UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2012] UKUT 372 (LC)
UTLC Case Number: LRX/18/2012

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charge – management charges – LVT holding unreasonable – not contended by tenant – no evidence – tribunal relying on own knowledge – held contrary to requirements in* Arrowdell *– appeal allowed

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

BETWEEN WALES AND WEST HOUSING ASSOCIATION LIMITED Appellant

and

SHARON PAINE Respondent

Re: 21 Lynwood Court
Elm Street
Roath
Cardiff CF24 3RI

Decision on written representations

The following case is referred to in this decision:

Arrowdell Ltd v Coniston Court (North) Hove Ltd [2007] RVR 39

DECISION

1. The appellant in this case is the landlord, and the respondent is the tenant of a first floor flat known as 21 Lynwood Court, Elm Street, Cardiff, under a lease dated 5 August 1988. The lease, which was granted under the right-to-buy provisions of the Housing Act 1985, is for a term of 125 years from 1 July 1982. Under the lease the tenant (referred to as the purchaser) covenants under clause 4(b) to pay on demand "(i) the amounts specified in the first proviso to Schedule A" as well as (ii) a reasonable part of the costs of repairs, (iii) and (iv) reasonable parts of insurance costs, (v) the cost of improvements and (vi) a reserve sum. Schedule A contains the rights granted to the tenant in accordance with Part 1 of Schedule 6 to the Act and rights to use the common parts and to benefit from the landlord (vendor) cleaning, lighting, maintaining, etc, the common parts. The first proviso to the schedule is that "the exercise of all rights specified in this Schedule shall be subject to the contribution by those claiming to exercise the same of a share of the reasonable costs of management of the Scheme and of keeping all structures or apparatus affected by such rights in good repair and working order." The Scheme is defined as Lynwood Court.

2. The tenant made an application dated 25 August 2011 to the leasehold valuation tribunal under section 27A of the Landlord and Tenant Act 1985. The LVT treated the application as being in respect of the service charges for "the current service charge year ending 2012". The application contained the following comments on the part of the tenant: "The charges made are not relevant to me as a private tenant and do not benefit me in anyway the costs are overcharged as they are not regular."

3. Prior to the hearing before the LVT a Scott schedule had been prepared setting out all the service charge items for 2011-12 and their respective costs and recording the applicant's comments on each one. Thus, for instance, against "Cleaning Service" the comment "Windows are not cleaned three monthly" appeared. The tenant's total service charge was shown to be £734.46.

4. One item on the schedule was: "Management Charge – The fee set by the Respondent at a level to cover administration, managing accounts, dealing with enquiries, supervising services." The amount for this was shown to be £292. The applicant's comment was: "Administration should not be included"; and the landlord's reply was: "The Respondent must recover the cost of administering and supervising properties from all leaseholders and tenants or its business would not be viable. This charge is applied to all the Respondent's dwellings."

5. In its decision the LVT recorded the case for the tenant as follows:

> "11. After hearing from the Applicant she revised her position and accepted that the matters demanded were, subject to service of the correct notice, properly recoverable under the lease. The tribunal carefully went through the Scott Schedule with the Applicant and upon reflection the Applicant conceded all sums as estimated would be reasonably incurred, save for communal cleaning, Legionella testing and the management charge."

6. The tribunal concluded that the amounts for communal cleaning and Legionella testing were reasonable. It then dealt as follows with the management charge:

> "15. Lastly, the size of the management fee remained in dispute. The Applicant's total service charge for 2011 (less the ground rent of £10) amounted to £666.36, of which the management charge was £292, which is 43.85% of the total demanded.
>
> 16. We put to Mr Goodwin [Mr Cliff Goodwin, who appeared on behalf of the landlord at the hearing] that the management fee was high and he did not demur from this general observation, whilst making no concession as to whether it was reasonably incurred or not.
>
> 17. In the tribunal's opinion there is not a great management burden in running this low maintenance development. Apart from the formalities of preparing accounts and serving demands, there is very little in the way of management required in negotiating and supervising either the initial or subsequent contracts – gardening, cleaning, repairs, insurance and so on. The overall charges are in our view excessive and therefore not reasonably incurred for the purposes of s 19(1)(a) of the Landlord and Tenant Act 1985. £292 per annum is even higher than the fees charged by some well known commercial landlords for their management fees which the tribunal has to adjudicate upon from time to time.
>
> 18. Mr Goodwin told the tribunal the Respondent does not charge administration fees, as so defined by Schedule 11 paragraph 1(1) of the Commonhold and Leasehold Reform Act 2002. However, we find that given the extent of the management charge, it is likely that there is a notional element to the management charge which will go towards financing such requests. It is for this reason that we have not determined an even lower figure for the reasonably incurred management charge.
>
> **Decision**
>
> 19. Applying our knowledge as an expert tribunal WE DETERMINE that the reasonably incurred management charge would be no more than £200 per annum."

