UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – interpretation of lease – whether omission of list of services to be provided by landlord rendered service charge irrecoverable – long course of conduct – appeal allowed

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF A LEASEHOLD VALUATION TRIBUNAL

BETWEEN:

CARDIFF COMMUNITY HOUSING ASSOCIATION LIMITED

Appellant

and

MS JEANETTE KAHAR

Respondent

Re: 228 Galleon Way,
Butetown,
Cardiff CF10 4JE

Martin Rodger QC, Deputy President

Cardiff Civil Justice Centre

7 June 2016

Mr Gwydion Hughes appeared on behalf of the Appellant
The Respondent appeared on her own behalf

Introduction

1. 228 Galleon Way, Butetown is a one bedroom flat on the fifth floor of a seven storey block on a modern development in Cardiff Bay. On 20 July 2006 the appellant, Cardiff Community Housing Association, granted a weekly tenancy of the flat. The issue in this appeal is whether that tenancy requires the tenant, Ms Jeanette Kahar, to pay a service charge to her landlord, Cardiff Community Housing Association Ltd.

2. In its decision given on 27 November 2015 the leasehold valuation tribunal (LVT) held that Ms Jeanette Kahar, was not obliged to pay a service charge because, although her tenancy agreement included a term apparently requiring the payment of such a charge, the agreement failed to identify the services which were to be provided. The LVT refused permission to appeal, but permission was granted by the Tribunal.

3. At the hearing of the appeal the housing association was represented by Mr Gwydion Hughes of counsel and Ms Kahar spoke on her own behalf. I am grateful to them both for the courteous and constructive way in which the appeal was conducted.

The facts

4. The tenancy of 228 Galleon Way granted on 20 July 2006 was between the appellant housing association and Ms S Kahar, who is the daughter of Ms Jeanette Kahar, the current tenant. The agreement was signed on 20 July 2006 and was for a weekly tenancy beginning on 24 July 2006. It was in a standard printed form, with space for details to be added.

5. The agreement began with a list of general terms, including terms relating to payments, which provided that:

> "1(1) It is agreed as follows:
>
> (i) The weekly payments for the Premises and the date of this Agreement shall be:
>
> | | |
> |---|---|
> | Rent | £48.90 |
> | Service charge | £14.60 |
> | Hearing charge | £ 5.50 |
> | Water charge | |
> | Total weekly charge | £69.00 |
>
> (ii) The total weekly charge is payable in advance on the Monday of each week."

6. The general terms also included the following statement relating to services:

> "1(iii) The Association shall provide the following services in connection with the Premises, for which the Tenants shall pay a Service Charge: ……."

Thus, although the standard text of the agreement included five blank lines where details of the services could be provided, in this case no such details were inserted into the printed form.

7. By clause 1(4) of the agreement the weekly rent could be increased or decreased by the housing association giving the tenant not less than 4 weeks notice in writing. The required notice was to specify "the rent and the included Service Charge." By clause 1(5) regular changes to the amount of the service charge itself were also provided for:

> "(5) The Association may increase or decrease the Service Charge by giving the tenant not less than 4 weeks' notice in writing. Service Charges will normally only be altered once a year, at the same time as the changes to the Rent, but may be altered at any time to reflect changes in the cost of providing the services."

8. Clause 2 of the agreement comprised a number of obligations to be performed by the housing association. It agreed to keep the structure and exterior of the flat and of the building in good repair, to repair the common parts, to keep the exterior and common parts in a good state of decoration, to keep external communal spaces tidy and to insure the structure of the building. For her part, the original tenant agreed by clause 3(2) "to pay the rent and other charges weekly in advance."

9. The agreement also gave the tenant the right to exchange the tenancy and on 21 July 2014 that is what occurred, when Ms Kahar took an assignment of the tenancy from her daughter. The assignment was completed by a formal deed of assignment in which the parties' signatures were witnessed by an officer of the housing association. At the same time the housing association and Ms Kahar each signed a licence permitting the assignment of the tenancy, in which Ms Kahar agreed to pay the rent and to observe all of the terms and conditions of the tenancy. The licence specifically recorded that the current weekly rent was then £87.70.

10. Together with these documents signed on 21 July 2014, although not referred to in either the deed of assignment or in the licence to assign, was a further document on a single sheet of paper headed "Appendix 1: Service Charge Schedule: Galleon Way." Without any introductory explanation this listed 15 separate services, each of the sort one would expect to be provided by a landlord in a modern block of flats, including ground maintenance, communal cleaning, communal lighting, gate and door entry systems, fire alarm, CCTV, TV aerial and satellite systems.

