable under a lease on grounds other than those set out in section 35(4) of the Landlord and Tenant Act 1987

IN THE MATTER of AN APPEAL AGAINST A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL OF THE WALES RENT ASSESSMENT PANEL

BETWEEN **MR B G L MORGAN**
and
MRS J C MORGAN **Appellants**

and

MR D FLETCHER AND OTHERS **Respondents**

Re: 95/97 Cathedral Road Cardiff

Before: HH Judge Jarman QC

Sitting at: Cardiff Civil Justice Centre, 2 Park Street, Cardiff, CF10 1ET
on 15 September 2009

Mr Ewan Paton, instructed by L G Williams & Pritchard Solicitors, Cardiff for the appellants.
The respondents in person.

The following cases are referred to in this decision:

Pepper v Hart [1993] AC 593

DECISION

Introduction

1. This is an appeal raising a short but important point of law as to the correct interpretation of section 35(4) of the Landlord and Tenant Act 1987. It is brought with permission by His Honour Judge Reid QC from a determination dated 21 April 2008 of the Leasehold Valuation Tribunal (LVT) of applications brought by the lessees of six of the eight residential flats in what was at one time a pair of large semi-detached dwellings in Cathedral Road Cardiff. The building is owned by the appellants who are also the lessees of another of the flats. The eighth flat is let to a Mr New. Each of the leases in question is a long lease in similar form under which ground rent and service charges are payable. On the ground floor there is a dental surgery and in the basement a dental laboratory.

Facts

2. The applications were made at a time when the proportion of the service charges payable under the leases in question added up to 116 per cent of the lessors' expenditure. Thereafter the appellants varied the proportion of the service charge under their own lease to $1/96^{th}$ and that of Mr New to $3/96^{th}$, the result of which was to reduce the total payable to 100 per cent.

3. The LVT rejected an argument on behalf of the appellants that such a reduction meant that the service charge provision was satisfactory. It pointed to the fact that the charge now due under some of the leases is sixteen times more than that due in respect of the largest flat of which the appellants are lessees. It therefore adjusted the charge payable under the leases which were the subject of application to $1/12^{th}$ or $1/10^{th}$. The effect of this was to reduce the aggregate of the service charge payable from 100 per cent to 79.166 per cent of expenditure. The LVT recognised that it could not adjust the contributions of the appellants or Mr New as they had made no applications, but it observed that it was open to them to make such an application or to agree the split of the remainder between them so as to achieve 100 per cent.

4. The appellants say that the LVT had no jurisdiction to do so and that the statutory provisions set out the only circumstances in which service charges can be adjusted by a LVT and only if the aggregate of such charges in respect of a building exceeds or falls short of 100 per cent. The respondents say that the jurisdiction arises whenever the computation of such charges is not satisfactory. The appellants were represented by counsel and his researches have revealed no judicial decision on the point. One of the respondents Mr Fletcher made submissions and the other respondents who attended were content to adopt his submissions. I am grateful to counsel and to Mr Fletcher for presenting submissions both written and oral in a clear, cogent and helpful way.

The Law

5. Section 35 of the Landlord and Tenant Act 1987 as amended by the Commonhold and Leasehold Reform Act 2002 provides so far as relevant as follows:

