



Neutral Citation Number: [2020] EWCA Civ 1621

Case No: C3/2019/1919

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)

His Honour Nicholas Huskinson

LRX/39/2018

[2019] UKUT 0130 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 December 2020

Before:

LORD JUSTICE DAVID RICHARDS
LORD JUSTICE HICKINBOTTOM

and

LADY JUSTICE ANDREWS

Between:

CURO PLACES LIMITED

Appellant

- and -

ANTHONY PIMLETT

Respondent

Christopher Baker (instructed by **Anthony Collins Solicitors LLP**) for the **Appellant**
Justin Bates and Miriam Seitler (instructed by **SouthWestLaw**) for the **Respondent**

Hearing dates: 5 November 2020

Approved Judgment

Lord Justice David Richards:

1. This second appeal concerns the service charge provisions in a tenancy agreement of a one-bedroom bungalow in a sheltered housing scheme in Bristol. Although the amount involved in this case is small, we are told that the same issues arise in over 3,400 other tenancy agreements, as regards properties on the same and other housing schemes of which the appellant is the landlord. We are told that the overall financial impact is in excess of £300,000 pa and will amount cumulatively, as at the end of the appellant's current financial year on 31 March 2021, to nearly £1.16 million.
2. The tenancy agreement, dated 18 August 2008, was made between the appellant (the landlord) and the respondent (the tenant). The bungalow is one of 32 residential units set in communal grounds with lawns, trees and paths. It is common ground that the landlord maintained the communal grounds at the time of the tenancy agreement and had done so for some years before then. Until 2017, the landlord did not seek to levy a charge for this maintenance (grounds maintenance) on tenants whose tenancies commenced before the end of April 2010 (when a change to the standard tenancy terms was made, expressly to cover grounds maintenance).
3. In January 2017, the landlord gave a written notice to the tenant, seeking to add grounds maintenance to the services under the tenancy agreement for which it could charge, and to charge £77.98 pa (or £1.50 per week) for grounds maintenance for 2017/18. The tenant objected. In circumstances where grounds maintenance had been provided without charge since he became a tenant in 2008, he argued that the landlord had no power under the terms of the tenancy agreement to add it as a service for which it could charge. Further, he contended that, if the tenancy agreement did permit its addition, the term was not binding on him by virtue of the Unfair Terms in Consumer Regulations 1999 (the 1999 Regulations).
4. In June 2017, the tenant applied to the First-tier Tribunal (Property Chamber) (the FTT) for a determination under section 27A of the Landlord and Tenant Act 1985 of his liability to pay the service charge in respect of grounds maintenance. Although the tenant raised both the issue as to the terms of the tenancy agreement and the issue under the 1999 Regulations, the FTT decided only the issue of construction, ruling in favour of the tenant. It did not consider or rule on the application of the 1999 Regulations. The Upper Tribunal granted permission to appeal. In a Decision dated 18 April 2019, the Upper Tribunal (Lands Chamber) (HH Judge Nicholas Huskisson) (the UT and the UT judge) dismissed the appeal on the construction point. The UT judge gave the appellant permission to appeal to this court.
5. A preliminary point arose as to whether this court should deal with the issue under the 1999 Regulations, if we were to hold in favour of the landlord on the construction of the tenancy agreement. The landlord wished us to do so, and advanced submissions on it in its skeleton argument. The tenant opposed this course, submitting that, should it arise, it should be remitted to the FTT for determination.
6. Permission to appeal to the UT had been confined to the construction issue and similarly, in giving permission to appeal to this court, the UT judge stated: "The grounds of appeal raise arguments as to the proper construction of the Tenancy Agreement which have a real prospect of success". In his Decision, the UT judge had recorded the common ground as regards the issue under the 1999 regulations at [12]:

“In the grant of permission to appeal to the Upper Tribunal it was recognised that the only issue in this appeal concerns the interpretation of the document. Neither party at the hearing before me had prepared any argument regarding unfair contract terms. Also I was told that there are other cases raising a similar point to that raised by the respondent which are pending before the FTT, being cases in which it is intended to argue (if necessary) the points regarding unfair contract terms. In these circumstances I was asked by both the appellant and the respondent not to consider the question of unfair contract terms. If my decision was favourable to the respondent the point would not arise. If my decision was favourable to the appellant then I was asked to remit to the FTT the question of whether clause 2.10.1(iii) was unenforceable by reason of being an unfair contract term.”

