

UPPER TRIBUNAL (LANDS CHAMBER)



[2023] UKUT 152 (LC)

UTLC Case Number: LC-2022-561
Royal Courts of Justice

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

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

*LANDLORD AND TENANT – SERVICE CHARGES – Consultation requirements for
qualifying long-term agreements – reasonableness of charges for repair of antiquated heating
system*

BETWEEN

CLARISSA YAMBASU

Appellant

-and-

LONDON BOROUGH OF SOUTHWARK

Respondent

Re: 15 Cronin Street,
London,
SE15 6JJ

Judge Elizabeth Cooke
28 June 2023
Royal Courts of Justice
Decision Date: 5 July 2023

The appellant was not legally represented
Mr Stephen Evans for the respondent

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The following cases are referred to in this decision:

Introduction

1. This is Ms Yambasu's appeal from a decision of the First-tier Tribunal ("the FTT") about the reasonableness of service charges in the sum of £4,375.95 demanded from her in February 2016. The charges were her share of the estimated cost of major works to be carried out at the respondent local authority's property, 1 – 38 Cronin Street in North Peckham, where Ms Yambasu has a long lease of flat number 15.
2. Ms Yambasu presented her own case to the Tribunal, and the respondent was represented by Mr Stephen Evans of counsel; I am grateful to them both.
3. I should say a word about the bundles. Unfortunately it was not possible for the parties to agree a bundle, and each presented their own. The respondent's bundle consisted of the FTT bundle itself, and a further bundle of appeal documents. The respondent did not send a full copy of its bundle to the appellant, making the assumption that she had kept the bundle from the FTT. This was unhelpful both to the appellant and to the Tribunal. However, the appellant was able to see all the documents referred to during the hearing.

The factual background

4. Ms Yambasu has a 125-year lease of her flat, granted to her in 2006. It contains at clause 4(5) a covenant by the lessor to provide a number of services including central heating and hot water "and to ensure so far as practicable that they are maintained at a reasonable level". The lessee covenants to pay "a fair proportion" of the cost to the lessor of providing the services and fulfilling other obligations including insurance, maintenance and repair of the building and so on.
5. By clause 2(8) the lessee covenanted "Not to disconnect the flat from the district central heating system if such system serves the flat without the previous consent in writing of the Council". It is not in dispute that the "district central heating system" serves the flat; at the heart of the long-running dispute between the parties is Ms Yambasu's contention that the system is too old to function economically or to be repaired or maintained, and also that the flats pay too much for heating because the system serves a number of commercial properties as well which, she says, do not pay for it.
6. The respondent issued proceedings against Ms Yambasu in the county court in July 2019 seeking to recover service charges in the sum of £4,375.96 together with costs and interest. The matter was transferred to the FTT for a determination of the reasonableness and payability of the service charge, in its jurisdiction under section 27A of the Landlord and Tenant Act 1985. The judge in the FTT also sat as a county court judge in order to decide about costs and interest. There is no appeal from the county court decision to this Tribunal; I am concerned only with the FTT's assessment of the reasonableness and payability of the charges.
7. The sum in issue in these proceedings was an estimated service charge, invoiced to Ms Yambasu in February 2016, relating to major works to the heating system.