11. A year after taking the assignment of the tenancy Ms Kahar received notice from the housing association that with effect from 3 August 2015 her new rent would be £74.60 and the new service charge would be £16.22 a week. It is now acknowledged by the housing association that this notice contained an error in that the service charge included a sum for window cleaning which ought not to have been there (it is unclear whether this service is not provided, or is provided without charge, but communal window cleaning appears in the

service charge schedule attached to the licence to assign). The housing association later explained that the true figure for the service charge ought to have been £12.92 a week, and a revised notification incorporating that figure was sent to Ms Kahar on 27 August 2015.

12. The error in giving notice of the increased charge came to light after Ms Kahar made an application to the LVT under section 27A Landlord and Tenant Act 1985 on 12 August 2015 in which she requested a determination of her liability. In her application Ms Kahar explained that she had exchanged her previous tenancy of a larger property in order to reduce her weekly expenditure but the effect of the new service charge was that her housing costs were now greater than they had previously been. As she confirmed at the hearing of the appeal, Ms Kahar had by then obtained a breakdown of the individual components of the new service charge from the housing association. In her application to the LVT she asserted generally that the service charge was extremely expensive but took specific issue with the cost of window cleaning, communal electricity, the maintenance of the car park and the item identified as being for "depreciation".

13. In order to meet these challenges, Miss Evans, one of the housing association's staff with responsibility for service charges at Galleon Way, made a witness statement in which she explained the error relating to window cleaning and provided a breakdown of the weekly charges. In paragraph 5 of her statement Miss Evans stated that the service charge schedule had been attached to the deed of assignment signed by Ms Kahar and her daughter on 21 July 2014. Further evidence concerning the services themselves was given in a witness statement by Mr Simms, a more senior manager of the housing association.

14. No issue was raised by Ms Kahar in her application concerning the principle of her liability to pay a service charge, and apart from exhibiting the relevant formal documents to the witness statement of Miss Evans, the housing association did not deal with that question at all in its evidence.

The LVT's decision

15. By its decision of 27 November 2015 the LVT determined that no amounts were due and payable by Ms Kahar to the respondent housing association in respect of service charges. The LVT noted the omission from clause 1(3) of the tenancy agreement of any details of the services which the housing association was to provide and for which the tenant was to pay the service charge. It then formulated two questions, which it put to the solicitor representing the housing association, namely:

> (1) Is there any agreement at all under which the applicant agrees to pay a "service charge"? If yes,
>
> (2) What services were the subject of the service charge and in respect of which the Tribunal could make a determination of payability?

16. In paragraph 9 of its decision the LVT gave its answers to those questions:

"The Tribunal determines that the exclusion of a description of services in clause 1(iii) is fatal to the respondent's case and renders no service charge being payable. Its reasoning is as follows:

(a) *Conduct alone*

The past conduct of the parties alone (i.e. if one was to exclude any consideration of the written Agreement and its assignment) cannot be said to form the basis of a contract. It is evident that at no time did the applicant know what services were the subject of the service charge and she cannot therefore be said to have agreed to pay for those services.

(b) *Conduct to "fill in the gap" in the services in clause 1(iii):*

The same applies as conduct alone. Even if the conduct of the respondent was evidential of the services actually being supplied it does not follow from her payment that the applicant agreed to pay for those services. Indeed the whole subject matter before the Tribunal is her challenge to certain of those services.

(c) *Appendix to the assignment*:

Leaving to one side the fact that the applicant cannot recall this document there is no reference to it in the Assignment, the document itself is just a general list of a large number of widely worded services and there is no evidence of any intention by both parties to incorporate those services as the description of services forming the basis of the service charge.

(d) *What is the extent of the agreement therefore in respect of services?*

The only agreement of sufficient certainty is that the original Tenant agreed to pay a service charge of £14.60. When assigned, the applicant through the assignment, agreed to pay a service charge for services described in the agreement. It cannot be said she agreed to pay £14.60 at that time as clearly time had moved on and the service charge would have been the subject of a number of subsequent adjustments.

