IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2018] UKUT 333 (LC)
Case No: LRX/29/2018

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – informal agreement between management company and managing agents – agreement had been renewed annually – whether this agreement constituted a qualifying long term agreement within sections 20 and 20ZA of the Landlord and Tenant Act 1985 as amended

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

BETWEEN:

BRACKEN HILL COURT AT ACKWORTH MANAGEMENT COMPANY LTD **Appellant**

- and -

ANDREW DOBSON AND OTHERS **Respondents**

Re: Flats 5, 17, 21, 11, 15 and 9,
Keswick View,
Ackworth,
Pontefract. WF7 7BT

Decision on Written Representations

His Honour Judge Huskinson

The following cases are referred to in this decision:

Corvan (Properties) Ltd v Abdel-Mahmoud [2018] EWCA Civ 1102

Paddington Walk Management Limited v The Governors of the Peabody Trust [2010] L&TR 6

Poynders Court Ltd v GLS Property Management Ltd [2012] UKUT 339 (LC)

DECISION

1. This is an appeal from the decision of the First-Tier Tribunal Property Chamber (Residential Property) (the FTT) dated 28th February 2018 whereby the FTT decided certain matters regarding the service charges to be paid by the respondents to the appellant in respect of their respective flats at Keswick View, Ackworth, Pontefract WF7 7BT for several service charge years.

2. The sole point arising in this appeal concerns the amount to be paid in respect of management fees. The FTT decided several other points regarding the amount of the relevant service charges, but there is no appeal regarding these other matters.

3. The appellant is the management company for the lessor in relation to the relevant property. Each of the respondents holds a flat on a long lease at a low rent from the lessor. These leases require the provision of various services by the appellant and require the payment of service charges by the respondents. The appellant has appointed Blue Property Management UK Ltd (BPML) as its managing agent. It is the amount properly recoverable in respect of the management fees payable to BPML which is the subject of the present appeal.

4. The FTT dealt with the question of management fees in paragraphs 31 to 33 of its decision in the following terms:

> "31. The Respondent argued that its oral agreement with BPML was not a Qualifying Long Term Agreement and that BPML's agreed management charges (£1500 pa) should not be limited to £800 pa because no consultation had taken place as required by section 22 of the 1985 Act.
>
> 32. The Respondent relied on the statement of Mr Jeyakara, produced to the Tribunal on the day of the hearing. Mr Jeyakara states that the instruction to BPML to manage the property in accordance with statutory requirements and the lease provisions is
>
> *"renewed annually during a telephone conversation with Mr P Evans [a director of BPML]"*
>
> The statement continues
>
> *"…… the contract … has been renewed annually since the original instruction was given; this has taken place on 30th October each year. It is agreed between both parties the contract shall last no longer than 364 days".*
>
> 33. It appears to the Tribunal that this conversation creates a continuous contract lasting 365 days, renewed on the 365th day each year. The Tribunal finds that no tender process is undertaken, and that BPML has no expectation that its

> management of the property will be terminated when Mr Evans speaks with Mr Jeyakara. It follows that the agreement between the Respondent and BPML is a Qualifying Long Term Agreement in respect of which no consultation has taken place, and that the liability of each applicant to contribute to this item of the service charges is limited by the 2003 Regulations to £100 per year."

5. The relevance of this reference to a qualifying long term agreement (QLTA) is as follows. Under the Landlord and Tenant Act 1985 section 20 there is a statutory maximum (currently £100) that a lessee has to pay by way of a contribution to relevant costs incurred under a QLTA, unless the relevant consultation requirements have either been complied with or dispensed with by, or on appeal from, the FTT. In the present case there is no suggestion of any dispensation. Also it is clear that there was no consultation in relation to the contract between the appellant and BPML as manager.

6. Accordingly the contribution each lessee could be required to make towards the relevant costs of management is limited to £100 per annum if the management services are being provided under a QLTA.

7. Section 20ZA(2) of the 1985 Act defines a QLTA as:

> "an agreement entered into, by or on behalf of the landlord or any superior landlord, for a term of more than twelve months".

8. The question for the FTT was whether the management services being provided by BPML to the appellant were being provided under an agreement between the appellant and BPML for a term of more than twelve months.

9. The manner in which the FTT examined and resolved this question is set out above.

10. At a previous hearing concerning the service charges payable by another lessee in the building the FTT had decided (inter-alia) that the contract between the appellant and BPML was an oral one with no details provided regarding its terms and that it was a QLTA prior to which no consultation process took place, with the result that the management fee payable by that lessee was limited to £100 per annum. There was no appeal against that decision. However that does not prevent the appellant, in these present proceedings regarding other lessees who were not party to the previous FTT decision, from raising the present argument.

11. On the morning of the hearing before the FTT counsel for the appellant submitted a skeleton argument to which was attached a short statement from the appellant's company secretary Mr Jeyakara. The respondents objected to this evidence being received. However the

FTT concluded that, in the absence of any other direct evidence as to whether the management contract was a QLTA, the appellant should be permitted to adduce the evidence of Mr Jeyakara.

12. The appellant and the respondents have both agreed to the present appeal being decided upon the written representation procedure.

13. The respondents in their written representations to the Upper Tribunal in relation this appeal raise questions as to whether the contractual arrangements between the appellant and BPML can truly have been made in the manner described by Mr Jeyakara. They further submit that, if these arrangements were made in this manner, this is an unsatisfactory state of affairs.