> (1) Any party to a long lease of a flat may make an application to a [leasehold valuation tribunal] for an order varying the lease in such a manner as is specified in the application.
>
> (2) The grounds on which any such application may be made are that the lease fails to make satisfactory provision with respect to one or more of the following matters, namely –
>
> …….
>
> (c) the repair or maintenance of any installations (whether they are in the same building as the flat or not) which are reasonably necessary to ensure that the occupiers of the flat enjoy a reasonable standard of accommodation;
>
> (d) the provision or maintenance of any services which are reasonably necessary to ensure that the occupiers of the flat enjoy a reasonable standard of accommodation (whether they are services connected with any such installations or not, and whether they are services provided for the benefit of those occupiers or services provided for the benefit of the occupiers of a number of flats including that flat);
>
> (e) the recovery by one party to the lease from another party to it of expenditure incurred or to be incurred by him, or on his behalf, for the benefit of that other party or of a number of persons who include that other party;
>
> (f) the computation of a service charge payable under the lease…
>
> (3) For the purposes of subsection (2)(c) and (d) the factors for determining, in relation to the occupiers of a flat, what is a reasonable standard may include-
>
> (a) factors relating to the safety and security of the flat and its occupiers and of any common parts of the building containing the flat; and
>
> (b) other factors relating to the condition of any such common parts.
>
> [(3A) For the purposes of subsection (2) (e) the factors for determining, in relation to a service charge payable under a lease, whether the lease makes satisfactory provision include whether it makes provision for an amount to be payable (by way of interest or otherwise) in respect of a failure to pay the service charge by the due date.]
>
> (4) For the purposes of subsection (2)(f) a lease fails to make satisfactory provision with respect to the computation of a service charge payable under it if –
>
> (a) it provides for any such charge to be a proportion of expenditure incurred, or to be incurred, by or on behalf of the landlord or a superior landlord; and

(b) other tenants of the landlord are also liable under their leases to pay by way of service charges proportions of any such expenditure; and

(c) the aggregate of the amounts that would, in any particular case, be payable by reference to the proportions referred to in paragraphs (a) and (b) would [either exceed or be less than] the whole of any such expenditure.

Submissions

6. The appellants make four main submissions in support of their case. Firstly, had it been intended that the circumstances set out in subsection (4) were not exhaustive it would have been a simple matter to use such words as "the circumstances where a lease fails to make satisfactory provision…. may include", similar to the wording in subsections (3) and (3A).

7. Secondly the current editors of Woodfall on Landlord and Tenant, Volume 4 paragraph 29.076 take the view that subsection (4) means "only if", although that view is expressed without further elucidation..

8. Thirdly, if the subsection is considered to be ambiguous then regard may be had to the report on which the statutory provision was based and to any clear ministerial statements on the point, providing the conditions set out in *Pepper v Hart [1993] AC 593* are satisfied. These provisions were a close implementation of the recommendations of the Nugee Report 1985 (Report of the Committee of Enquiry on the Management of Privately Owned Blocks of Flats HMSO 1985). At paragraph 7.6.9 of the report the authors considered that variation of leases of flats in the same building is justified without majority approval where the scheme set out in the leases is seriously defective, and the defects have a direct bearing on the upkeep and fitness for habitation of the flats in the block. A number of examples were given including the aggregate of the percentages of service charges payable being either more or less than 100 per cent of expenditure.

9. There was debate in the House of Lords on the second reading of the bill (HL Deb 13 May 1987 Vol 487 cc636-651) as to whether there should be a right to apply to vary where the aggregate was less, as well as more than, 100 per cent. The minister who proposed the bill expressed the view that former right would encourage well-maintained blocks of flats. However, the Act as originally passed provided only the latter right. In 1993 an amendment was proposed, and carried, to provide also the former right (HL Deb 20 May 1993 Vol. 545 c.1882) and was brought into effect by the Leasehold Reform, Housing and Urban Development Act 1993. At no stage in these debates was there mention of a right to apply to vary when the aggregate was 100 per cent. Accordingly it is submitted that the intention was to ensure that the aggregate of the services charges payable should be no more and no less than 100 per cent. To give a tribunal the power to alter the fairness of how the individual lessees should contribute to that 100 per cent would entail a major policy decision. Moreover had that been the original intention and meaning there would have been no need for further debate or amendment.

10. Finally, the appellants submit that if the circumstances set out in subsection (4) are not exhaustive and the subsection contemplates a consideration of whether a computation is satisfactory in other circumstances, it is surprising that no further indication is given as to what those circumstances may be. The floodgates would be opened to all sorts of arguments as to what is or is not fair.