7. Having invited and received a written submission from the landlord as to whether this court should deal with the issue, we ruled before the start of the hearing that we would not do so. We did not consider it appropriate that such a point should be considered for the first time on a second appeal, particularly (though not exclusively) because it requires evaluation of evidence and of whether the term is, in all the relevant circumstances, unfair, and there may be a need for more evidence. Further, this appeared to have been the position adopted by both parties before the UT. The submissions before us were therefore directed only to the issue of construction.
8. The tenancy agreement was made with Somer Community Housing Trust, a registered social landlord (or, as it would now be termed, a registered provider of social housing). The appellant was formed as a housing association in 2012, following the amalgamation of Somer and two other housing associations, and thereby became the landlord.
9. The tenancy agreement comprises two parts: the particulars of tenancy and the conditions of tenancy agreement. The particulars of tenancy contain the details specific to the tenant, including the rent and service charges. It recorded the weekly rent as £65.85 with a weekly service charge, described as a “supporting people charge”, of £11.70. The service charge was itself broken down into “emergency alarm” (£2.19) and “sheltered housing officer” (£9.51). These services were subsequently discontinued in 2016.
10. The conditions of tenancy contain terms in standard form, including the following provisions relevant to this appeal.
11. Under the headings “Service Charges (where applicable)” and “Changes in the Service Charge” respectively, clauses 1.4.1 and 1.5.1 provide:

“1.4.1 If you receive any service with specific charges from the Trust they will be listed in the Particulars of Tenancy.

You will pay a service charge for those services.”

“1.5.1 The annual service charge will be based on how much the Trust estimates it is likely to spend during the year to provide the services to you.”

12. Clause 2 contains the landlord’s obligations and under the heading “Services”, clause 2.10.1 provides:

“The Trust agrees to provide the Services (if any) listed in the Tenancy Agreement and for which you pay a service charge providing that, subject to consultation with tenants:

(i) the Trust may stop providing any of the Services if it reasonably believes it is no longer practicable to do so; or

(ii) provide the same service in a different way; or

(iii) it may provide extra Services if it believes this would be useful.”

13. Under the heading “Altering the Agreement”, clause 6.3.1 provides:

“Except for changes in rent or service charges the terms of this Tenancy may only be changed if you and the Trust agree to the changes in writing.”

14. Only in clause 2.10.1 does the word “Services” appear with an upper case “S”, but even then “service” appears in sub-paragraph (ii) with a lower case “s”. In my view, nothing turns on the use of the upper or lower case, which appears to be haphazard.

15. Grounds maintenance was not, of course, a service listed in the particulars of the tenancy in this case. Clause 1.4.1 did not therefore apply to it, at any rate before a notice of variation given in January 2017. Nor, as is common ground, did it fall within the landlord’s obligations set out in clause 2 of the Conditions, save probably as regards those paths necessary for the tenant’s occupation of his property.

16. In a notice of variation dated 16 January 2017 and served on the tenant, the landlord stated that the tenancy would be varied with effect from 28 February 2017 by the addition of grounds maintenance as a service to be provided by it, for which a service charge would be payable by the tenant.

17. The landlord submitted to the Tribunals below that it was entitled to provide grounds maintenance as an extra service pursuant to clause 2.10.1(iii), having carried out the consultation required by 2.10.1, and to charge for it, with its amount determined in accordance with clause 1.5.1. It submitted that it was entitled to vary in this respect the terms of the tenancy in accordance with the exception “for changes in rent and service charges” provided by clause 6.3.1. It is not disputed that the landlord carried out a proper consultation.

18. Affirming the decision of the FTT, the UT judge held that the landlord was not entitled by the terms of the tenancy agreement to designate grounds maintenance as an extra service or, therefore, to charge for it. His reasoning was set out as follows:

“41. However I note that the position at the date of the grant of the tenancy agreement was as follows. The bungalow let to the respondent was part of a sheltered housing scheme and was set within substantial garden grounds which were properly maintained by the landlord SHT. SHT was a responsible social landlord. Accordingly the tenancy was granted in circumstances where both landlord and tenant knew that the grounds were maintained by the landlord and where there was nothing to indicate any prospect of alteration in this position. Despite this being the case the tenancy agreement made no provision for payment by the tenant of a service charge towards the landlord’s costs of maintaining the grounds.

42. Clause 1.4.1 is of importance. This made clear that the only matters to be charged for by way of service charge were those falling within the following words: “if you receive any services with specific charges from the Trust they will be listed in the Particulars of Tenancy”. After the grant of the tenancy the landlord was not entitled to charge for ground maintenance – the only route by which the landlord (now the appellant) could become entitled to charge for ground maintenance is if the appellant is correct in its argument that it was entitled pursuant to clause 2.10.1 to add ground maintenance to the services and to charge for it.

43. The respondent could only operate clause 2.10.1(iii) for the purpose it seeks if ground maintenance can properly be said to fall within the following words: “It may provide extra Services if it believes this would be useful”.

44. In my view the word extra here means extra to services that as a matter of fact are being provided by the appellant prior to the purported reliance upon clause 2.10.1(iii). This in my judgement is the natural meaning of the words.