8. Because of the cost of those works, the respondent sent out notices to the residents, dated 29 June 2015, in compliance with its obligation to consult its lessees pursuant to section 20 of the Landlord and Tenant Act 1985 and the Service Charges (Consultation Requirements) (England) Regulations 2003.
9. In her statement of case in the FTT Ms Yambasu explained that the heating system was over 48 years old and well outside its useful economic life of 25 years; she pointed out that it had been refurbished at a cost of £3,784,930.80 since 2013 which she said was an unreasonable cost when apportioned among 730 properties. She made three arguments that are relevant to this appeal:
 - a. She referred to the notice dated 29th June 2015 which she said was dropped through her letter box, without a postage stamp, on 17 July 2015. She asserted that she was entitled to be served with a notice in accordance with section 20 of the 1985 Act.
 - b. She said that the charges had not been fairly allocated – as required by the lease – because they had been split between the 730 properties without the inclusion of a school which was also served by the same system, as well as a Youth Centre, an Education Centre, a Tenant Management Organisation and new development buildings in North Peckham. She also challenged the division between the leasehold properties on an equal basis without regard to the size of the flats so that a resident in a two-bedroomed house such as her own was charged the same as one the lessee of a flat with more bedrooms.
 - c. She complained that the heating was inefficient, that she has suffered long periods without hot water and heating, and that the system is inefficient and uneconomic. She wished to be able to disconnect from the system and install a combination boiler.
10. The hearing before the FTT took place on 4 July 2022. Ms Yambasu did not attend. She asked permission to appeal on the basis that, in view of the reason for her failure to attend, the FTT should not have proceeded in her absence. The Tribunal refused permission on that ground, because (in light of the reason given) there was no realistic prospect of success on appeal. In Ms Yambasu's absence the FTT considered her statement of case and her evidence. The respondent's representative and witnesses did attend.
11. The FTT decided that the respondent had served its section 20 notice on 29th June 2015, that the charges should be apportioned as already determined by the FTT in a decision between the same parties, and that the service charge was reasonable and payable in a lesser sum than that charged by the respondent, with the effect that after deduction of an amount that she had already paid the sum payable was £3,628.78.
12. Ms Yambasu has permission to appeal that decision on three grounds:
 - a. That the FTT did not decide her case on consultation; it determined that the notice had been served on 29 June 2023, in accordance with the respondent's

evidence, but failed to consider whether the consultation requirements had been complied with.

- b. That – in the absence of a clear explanation by the FTT of the basis for the apportionment - the apportionment was unfair on the basis that the leaseholders were paying to heat other properties owned by the landlord.
- c. That the service charges were not reasonably incurred.

13. I address each ground of appeal in turn.

Did the respondent comply with the consultation requirements?

- 14. Section 20 of the Landlord and Tenant Act 1985, as substituted by the Commonhold and Leasehold Reform Act 2002, imposes a limit on the amount that leaseholders can be required to pay in respect of “qualifying works” or works done under a “qualifying long-term agreement” where requirements for consultation have not been complied with and the FTT has not given the landlord a dispensation from those consultation requirements.
- 15. The schedules to the Service Charges (Consultation Requirements) (England) Regulations 2003 set out the consultation requirements for the various kinds of works to which section 20 applies. The schedules specify the contents of the notices, and the extent to which a lessee who responds to a consultation notice is entitled to a further response from the lessor.
- 16. In her statement of case before the FTT Ms Yambasu complained that she was not given the notice until some 18 or 19 days after its date. She stated that she was entitled to be served with a notice “as laid down and in accordance with section 20 of the Landlord and Tenant Act 1985”. I read that as a statement that she was entitled to be consulted in accordance with the statute.
- 17. The FTT, at paragraph 18 of its decision, stated that the only point taken by Ms Yambasu was that she did not receive the notice until 17 July 2015. It accepted the evidence of the respondent’s witnesses and found that the notice was delivered by hand on 29 June 2015.
- 18. That decision said nothing about the content of the notice. The respondent in its grounds of opposition to the appeal, and Mr Evans in his skeleton argument, argued that the FTT was correct to say that the only challenge was to the date of service. I disagree; I take the view that Ms Yambasu in her grounds of appeal was saying that she had not been consulted as the statute required. However, both parties to the appeal produced a copy of the notice itself. It purports to be given under Schedule 3 to the 2003 regulations, being a consultation about major works to be carried out under a qualifying long-term agreement. It meets all the requirements of Schedule 3, which provides as follows:

- (1) The landlord shall give notice in writing of his intention to carry out qualifying works–
 - (a) to each tenant; ...