The question is whether the core agreement to pay a service charge is sufficient detail of agreement to enable the Tribunal to fill in the gaps i.e. is this a case of "whatever can be made certain is certain". The Tribunal accepts that the respondent has provided services that the applicant has benefited from over a period of time and the Tribunal should look to see if it can find that there is an agreement to pay for those particular services. The difficulty for the Tribunal is that in order to do so it would have to decide what services would be normal and customary in tenancies of this nature so that it can imply an agreement by the applicant to pay for them. In the particular facts of this case however the Tribunal feels that it cannot write the tenancy for the parties where they omitted to include an essential description of the services. It is not the Tribunal's function to decide what services it would be customary for a Housing Association tenant to pay for. In light of this, as the description of services therefore remains blank, it follows that no payment is due by the applicant."

17. The LVT nevertheless helpfully proceeded to consider the reasonableness of the charges challenged by Ms Kahar as far as it was able to on the evidence. This is good practice, especially where a tribunal has taken a point of its own of which neither party was previously aware; usually the least it ought to do, as the LVT did here, is to resolve the issues which the parties themselves regarded as important. Having undertaken that exercise, the LVT provisionally concluded that, of aggregate weekly charges totalling £12.92, the sum of £11.10 would have been reasonable if the tenancy had provided for the recovery of a service charge at all. The LVT indicated, in particular, that the practice of including a sinking fund contribution for the replacement of the lift was not covered by any of the provisions of the agreement and, quite apart from the problem created by the failure to identify the services to be provided in the tenancy agreement, should not be charged for. As the LVT was satisfied for the reasons it had given that no service charge was payable at all it made no further determination in relation to those sums.

The appeal

18. The appeal turns entirely on the effect of the tenancy agreement. The agreement recorded expressly that the weekly payments for the premises included a service charge of £14.60, variable on four weeks notice. By clause 3(ii) the original tenant agreed to pay the rent "and other charges weekly in advance". The "other charges" referred to obviously included the service charge of £14.60.

19. The omission to include details of the services for which the charge was payable in clause 1(3) obviously created some uncertainty over what was to be provided, but in my judgment it cannot be suggested that it relieved the original tenant of the obligation to pay the agreed sum of £14.60 towards those services, whatever they were. The LVT did not suggest that it did, and it was concerned only with the liability of Ms Kahar after she took the assignment of the tenancy.

20. The absence of a list of services in clause 1(iii) does not appear to have created any practical difficulty. I understand the building was new in 2006, so it may not have been possible to point to services already being provided to other tenants of flats in the building when the tenancy was granted. What is clear, however is that an assessment had been made of the charge which was to be levied and, as the landlord is a housing association, it can fairly be inferred that the figure of £14.60 was based on an estimate of the costs of providing specific services. At the commencement of the tenancy there must, therefore, have been a list of services which it was intended should be provided and paid for by the tenant. At any time between July 2006 and July 2014 details of the services to which the charge related could have been requested. The evidence does not disclose whether any such request was made, nor whether the service charge schedule said by Miss Evans to have been annexed to the deed of assignment, had been provided to the original tenant in 2006 or subsequently. What is indisputable, however, is that services were costed, delivered and paid for during the period of 8 years before the assignment of the tenancy to Ms Kahar. The nature of those services was therefore capable of being ascertained, and there is no reason to doubt that they were the same services as were dealt with in the appellant's evidence to the LVT.

21. When Ms Kahar took the assignment of the tenancy in July 2014 she took over the obligations of the original tenant by the agreement she made with her daughter in the deed of assignment. By that stage the tenant's obligations did not include the payment of £14.60 per week as a service charge as the sum originally specified in clause 1(1) of the agreement had no doubt been varied regularly as the cost of services changed. In the licence to assign Ms Kahar also agreed directly with the housing association that she would observe all the terms and conditions of the tenancy. Had anyone asked at that point what the terms and conditions of the tenancy were in relation to the payment of a service charge there could have been no possible ambiguity. The practice of the parties over the previous 8 years provided a continuous record of the services rendered to tenants of flats in the building and of the sums charged for them. If necessary the calculations carried out by the housing association could have been produced to show which of the services actually provided had been taken into account in setting the charge. The LVT concluded that the conduct of the parties could not form the basis of a contract because Ms Kahar did not herself know what services were the subject of the charge so could not be said to have agreed to pay for them. I find that reasoning unconvincing. She had the means of knowing what the services were by inquiry, and agreed to be bound by the terms of the tenancy agreement, including the obligation to pay for services. The only inference from her payment over a period of a year is that, like her daughter who had preceded her as tenant, Ms Kahar was content to pay for the services which had been taken into account by the housing association when it calculated the weekly figure.