45. My view upon this point is strengthened by the inclusion of the words “if it believes this would be useful”. The addition of the extra service must be something which can properly be believed to be of some use (or benefit) so as to make the post-addition position on the estate better than the pre-addition position. However on the facts of the present case the pre-addition position (i.e prior to the purported exercise of clause 2.10.1(iii)) is exactly the same as regards ground maintenance to the post addition position. There is no way in which the operation by the appellant of clause 2.10.1(iii) can be said to be useful save only the use to the appellant of being able to charge money for something it was not previously charging money for. A financial benefit of this kind to the appellant is in my view not what is contemplated by the word “useful”.

46. I consider that there is further support for my view in the following point. Clause 2.10.1 opens with a provision that the landlord “agrees to provide the Services (if any) listed in the Tenancy Agreement and for which you pay a service charge...” Accordingly as regards these services there is an agreement by the landlord to provide the services – in other words the landlord is contractually obliged to do so. However subparagraph (iii) merely states that the landlord “may” provide extra services. It seems that if this provision is operated then, although the landlord is entitled to provide the services, the landlord is not obliged to do so. Accordingly these services, supposing they had properly been introduced as constituting “extra” services, would be services which stood in a different position from the ones which the landlord had actually contracted to provide. These services are not of a type which it is contemplated should be paid for having regard to clause 1.4.1.”

19. Having arrived at what the UT considered to be the natural and ordinary meaning of the words of the relevant provisions of the tenancy agreement, the UT added at [48]:

“As regards the overall purpose of the clause and the tenancy agreement, the purpose of the tenancy agreement was to grant to the respondent a tenancy of a bungalow in attractive garden grounds which could be expected to be kept maintained (rather than be allowed to become neglected and overgrown) by the landlord. These were the facts and circumstances known or assumed by the parties at the time the tenancy agreement was executed. However despite this the tenancy agreement made no provision for the payment of any service charge by the tenant in respect of ground maintenance. Also there is nothing inconsistent with commercial common sense for the respondent to be taking a tenancy of a bungalow in maintained grounds in circumstances where, although there was no contractual obligation on the landlord, the landlord was a responsible provider of sheltered accommodation and could be expected to continue to maintain the grounds – such that the rent paid by the respondent would be a rent appropriate for a bungalow in grounds which could be expected to continue to be maintained without further charge to the tenant.”

20. Mr Bates, on behalf of the tenant, supports the reasoning of the UT judge.
21. Central to the UT’s reasoning was, correctly, the meaning and effect of clause 2.10.1. It read “extra Services” as connoting services that were extra to those in fact being provided by the landlord. I am unable to agree that this is the natural and ordinary meaning of those words, whether in the context of the tenancy agreement read alone or (as it must be, so far as appropriate) in the factual context in which it was made.
22. As a matter of the language of clause 2.10.1, the words “extra Services” in subparagraph (iii) are in my judgment governed by the opening words of that clause:

“The Trust agrees to provide the Services (if any) listed in the Tenancy Agreement and for which you pay a service charge”. It seems to me inescapable that the services contemplated by sub-paragraph (iii) are those which are extra to the services listed in the Tenancy Agreement. There is no reference in clause 2.10.1, or elsewhere in the tenancy agreement, to services that are or were in fact provided by the landlord, as opposed to those that are listed in the agreement.

23. It also seems inescapable to me that sub-paragraph (iii) must be read consistently with sub-paragraphs (i) and (ii). Sub-paragraph (i) provides that the landlord “may stop providing any of the Services if it reasonably believes it is no longer practicable to do so” while sub-paragraph (ii) provides that it may “provide the same service in a different manner”. These sub-paragraphs refer back to the services “listed in the Tenancy Agreement” and entitle the landlord, subject to consultation with the tenants, to vary the tenancy agreement in those ways. Likewise, in my view, sub-paragraph (iii) entitles the landlord to vary the agreement by adding services if it believes this would be useful. They are all means whereby the landlord’s obligations as regards the provision of services may be varied, and varied without the consent of the tenants, albeit subject to prior consultation with them.
24. It is worth also noting the protection for tenants provided by clause 2.10.1. The landlord’s belief that the provision of the extra service would be useful must, of course, be genuine, and there must be genuine and prior consultation with tenants. The belief must also be rational and made after consideration of all obviously relevant considerations and the exclusion of all irrelevant considerations: see *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661. Additional protection is provided by the landlord’s statutory status as a registered provider of social housing, and the internal complaints procedure and the right to take complaints to an ombudsman: see clauses 6.5.1 and 6.6.1. This, I consider, meets the point made by the UT at [48] that the landlord is a responsible provider of sheltered accommodation.
25. To read these sub-paragraphs, or just sub-paragraph (iii), as referring instead to the services in fact provided by the landlord is to introduce a point of reference for which there is, in my view, no warrant in the terms of clause 2.10.1 or in any other part of the agreement. It would have the effect of making these provisions depend on a factual investigation of the position prevailing at the relevant time. I use the term “relevant time” advisedly, because there seems to be some confusion as to what would constitute the relevant time. At [41], the UT judge referred to the position as at the time in 2008 that the tenancy agreement was made. At [48], he emphasised the position at that time. However, at [44], he stated his view that sub-paragraph (iii) refers to services that are “extra to services that as a matter of fact are being provided by the appellant *prior to the purported reliance upon clause 2.10.1(iii)*” (emphasis added). This is repeated at [45] as the relevant time. If the relevant time is the date of the tenancy, it would foreseeably produce inconsistent results for different tenancy agreements with identical provisions, depending on their commencement dates, and require a factual investigation of the precise extent of the services being provided without charge at those dates. If the relevant time is the position prior to the purported reliance on sub-paragraph (iii), there could be no objection to invoking the sub-paragraph in respect of services which had once been provided by the landlord but which it had ceased to provide. If any of these results were intended, they would need