- (2) The notice shall–
- (a) describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected;
 - (b) state the landlord's reasons for considering it necessary to carry out the proposed works;
 - (c) contain a statement of the total amount of the expenditure estimated by the landlord as likely to be incurred by him on and in connection with the proposed works;
 - (d) invite the making, in writing, of observations in relation to the proposed works or the landlord's estimated expenditure;
 - (e) specify–
 - (i) the address to which such observations may be sent;
 - (ii) that they must be delivered within the relevant period; and
 - (iii) the date on which the relevant period ends.

...

3. Where, within the relevant period, observations are made in relation to the proposed works or the landlord's estimated expenditure by any tenant or the recognised tenants' association, the landlord shall have regard to those observations.

19. There is no provision in Schedule 3 for the lessee to be able to nominate a contractor, because the work is to be done under an existing qualifying long-term agreement. Ms Yambasu did not make any observations under paragraph 1(2)(d).
20. Accordingly the consultation requirements were met. Insofar as there was a challenge to the content of the notice as well as to its date, that challenge was bound to fail. The appeal fails on this point and the FTT's decision that the respondent had complied with the consultation requirements is affirmed.
21. At the hearing of the appeal Ms Yambasu said that what she meant in her statement of case was that there was no qualifying long-term agreement. She said she had asked the respondent for a copy of the agreement to which the notice referred, and she was given a copy of an agreement made in July 2015, which was therefore not in existence when the notice was given at the end of June. Moreover, she said that she had not been consulted before that agreement was made as section 20 of the 1985 Act requires.
22. That was an entirely new challenge; there was no hint of it in Ms Yambasu's statement of case before the FTT, nor in her grounds of appeal to the Tribunal. It is therefore not a point she can now take on appeal. At my request, the respondent has helpfully written to the Tribunal since the hearing to provide details of the QLTA to which the notice referred, and has copied that to the appellant, for which I am grateful. The respondent was not obliged to provide that information to the Tribunal but I hope that it resolves the point for Ms Yambasu.

The apportionment

23. The service charge in dispute is Ms Yambasu's share of a very substantial sum, and as we observed above the lease obliges her to pay "a fair proportion" of the landlord's costs. Her

quarrel with the apportionment of the charge in dispute in these proceedings was, according to her statement of case, twofold: that the leaseholders were paying for heating for the respondent's non-residential tenants, and that the charge was apportioned on a unit basis rather than being weighted in accordance with the size of the property.

24. The FTT dealt with apportionment as follows:

“21. The Defendant makes a number arguments under this heading. Firstly she argues that the method of apportionment of the relevant charges chosen by the Claimant is unfair and therefore unreasonable.

22. This point in relation has been determined as between the parties before. In Tribunal cases LON/00BE/LSC/2014/059 & 0583. That case concerned the same lease provisions and also related to service charges incurred for repairs to the communal heating system. In that case the tribunal decided that it was unfair to apportion the charges on a unit basis when other charges were on the bed-weighting system.

23. Mr Cremin's initial position was that this decision was not binding on this differently constituted tribunal considering a different application. He was asked by the tribunal to consider whether the decision whilst not binding on the tribunal, was binding between the parties in that it created an issue estoppel. He conceded that it did.

It is far from clear whether on this application we would have reached the same finding, but given Mr. Cremin's concession that the decision created an issue estoppel as between the parties, we consider that total figure for the charges should be the alternative figure given at paragraph 14 of the Claimant's statement of case: £4375.96.”

25. So the FTT found that the correct way to apportion the charge was by the “bed-weighting” method, as Ms Yambasu had argued.

26. However, there is no sign that the FTT decided Ms Yambasu's other argument that the heating system serves other properties belonging to the respondent and are not being charged for it, so that the residential lessees are subsidising other properties.

27. In the light of observations made about this point by both parties, I turn to the earlier decision of the FTT, referred to in its paragraph 22 quoted above. That decision, dated 17 July 2015, was about the reasonableness and payability of service charges for the years ended 31 March 2009 to 2014 in respect of heating and hot water, including the cost of major works to the boiler and the heating system.