22. The alternative way in which Mr Hughes for the Appellant, put the case was that when she took her assignment of the tenancy and entered into the licence to assign, Ms Kahar was given a copy of the service charge schedule for Galleon Way. By agreeing to pay the aggregate rent of £87.70 referred to in the licence, which included the service charge, Ms Kahar was assuming an obligation to contribute towards the cost of the services which were then being provided and which were included in the schedule.

23. Ms Kahar took a very realistic and constructive approach to the appeal. She had always understood that she was liable to pay a service charge and her concern had been about the amount of the increase notified on 1 July 2015. It was the substantial increase to £16.22 a week which she had challenged and she appreciated that a service charge was necessary in order to maintain the services provided to the building. She had a number of specific complaints about the quality of the services but acknowledged that she had not provided any alternative costs for the same services.

24. For the reasons I have already given I am satisfied that the LVT was wrong to conclude that no service charge was payable. In short, the initial ambiguity over the services to be provided has been filled by the course of dealings over the years, both before and after the assignment, and by the express agreement of the respondent to pay the inclusive weekly rent at the time she entered into the licence and was provided with the schedule of services.

Disposal of the appeal

25. I indicated during the hearing of the appeal that this would be my conclusion and Mr Hughes, on behalf of the housing association, suggested that I should remit the application to the LVT for further consideration in view of the fact that it had expressed its conclusions on

the reasonableness of the charges in somewhat provisional terms. I was not attracted to that course and invited the parties to seek to reach agreement, based broadly on the LVT's indications, on the appropriate service charge payable by Ms Kahar for the year beginning 3 August 2015. Unfortunately the LVT's treatment of the sum of £1.16 per week described as being for "depreciation", proved to be an obstacle to such an agreement. It was explained to the LVT by Miss Evans in her witness statement that this sum was for a reserve fund to cover the cost of replacing the lift after 25 years. The LVT made no comment on the quantum of the charge as it did not have evidence to enable it to do so, but indicated that the absence of a clause specifically allowing for a reserve fund would require that it be disallowed in any event.

26. Mr Hughes indicated that the appellant would seek to challenge the LVT's conclusion on the ability to build up a reserve fund for the replacement of the lift. The basis of the challenge would be that a contribution towards the reserve fund had been included in the service charge since the premises were first let in July 2006. Although the schedule of services made no reference to a separate reserve fund it did identify the lift as one of the items on which service charges would be expended and the practice of the parties from the outset should be sufficient to enable the charge to be included as a service charge item.

27. It is unfortunate that the views of the LVT on the recoverability of contributions towards the eventual replacement of the lift were not raised as a separate issue in the appeal. Mr Hughes' submission is certainly arguable, although I express no concluded view on whether the same conclusion should be reached in respect of a "service" which would not have been obvious at the time the charge was being paid.

28. After a short adjournment to enable the parties to consider the position I was invited to set aside the decision of the LVT and to substitute a determination that for the period from 3 August 2015, until any future increase is notified, the weekly service charge contribution payable by Ms Kahar should be an agreed figure of £11. By setting aside the decision of the LVT, the views it expressed on the recoverability of the depreciation charge no longer determine that issue between the parties (whether or not those views would otherwise have been binding).

29. The housing association now intends to consider its position on its entitlement to include the weekly contribution towards a reserve fund, and to investigate to what extent, if at all, the presence of the weekly contribution as a component of the service charge was made known to the tenants of Galleon Way or included in the services described in other tenancy agreements (if the defect in Ms Kahar's agreement is not typical). If it considers that it is entitled to include such a contribution in the service charges for 2016/17, which will presumably be notified to tenants in July 2016, it will no doubt also wish to provide a clear breakdown of those charges. If Ms Kahar or any other tenant then wishes to challenge their liability to make that contribution an application to resolve the issue with proper evidence may then be made to the LVT (I would suggest by the housing association itself).

30. The good sense of building up a fund to meet substantial expenditure on the replacement of the lift is obvious and is in the interests of all parties, but, for the future, it would be

preferable for the housing association to include an express entitlement to accumulate such a reserve in its tenancy agreements.

31. I therefore express no concluded view on the issue of contributions towards a reserve fund and limit my decision to setting aside the determination of the LVT and substituting the agreed weekly service charge of £11.00 for the period from 3 August 2015 until the next increase.

Martin Rodger QC
Deputy President

27 June 2016