to be reflected in the language of the agreement, rather than being contrary to what, in my judgment, is the natural meaning of the agreement.

26. In support of his reading of sub-paragraph (iii), the UT judge said at [45] that his view was strengthened by the words “if it believes this would be useful”, which he read as requiring the position of the estate after the addition of the extra service to be, in fact, better than its pre-addition state. On the facts of the present case, the pre- and post-addition positions of the estate would be the same as regards grounds maintenance and the addition of grounds maintenance could not therefore be said to be useful, save for the purposes of the landlord who could then charge for it. This, as it seems to me, ignores that, as regards this tenancy agreement, the landlord would have been entitled at any time to stop providing grounds maintenance. By adding it as an extra service under sub-paragraph (iii), the landlord becomes contractually bound to provide it, unless and until “it reasonably believes that it is no longer practicable to do so” under sub-paragraph (i). Mr Bates supported the UT’s reasoning by submitting that “useful” in sub-paragraph (iii) governs the service; it cannot be said to be useful to provide a service if it is already being provided. As a matter of the language used, this is not in my view correct. Sub-paragraph (iii) states that “it may provide extra Services if *this* would be useful” (emphasis added). “Services” is plural, so as a matter of grammar “this” cannot refer to the extra services. In my view, “this” refers to the *provision* of the extra services under the agreement in accordance with sub-paragraph (iii), which thereby become part of the landlord’s obligations.
27. I do not consider plausible the reading of sub-paragraph (iii) adopted by the UT judge at [46]. He considered that sub-paragraph (iii), through the use of the permissive words “it may provide”, entitles the landlord at any time to cease to provide extra services once added under clause 2.10. In its context, however, the word “may” refers to the discretion of the landlord to add extra services to the listed services. Once the discretion is exercised those extra services form part of the services which it is obliged to provide under the agreement. If the purpose of sub-paragraph (iii) were to enable the landlord voluntarily to provide extra services, it is hard to see why it should be included at all, still less why there should be a requirement for prior consultation with the tenants.
28. Picking up on what the UT judge said at the end of [46], that the services envisaged by clause 2.10.1(iii) “are not of a type which it is contemplated should be paid for having regard to clause 1.4.1”, Mr Bates submitted that there was no provision in the agreement entitling the landlord to charge for any extra services, whether or not they were already being provided. He pointed to clause 1.4.1 which in terms refers only to the services listed in the particulars of tenancy.
29. I cannot accept this submission. Clause 1.5.1 provides that the annual service charge is to be based on the landlord’s estimate of the amount it is likely to spend “during the year to provide the services to you”, with balancing payments one way or the other after the end of the year once the costs actually incurred are known. Once it is accepted that, by operating clause 2.10.1, the landlord can add extra services to those that it is obliged to provide, it follows that they will be included in “the services” by reference to which the annual service charge is to be calculated. The effect of clause 6.3.1 is that changes in rent and service charges may be made without the tenant’s agreement.

30. I should mention the point made by the UT judge at the end of [48] where he suggested that the rent paid by the tenant “would be a rent appropriate for a bungalow in grounds which could be expected to continue to be maintained without further charge to the tenant”. There was no evidence before the Tribunals to support this suggestion.
31. For these reasons, I am unable to agree with the decisions of the tribunals below, and I would accordingly allow the appeal. It follows from what I said at the start of this judgment, that I would remit to the FTT the issue concerning the application of the 1999 Regulations.

Lord Justice Hickinbottom:

32. I agree.

Lady Justice Andrews:

33. I also agree.