UPPER TRIBUNAL (LANDS CHAMBER)

[2023] UKUT 206 (LC)

LC-2022-595

Durham Civil & Family Justice Centre

14 August 2023

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

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

LANDLORD AND TENANT – SERVICE CHARGES – assured tenancies – whether costs of services added since commencement of tenancy recoverable – effect of suggested failure to include prescribed information with service charge demands – section 21B, Landlord and Tenant Act 1985 – appeal dismissed

BETWEEN

(1) MARY MIDDLETON
(2) SYLVIA JOAN PEACOCK

Appellants

-and-

KARBON HOMES LIMITED

Respondent

Re: 9 Magdalene Court,
Medomsley, Consett,
County Durham

Martin Rodger KC, Deputy Chamber President

11 August 2023

Mr William Peacock, as lay representative, for the appellants
Ms Robyn Cunningham, instructed by Ward Hadaway LLP, for the respondent

No cases are referred to in this decision

Introduction

1. The main issue in this appeal is whether the respondent social housing provider was entitled to collect service charges for services which it provided to the 19 assured tenants of Magdalene Court, a purpose-built block of retirement apartments in Consett.

2. The appeal is against a decision of the First-tier Tribunal (Property Chamber) (the FTT) issued on 25 April 2022 on an application brought by two of the assured tenants under section 27A, Landlord and Tenant Act 1985 (the 1985 Act). The FTT determined the liability of the applicants and other tenants of flats in the building to pay service charges for the years 2017 to 2021 to their landlord, the respondent, Karbon Homes Ltd (Karbon).

3. The application to the FTT was brought by Mrs Mary Middleton, the tenant of Flat No. 3 in Magdalene Court, and Mrs Sylvia Peacock, the tenant of Flat No. 9. Mrs Middleton sadly died in February 2023 and has been succeeded in the tenancy by her husband, Mr John Middleton. There has been no application to substitute a personal representative, but the appeal continues, and the issues are identical for each of the flats.

4. At the hearing of the appeal Mrs Peacock was represented by her husband, Mr William Peacock, who had represented both the applicants at the FTT. Karbon was represented by Ms Robyn Cunningham. I am very grateful both to Mr Peacock and Ms Cunningham for guiding me through the denser material in this case.

The tenancy agreements

5. Mrs Middleton occupied Flat 3 under a tenancy agreement granted in 2011 which became a fully assured tenancy in 2012. Mrs Peacock occupied Flat 9 under a tenancy granted in 2014, which became assured in 2015. In each case the original landlord was Derwentside Homes Ltd, but its interest was acquired by Karbon in 2017.

6. The tenancy agreements are not identical, but the differences are immaterial for the issues in the appeal. It is convenient to refer to Mrs Middleton's tenancy of Flat 3, which is one of the earliest in the block (which was converted to its current form in 2011).

7. The tenancy is a weekly tenancy and rent is payable weekly in advance, on Monday. By clause 28.1 the tenant agreed to pay the rent, service charges and any other charges listed at the start of the agreement when they were due. At the beginning of the agreement, above the space for the tenant's signature, the weekly rent, inclusive of a service charge, was recorded as £102.27. The weekly service charge at the start of the tenancy which formed part of that rent was stated as £36.49. That charge was then broken down into service charges of £30.13 and water and sewerage charges of £6.36. Other charges which might have been included were listed (for garages, heating, furniture or personal support) but none was applicable, and these were left blank.

8. Neither of the tenancy agreements included a list of the services for which the service charges were payable, but clauses 56.1 and 56.2 explained how the charges could be varied, as follows:

> "56.1 If you receive services we may increase your Service Charges on the first Monday in April by an amount set out in a written notice sent in advance of it taking effect (the "First Service Charge Increase"). We will send you a Service Charge Schedule showing full details.
>
> 56.2 After the First Service Charge Increase you will be asked to pay a Service Charge based on our estimate of the sum we are likely to spend in providing services to you over the coming year. That will be the Service Charge we will ask you to pay for that year and will set out in a Service Charge Schedule."

9. The tenancy agreement therefore provided that, at least from the April following the start of the agreement, full details of the service charge would be included in a service charge schedule. The amount of the service charge itself would also be stated in a written notice given before the first Monday in April. It may be that details of the services had been given to the tenants at the time they signed the agreement, but there is no evidence about that. Each year an estimate would be made of the cost of providing the services in the schedule. After each year end the costs actually incurred would be ascertained and any surplus or shortfall would be taken into account in calculating the charge for the following year.