11. The respondents rely heavily upon the words "…fail to make satisfactory provision in respect to….the computation of a service charge under a lease" in subsection (2). It is submitted that those words are clear and are intended to provide a remedy for obvious unfairness in the proportions in which the service charge is payable. An example was given in argument of a developer who converts a building into two flats and lets them on the basis that the lessees pay a service charge of 50 per cent each. The developer could then build an extension to house a third flat and then sell or let that flat on the basis that the maintenance of the building is met by the two original lessees, thereby gaining a more valuable flat. It was submitted that Parliament could not have intended such a result. It must have been intended that if a property is changed after the original leases are entered into the proportions can be varied by a tribunal even if the aggregate remains at 100 per cent. This applies to the building in question which has been substantially altered by increasing the size of some flats and adding others since the original leases were entered into.

12. Secondly, the word computation means that a logical method of calculation should be used which requires the proportions in which the contributions are paid to be reasonable. No logical or reasonable computation would produce a result where the appellants pay 1/96th in respect of their flat and Mr New pays 1/32nd whereas the other lessees pay between 1/12th and 1/6th for same sized or smaller flats.

13. At the time when the applications were submitted, the aggregate of the service charge payable was 116 per cent. The appellants brought about the change to 100 per cent after the original hearing was adjourned.

14. Finally, the respondents rely upon two decisions of the LVT, namely Re 11 Bramham Gardens London SW5 OJQ (LON/00AW/LVL/2006/001&4) and Re Flats 1-32 129 Backchurch Lane London E1 1LT (LON/00BG/LVL/2007/0001).

Conclusions

15. In my judgment the difference in wording between subsection (4) on the one hand, and that in subsection (3) and (3A) on the other, is not a strong indication one way or the other as to the proper construction of the former. As a matter of wording had the intention been that subsection (4) should be read as "only if" then it would have been simpler still to use those words. Whilst some regard must be given to the views of the editors of such a publication as Woodfall, the expression of the view is not of great assistance given, as it is, without further elucidation.

16. Moreover, whilst there is force in the respondents' submission that the words " satisfactory" and "computation" connote a satisfactory calculation as well as a satisfactory result, that begs the question as to whether those words are subsequently qualified or merely exemplified in the circumstances then set out.

17. It follows in my judgment that there is an ambiguity in the section and that regard can be had to any assistance which may derived from the report on which the statutory provisions are based and to ministerial statements made during the passage of those provisions through Parliament. The conditions set out in *Pepper v Hart [1993] AC 593* are, in my view, satisfied. The assistance which is so derived in my judgment is that the authors of the report and the promoters of the then bill had in mind two situations which it was intended to avoid. The first is that the aggregate of service charges payable in respect of a block of flats amounts to more than 100 per cent of expenditure, thus giving the lessor a surplus over monies expended. The second situation is where the aggregate is less than 100 per cent, thus producing a shortfall. That is a situation which fails to promote the proper maintenance of the block.

18. Each of those situations is avoided if the service charges payable aggregate to 100 per cent. The view may be taken that is it is also desirable, or just as desirable, to avoid a situation where the contributions are unfairly disproportionate such as in the example cited by the respondents or indeed the facts of the present case. But in my judgment that is a mischief of a different nature to that contemplated by the report and the promoters of these provisions. It relates to fairness as between tenants, rather than to whether the lessor makes a profit or has an incentive to maintain the block. The case is somewhat unusual here because the appellants are also the lessees of one of the flats, but as a matter or principle it seems to me that a distinction must be maintained between their interests as lessors on the one hand and as lessees on the other.

19. As was recognised by the authors of the report, their recommendations represented an intervention without majority approval in the contractual freedom of the parties and accordingly required justification. The justification given was that such intervention is needed where the scheme is seriously defective, and the defects have a direct bearing on the upkeep and fitness for habitation of the flats in the block. It seems to me that an intervention in the proportions in which the service charge is made also requires justification, but can not be said to have a bearing on the upkeep and fitness for habitation of the flats in the block. It may well be that such intervention can be justified, but it was not a justification which was made or articulated in the report or in the passage of the bill through Parliament. The reason, I am satisfied, is that that was not the mischief which the provisions were intended to remedy. I accept the submission that whether such intervention can be justified is a major policy decision.