7. The appellant applied to the LVT for permission to appeal. It said that under the lease it was permitted to charge a management charge; that the applicant's only comment in the Scott schedule had been that "Administration should not be included"; and that apart from this the applicant did not challenge the payment of the management charge or submit any evidence that would have supported such a challenge. Thus, it said, the tribunal had come to a decision on this without any evidence from the applicant; and it was the tribunal, rather than the applicant, that had expressed the view that the charge was "at the higher end", thus acting contrary to the LVT Guidance, which said that "The LVT is not there, however, to make either party's case for them." The application then set out a comparison between its charges and regulated management charges, comparisons with other providers, and a summary of the costs that it had actually incurred relative to income generated in 2011.

8. Refusing permission to appeal the LVT said:

> "4. The tribunal is entitled to take a view as to whether a management charge has been reasonably incurred whether or not evidence is placed before it by the leaseholder.
>
> 5. Upon making it clear to the respondent that the tribunal was concerned about the rate of the management charge, the Respondent did not seek any adjournment to place evidence as set out in pages 2-4 of the appeal letter. The tribunal made its decision without the benefit of that evidence before us and we cannot now take it into account."

9. On the appellant's application to this Tribunal I granted permission to appeal, and I said that the appeal was suitable for determination on written representations. The tenant has not responded to the appeal. The appellant has set out its grounds of appeal, which are in essence those that it advanced to the LVT when seeking permission to appeal. Its submissions include the material that the LVT, in refusing permission to appeal, said that it could not take into account.

10. The appellant says that it currently manages 595 properties that have been purchased from it as a registered social landlord under the Right to Buy (RTB) scheme. It also manages 600 properties under the Retirement for Sale scheme and the Leasehold Scheme for the Elderly (RFS/LSE). They are a mixture of flats and houses. For all of them it is responsible for the upkeep and maintenance of both the internal and external communal areas, and it charges a management fee for the services provided.

11. Historically, the appellant says, the management charges for both RTB properties and RFS/LSE were set under a government framework. The management charges for RTB properties were set under allowances determined by Tai Cymru, the precursor to the regulatory regime now operated by the Welsh Government. Tai Cymru was abolished in 1999, but the appellant has continued to apply the management charges as set at that date and has simply uplifted them by the RPI each year. The last regulated charge was £217 per annum set for 2000, and the fee has increased by an average of 2.3% per annum since then.

12. The management charges for RFS/LSE were originally regulated by the Housing Corporation and were applicable to the whole of the UK. Although, following devolution, there is now no specific government regulation of these charges in Wales, in England management charges are still regulated by the Tenant Services Authority, the successor body to the Housing Association, and the appellant continues to follow this regulatory regime. The regulated management fee for an RFS/LSE flat for 2011 was set at £360, which compares with the £292 charged by the appellant for its RTB flats. The service provided under each scheme is very similar. The only difference is that the RFS/LSE schemes tend to have an on-site manager, who is paid as a direct cost within the service charge and tends to do more of the management of on-site services, which, for RTB schemes is done by remote managers. Taking this into account, the appellant says, there is an argument that the management charge for RTB schemes ought to be higher than for RFS/LSE schemes, whereas it is substantially lower.

13. As far as the LVT's reference to charges made by commercial landlords are concerned, the appellant says that in its experience their overheads are recovered through three separate charging mechanisms: a management fee, a charge for administration expenses and by a mark-up applied to direct costs. Since the appellant levies neither an administration charge nor a mark-up to direct costs, its management fees cannot fairly be compared with those of commercial providers without considering their other charges, some of which may not be readily visible.

14. The appellant sets out in an appendix a summary of its overall costs in 2011 for its RTB and RFS/LSE properties. Its costs for RTB properties totalled £131,339, and the management charge income was £129,255. For RFS/LSE properties the costs were £203,138, and the management charge income was £216,000.

15. In reducing the management charge element of the service as it did, from £292 to £200 the LVT in my judgement acted erroneously in two ways. The first error consists of procedural unfairness. There are a number of aspects to this. The pre-hearing procedures were designed, very properly, to ensure through the medium of a Scott schedule that each party's case was made clear in advance of the hearing and the issues that the tribunal had to determine were thus defined. In relation to the management charges the applicant's comment was: "Administration should not be included"; and the landlord's reply was: "The Respondent must recover the cost of administering and supervising properties from all leaseholders and tenants or its business would not be viable. This charge is applied to all the Respondent's dwellings." So the position of the parties was clear. The contention of the tenant was that administration charges should not be included; the appellant said that it had to recover the costs of management from all its tenants. No question was raised in relation to the reasonableness of the amount of the management charge. That was not an issue between the parties.