14. However upon this appeal which is proceeding by way of review (and in relation to which there is no cross-appeal by the respondents) I am bound to accept the findings of fact made by the FTT.

15. The FTT appear to have accepted as factually correct the description given by Mr Jeyakara as to how the instructions to BPML to manage the property have been renewed annually and how it is agreed between the parties that the contract shall last no longer than 364 days.

16. The recent decision of the Court of Appeal in *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102 considers the two cases referred to by the appellant in its statement of case, namely *Paddington Walk Management Limited v The Governors of the Peabody Trust* [2010] L&TR 6 and *Poynders Court Ltd v GLS Property Management Ltd* [2012] UKUT 339 (LC).

17. This decision shows that that the correct approach in a case such as this is to consider the proper construction of the contract between the landlord and the provider of the management services and to decide whether the agreement is for a term exceeding 12 months. This involves considering whether the term must exceed 12 months, rather than analysing the substance of the management agreement and its various obligations and considering whether there can be detected an intention or expectation that the services may be provided for a period extending beyond 12 months. See paragraphs 36 to 39 of that decision:

> "36 The issue the court is invited to decide is whether it is determinative, for the purposes of assessing whether an agreement is for a term longer than a year, that an agreement involves a commitment to twelve months or more (as contended by the appellant), or that the maximum possible length of the period is greater than a year (as submitted by the respondent).

37. If it were necessary to do so, I would agree with the appellant's approach to this issue: the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch*)* (although the point was uncontroversial), where he noted

> "30. Although the estate management deed has no fixed term, it is incapable of determination by West End Quay Estate Management Ltd until the expiry of twenty-five years. Accordingly it is an agreement for more than twelve months." (emphasis added)

38. I would disagree with the approach of the respondent that the deciding factor is the maximum length of the period. HHJ Marshall QC was correct in *Paddington Walk* at paragraph 49 that the deciding factor is the length of the commitment. That must be read as the 'minimum commitment'. Adopting the language of clause 5 itself, the issue is the duration of the "term" the parties have "entered into" in the "agreement".

39. If this interpretation is correct, it would follow that HHJ Gerald was wrong in *Poynders Court* . Whether the agreement is for a term exceeding 12 months is not about the substance of the management agreement and its various obligations. Rather, it is about whether it is an agreement for a term which must exceed 12 months. In *Poynders Court*, whilst the managing agent may have been "intended" to provide the services for a period extending beyond 12 months, the relevant clause as to the term of engagement did not secure that they were under contract to do so for the period of more than twelve months. The requirement that the contract be for a term of more than twelve months cannot be satisfied simply by the contract being indeterminate in length but terminable within the first year."

18. It is therefore necessary to apply this approach to the facts found by the FTT in the present case.

19. The FTT accepted as a matter of fact that the instructions to BPML had been renewed annually during a telephone conversation. The FTT also accepted the evidence that it was agreed between both parties that the contract should last no longer than 364 days. It may well be that both the appellant and BPML had an expectation that in all likelihood the contract would be renewed for the next year. However an expectation to this effect is not the same thing as the existence of a contract between the appellant and BPML which was for a term exceeding 12 months – i.e. a contract under which the minimum commitment which each party took to the other was more than 12 months. From the FTT's acceptance of the evidence of Mr Jeyakara I conclude that either party (whether the appellant or BPML) would have been entitled to decline to renew the contract such that it would have ended on the termination of the relevant 364 day (or perhaps one year) period.

20. It follows that I conclude the FTT was wrong in its findings as set out in paragraph 4 above. Even if the conversation created a "continuous contract lasting 365 days" this would still not be a contract "for a term of more than twelve months" and would therefore not be a QLTA within section 20ZA. The fact that as a matter of history the parties have renewed the contract each year does not alter the fact that, upon the proper construction of the contract between them, the contract was only for 364 days (or for one year) and would not last longer than that unless it was renewed.

21. In the result therefore the appeal must be allowed. The FTT was wrong in concluding that the provisions of section 20 and section 20ZA required the amount of the management fee to be paid by each of the lessees to be limited to £100 per annum.

22. The FTT's decision as to the amount properly payable by way of service charge in respect of management fees was taken solely upon this point regarding a QLTA**.** The FTT did not go on to consider what would have been a reasonable management fee supposing that the amount was not limited to £100 per annum. I have considered whether the case should be remitted to the FTT so that this point can be decided by the FTT. However I notice that there is no cross-appeal by the respondents. I also notice that in the two earlier FTT decisions, which the respondents have submitted in support of their case, the FTT decided in relation to this building (albeit in cases not concerning the present respondents) that a management fee at a rate of £1500 per annum (i.e. £187.50 per flat) was reasonable, see paragraphs 51 to 55 of the decision in MAN/00DB/LSC/2015/0080 and see the last paragraph within numbered paragraph 32 of the decision in MAN/00DB/LSC/2016/0094. Accordingly I do not consider it would be proper to remit this matter for further consideration by the FTT.

23. In the result I allow the appellant's appeal. The amount recoverable through the service charge provisions from the respondents in respect of management fees is not limited to £800 per annum by reason of the rules regarding a QLTA. Accordingly for the relevant years the management fee of £1500 per annum was properly chargeable.

His Honour Judge Huskinson

11 October 2018