20. It is for this reason that I find that subsection (4) must be construed as if the word "if" reads "only if." Some limited support for that conclusion can be derived in my judgment from the absence of a list or examples of factors which should be taken into account if the LVT had discretion, as appears in some of the other subsections. I say limited because in my judgment there is some force in the point made by the LVT in the present case that such tribunals have experience and expertise in such matters.

21. For the sake of completeness I should say that I did not derive assistance from the LVT decisions to which I was referred. Both of those decisions involved a situation where the aggregate was 100 per cent.

22. Although I have some sympathy for the respondents, in my judgment I must allow this appeal on this point and set aside the determination of the LVT as to the proportions in which the service charge is payable so that those proportions remain as provided for by the leases in question. Accordingly the other points raised by the appellants are academic and I do not decide them. A letter on costs accompanies this decision, which will take affect when the question of costs has been determined.

Dated 28 September 2009

His Honour Judge Jarman QC

Addendum

23. This costs decision is supplemental to the decision. In subsequent written submissions it has been made clear on behalf of the appellants that they seek no order for costs but that they do intend to recover the costs of the appeal against the respondents under the service charge provisions in the leases in question. The appellants submit that if an application were made under section 20C of the Landlord and Tenant Act 1985 then it should be dismissed.

24. I received written submission from The Reverend A and Mrs K Kettle and behalf of Mr Fletcher, Mrs Fairclough and other respondents challenging the appellants' right to recover costs under section 20C. I have also received an additional response and letter (the latter on 29 October 2009) from Mr Fletcher and have taken these into account so far as relevant. The respondents represented themselves during the hearing. On behalf of the appellants I have been asked to disregard disputed assertions which were not the subject of the hearing. It was made clear that the appellants did not wish to incur additional costs in a formal section 20C application hearing unless that was deemed appropriate.

25. Section 20C provides so far as relevant:

"Limitation of service charges: costs of proceedings

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, [residential property tribunal] or leasehold valuation tribunal, or the Lands Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made −

...

(c) in the case of proceedings before the Lands Tribunal, to the tribunal;

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances."

26. In my judgment it is appropriate in the interest of saving yet further costs to treat the respondents' responses as applications under section 20C and to deal with them as such in this decision.

27. The respondents point out that they made applications to the LVT when they discovered that the services charges in question added up to 116 percent. The appellants renegotiated their own lease and that of one other leaseholder before the hearing date of the LVT so that the percentage was reduced to 100. The LVT found that the appellants had failed to comply with the RICS Code of Practice in several respects, had not always responded to matters raised by the leaseholders and that the accounts were not clear. The LVT were not however inclined to provide for a third party manager. There has been little response from the appellants and little management of the property since. It was the appellants' decision to appeal and they have benefited financially from the result. The respondents submit that if they are to be responsible for the costs then they would be penalised through no fault of their own for the LVT decision. Mr Fletcher adds that the appellants appealed as leaseholders rather than landlords and should have come to an agreement as suggested by the LVT. The service charge proportions are unreasonable.

28. The appellants do not accept the complaints with regard to management. In any event in my judgment these complaints are not relevant to this decision which is confined to the costs of the appeal from the LVT. The result of the decision on the appeal is that the LVT had no jurisdiction to review the respective proportions of the service charges once the aggregate was reduced to 100 percent.

29. Although the respondents say that the decision of the LVT was made through no fault of theirs, they argued before that tribunal, as they did on the appeal, that the service charge proportions should be adjusted to a fair basis. That is not a result which in my judgment was open to the LVT or the Upper Tribunal on appeal. Although part of the interest of the appellants in pursuing the appeal may well have been as leaseholders, they were faced as landlords with implementing a decision which was wrong in law. In my judgment it cannot be said with justification that the appellants were unreasonable in appealing that decision to what was in the event a successful conclusion. There is nothing in my judgment in the relevant conduct of the appellants which suggests any other result that the party who has

succeeded in the appeal should recover costs albeit that the mechanism is by way of the service charge provisions.

30. Accordingly the applications under section 20C are dismissed.

Dated 18 November 2009

His Honour Judge Jarman QC