28. According to both parties, between 2013 and 2015 the respondent had work done on the heating system, after taking advice from consulting engineers. The cost of that work was the subject of the earlier proceedings. After that work was finished it became clear that

more work was needed to the underground pipe system, and the costs of that later work are the subject of the present proceedings.

29. To go back to the 2017 decision, the FTT found, first, that the bed-weighting method was a fair method of apportionment (and that charging per unit was not). Whether that did create an issue estoppel between the parties as regards a different service charge, levied at a different date, I do not need to decide because the FTT's decision on the bed-weighting method was what Ms Yambasu wanted and I do not understand her to challenge it now.
30. The second point the FTT decided in 2017 was that while some of the buildings Ms Yambasu said were connected to the heating system were not connected, a Tenant Management Organisation office and a school were connected. Eight units were added to the denominator of the apportionment fraction to reflect the TMO office, and 29 to reflect the school.
31. It is evident from her statement of case in the FTT in the present proceedings that Ms Yambasu asserts that more properties are in fact connected. However, she was not able to show me any evidence for this that she had produced to the FTT, other than her own assertion. She produced a notice about road closures which suggested that more properties were going to be connected to the heating system in 2020; if that is what happened then one would expect to see it reflected in the apportionment of charges thereafter, but it has no relevance to the charge in issue in the present appeal.
32. That leaves the school and the TMO office, which the FTT has held are connected to the system, and there does not appear to have been any evidence before the FTT on this occasion that they were no longer connected. And that takes us to two difficulties with the FTT's figure of £4,375.96 at its paragraph 24.
33. One is that the figure is, as Mr Evans explained, a typographical error. The respondent in its statement of case at paragraph 14 said that if the method approved by the FTT in 2017 was used then Ms Yambasu's share was £4,205.26, and that is the figure the FTT should have used in its paragraph 24. However, in the summary of its decision at paragraph 1, and in its conclusion at paragraph 35, the FTT said that the amount now payable by Ms Yambasu was £3,628.78. That figure is calculated by subtracting what Ms Yambasu had already paid (£576.48) from £4,205.26; so it is correct if the £4,205.26 was correct.
34. The other difficulty is that the FTT did not deal with Ms Yambasu's assertion that more properties were connected to the system and that they were not paying. The FTT had itself decided in 2017 that the TMO office and the school were connected, and it had no evidence in 2022 that that had changed. So the question arises whether the sum of £4,205.26 is calculated on the basis that the school pays for 29 units and the TMO for 8. The respondent did not have that information to hand at the hearing but it has since produced a calculation which indicates that the total units in the bed-weighting calculation was 4,589. Ms Yambasu's flat pays $\frac{6}{4,589}$ since flats are regarded as four units plus one for each bedroom. The denominator of 4,589 was the figure used by the FTT in 2017 to produce a calculation that included the extra units for the TMO and the school, and I am satisfied that they were correctly included this time too.

35. It would have been helpful if the FTT had spelled this out. But in light of the additional information now to hand this ground of appeal fails; the apportionment approved by the FTT did not fail to include the other buildings connected to the system.

The reasonableness of the charges for the major works

36. That brings us to the final issue in the appeal, and the heart of Ms Yambasu’s quarrel with the respondent about the heating system, which is that it is just too antiquated and expensive for costs incurred in maintaining it to have been reasonably incurred.

37. It is impossible not to have sympathy with Ms Yambasu. She has experienced repeated failures of the heating system over many years. She has already paid substantial sums, following the 2017 proceedings, to have the system upgraded, and is now faced with a further demand, this time for a four-figure sum, for yet more work on an obsolete system, when she could get a combination boiler fitted for a fraction of the cost and be rid of the problem.

38. The FTT’s decision again deals with the issue rather briefly. It accepted the respondent’s witness’ evidence which it summarised as follows in its paragraph 26:

- a. “The Claimant is subject to covenants to keep the system in operation and scrapping the system would require wholesale variation of leases.
- b. Allowing individuals to opt in or out would mean the system would be unable to function properly and would be much more expensive for those remaining on it.
- c. He also makes clear that a substantial amount of other work would be needed to make it possible for units to have their own boilers (as set out at paragraph 11 of his witness statement).
- d. That not all the boilers are operational at once meaning that the system can operate at a level appropriate for the number of dwellings connected to it.
- e. In his view there was no realistic alternative to continuing to maintain the district heating system.”