16. At the hearing, the reasonableness of the management charge was raised, but not, it appears, by the tenant. Instead it was the tribunal that put to Mr Goodwin that the management fee was high. Although it is not unlawful for a tribunal in proceedings such as these to question a service charge item, or an aspect of an item, that has not been identified as being in dispute between the parties, it should be slow to do so. This is for two reasons. The first is that proceedings under section 27A are essentially inter partes. An LVT should not regard itself in such proceedings as having a roving commission to mete out justice as it sees it, regardless of the contentions advanced by either party. Secondly, if it questions an item or an aspect of an item that has not hitherto been in dispute, problems of evidence are likely to arise since the parties will not have prepared their cases or sought to produce material to deal with the new question. What happened in the present case appears to me to be an unfortunately good illustration of the sort of problems that can arise and the errors that an LVT may make in dealing with them.

17. The point was put as "a general observation" to Mr Goodwin that the management fee was high, and the decision records that he did not demur from this general observation but made no concession as to whether it was reasonably incurred or not. That was a complete answer to the observation, in the context of proceedings in which such a matter was not one of the issues between the parties, and there was no reason,

contrary to the suggestion in the LVT's refusal of permission to appeal, why he should have sought an adjournment in order to produce evidence. If the tribunal not been satisfied with the answer and considered that the question of reasonableness needed to be pursued, it ought clearly to have invited him to produce evidence justifying the level of the management charge. If it had done this, an adjournment would indeed have been necessary to enable him to produce the material because he could not have been expected to have at his fingertips the sort of matters that the appellant was later able to set out in applying for permission to appeal. It was, in my judgment, manifestly unfair for the LVT to determine that the management charge was not reasonable without affording to the appellant this opportunity.

18. With no material provided by either party on the question of reasonableness the LVT decided to reduce the amount payable in respect of the management charge by, as it put it, "applying our knowledge as an expert tribunal". No part of that "knowledge" had been put to Mr Goodwin. That was manifestly a procedural error. If it had been suggested to him that a particular commercial landlord had charged a particular amount on a particular estate, he might have been able, if he was aware of the relevant facts, to say whether a useful comparison in this respect could be made. If he was not aware of the relevant facts, and was not given the opportunity of investigating them, the LVT would have had no evidence on the matter.

19. The approach to be adopted in situations like those in the present case, and the errors to be avoided, were made clear by the Lands Tribunal (the President and N J Rose FRICS) in *Arrowdell Ltd v Coniston Court (North) Hove Ltd* [2007] RVR 39 in a passage that has appeared in a number of subsequent decisions of that Tribunal and the Lands Chamber. At paragraph 23 the Tribunal, accepting the submissions of counsel on both sides, said this:

> "It is entirely appropriate that, as an expert tribunal, an LVT should use its knowledge and experience to test, and if necessary to reject, evidence that is before it. But there are three inescapable requirements. Firstly, as a tribunal deciding issues between the parties, it must reach its decision on the basis of evidence that is before it. Secondly, it must not reach a conclusion on the basis of evidence that has not been exposed to the parties for comment. Thirdly, it must give reasons for its decision. In the present case the tribunal rejected the evidence of both the experts on relativity, and it was entitled to do this provided its reasons for doing so were explained. But in basing its decision on 'its own knowledge and experience, particularly in relation to relativities which have been agreed between parties or their valuers in other similar cases' it was in error because those agreements on relativity had not been identified nor had the parties had the opportunity to comment on them. As expressed, the decision contravened the second requirement. In refusing permission to appeal, the tribunal said that it did not rely on any specific case or cases, but on this basis the first requirement was contravened. As for the third requirement, reasons that state that the decision was based on no evidence or on evidence that was not disclosed to the parties are adequate in one sense: that they enable the invalidity of the decision to be established. But to support a valid decision the reasons must enable the parties to understand why it was that the tribunal reached the conclusion that it did rather

than some other conclusion, so as to show that the conclusion was one to which the tribunal was entitled to come on the basis of the evidence before it."

20. In the present case the LVT had no evidence before it on the reasonableness of the management charge. It said that it reached its decision by applying its own knowledge, but none of that knowledge had been put to the parties. And the mere statement that it had applied its own knowledge did not explain why £292 was not reasonable and £200 was reasonable. The decision thus failed to meet any of the three inescapable requirements identified in *Arrowdell*. Formally, there were substantial procedural defects, and the decision itself was unlawful since it was based on no evidence. The appeal must accordingly be allowed. The service charge payable for the service charge year is the amount that was demanded by the appellant.

Dated 22 October 2012

George Bartlett QC, President