39. The FTT went on to say:

“29. The Defendant’s final point is that the service provided by the heating system is “below average standard” and that she has been left without heating for “days and sometimes weeks in the middle of the winter from year to year”. She says she has had to spend “lots of money” on electricity using portable heaters to heat her home and to boil hot water. She states that during Christmas 2019 there was no heating and hot water.

30. The difficulty with this argument is that this case is concerned with charges for works designed to improve the functioning and reliability of the district

heating system. Mr. Marengi's evidence is clear that the works have been a success in that they have improved the systems reliability and "bursts have been reduced to a minimum". Water losses have reduced considerably. Given the unviability, as set out above, of scrapping the system in its entirety, it is difficult to see what else the Claimant can do other than carryout works to try and improve the functioning of the system. The Defendant herself appears to accept that the situation has improved from the historic position in that any outages are now for a shorter duration.

31. In the tribunal's view the service charges are reasonable and have improved the functioning and reliability of the district heating system ..."

40. Section 19 of the Landlord and Tenant Act 1985 provides that where a service charge is incurred before the relevant cost is incurred (such as this one), no greater amount than is reasonable is payable. The principal authority on the meaning of "reasonable" in this context is *Waler v Hounslow London Borough Council* [2017] EWCA Civ, where the Court of Appeal – in a decision about costs actually incurred rather than estimated charges - held that the outcome achieved by the landlord must be a reasonable one, but need not be the cheapest; nor need it be the best possible solution, nor the one preferred by the tribunal.
41. The FTT's reasoning at its paragraphs 26 to 31, if read without knowledge of the background, are not compelling; one might get the impression that the landlord was locked into a system that it had to continue to maintain, no matter how uneconomic it had become. The idea that the landlord could not change the system without varying the leases is unconvincing; the lease requires the respondent to provide heating and hot water (which requirement could be waived), and does not require it to continue to maintain this particular system.
42. However, what is apparent from perusal of the appeal bundles produced by both parties, albeit not spelt out in full in the FTT's decision (no doubt because the background is so well-known to both parties) is that the respondent's decision to carry out the major works in question in this appeal followed a programme of work begun in 2013, after a feasibility study carried out by consulting engineers. That study recognised that the system had reached the end of its useful life, but that the respondent wanted to carry out a phased programme of upgrading rather than starting again from scratch, because of budget constraints. The work done between 2013 and 2015 consisted of the installation of two new boilers and associated pipework and electrical services. The further work that is the subject of the charge in issue in this appeal builds on that work.
43. It is therefore abundantly clear that for the respondent now to abandon the old system would mean that it would have wasted the work done between 2013 and 2015. In the light of that background, which was well-known to the parties, it is possible both to understand Ms Yambasu's continuing frustration but also to understand that this further cost, building on the earlier work of renewal, was reasonably incurred by the respondent. As to whether it was reasonable in terms the actual amount, there was no evidence before the FTT that the estimate was unreasonably expensive. Indeed there was no evidence at all that about the level of the charge; Ms Yambasu's argument was that she should not have to pay at all.

44. Ms Yambasu's preferred solution was for the respondent to allow her to disconnect from the system. The lease gives the respondent an unqualified right to refuse her permission to do that (see paragraph 5 above) and it has done so. Does the availability of that alternative mean that the service charge was not reasonable? Clearly not; the respondent's reasons for rejecting the request to disconnect, summarised at paragraph 41 above, were sound: that the disconnection of one residents places a greater burden on the others, and that there would in fact be more work needed to make disconnection possible, which of course residents would have to pay for.

Conclusion

45. Accordingly the appeal fails and the decision of the FTT remains in place.

Judge Elizabeth Cooke

5 July 2023

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.