10. I was shown an example of a written notice increasing the rent and service charge for 2019-20. It includes a schedule which lists charges for a variety of services including cleaning and the supply of electricity to communal areas, the provision of a communal laundry, servicing and repair of the lift, a retirement living scheme officer and other items.

11. Clause 57 of the tenancy agreement is headed "Varying Existing Services" and says this:

> "We may, after consulting with you and all other affected tenants, increase, add, alter, vary, reduce or remove any service(s) for which you pay a Service Charge. We will act reasonably and take account of tenants' views … [A]ny change will take effect after we have served one month's notice setting out the changes and the date from which they will take effect (a "Notice of Variation"). The Notice of Variation will also set out any revised Service Charge or new service as a result."

The tenants' application

12. Mr Peacock began to question the service charges levied by Karbon and its predecessor in 2017 and secured a number of credits and concessions. In September 2020 he assisted the appellants to issue their application under section 27A, 1985 Act for a determination of the charges payable for the years 2011 onwards.

13. By a direction issued on 7 January 2021 the FTT ruled that it would not consider charges for any year earlier than 2013. Karbon was not legally represented during the final FTT hearing. The FTT recorded in its final decision that the housing manager who attended on Karbon's behalf, Mr Robson, "acknowledged that there had been a failure to provide the necessary statutory information prescribed by section 21B of the 1985 Act for service charge years 2014/15, 2015/16, 2016/17 and conceded that sums demanded for those years would not be pursued". Since the charges had already been paid by the tenants who brought

the application, it is not clear what was meant or understood by that apparent "concession", but the FTT said nothing more about those three years.

14. The remaining charges in issue at the FTT hearing were for the years from 1 April 2017 to 31 March 2020, and on account for the year 2020-21. Mr Peacock had identified the items which were in dispute in the original application form and the parties had explained their respective arguments about those items in a schedule directed by the FTT.

15. The FTT decided that most of the charges were payable in full, but it reduced a very small number. The main reason it gave for approving the charges was that it had received no evidence that they were unreasonable for the service provided. It was satisfied that the current method of apportionment of charges provided to all of the landlord's buildings was now reasonable and that charges collected by Karbon's predecessor using a different apportionment had been recalculated, with the revised apportionments being shown in the schedule.

The issues

16. The Tribunal gave permission to appeal on three issues and adjourned consideration of the whether permission should be given on two further issues until the hearing of the appeal.

17. The main ground for which permission was given concerned Karbon's entitlement to add charges which had not originally been included in the service charge schedule when the tenancies began.

18. Additional points were made about the apportionment of the cost of contracts for monitoring fire alarm panels, smoke alarms and door entry systems, and the cost of providing remote help points and a response service. On closer investigation these points were simply examples of the same overarching issue (at least, to the extent that permission to appeal had been granted; Mr Peacock would also have liked to challenge the FTT's conclusion that the charges were reasonable but he did not have permission to do so).

19. Permission was also sought on an issue concerning compliance with section 21B, 1985 Act in years other than those which Karbon had not conceded. Consideration of whether to grant permission on that issue was deferred because it was not clear from the FTT's decision whether it had been the subject of agreement at the hearing.

20. Whether permission should be granted on an issue concerning the apportionment of the cost of providing the warden call service was also deferred because it was not clear from the FTT's decision whether it had given its approval to the charges claimed by the landlord or required that they be recalculated using a different method of apportionment.

Additional charges

21. The tenants' case before the FTT, and repeated by Mr Peacock at the appeal, was that the landlord was not generally allowed to treat items which it was obliged to provide under the terms of the tenancy agreement as services for which a charge was payable. Only items

which were specifically identified as subject to an additional charge could be included (and those were limited to the heating and cleaning of communal areas). The FTT did not accept that proposition and pointed out that, from their commencement, each tenancy agreement included a substantial service charge. Mr Peacock reargued the point at the appeal, although he did not have permission to appeal on it. The FTT's conclusion was clearly correct. The tenancy agreement clearly reflects an understanding that payment would be made for certain services, the estimated cost of which was capable of being identified and recorded as part of the rent payable from the commencement of the tenancy. Mr Peacock said that the estimate was too high because it included items which were not identified as services in the agreement. There is no evidence of what was said about services in 2011, but there is no reason to think that the service charge was not a genuine estimate of what it was expected to cost to provide specific services.

22. Although it is not clear what the parties originally agreed, or understood, about which services were covered by the service charge, the mechanism for setting a new charge each year requires the provision of a schedule of services. In practice these have always been provided although, because the FTT ruled out consideration of the earliest years, those for 2012 and 2013 were not shown to the FTT, nor were they available for the appeal. For Mrs Middleton tenancy of Flat 3, which began in 2011, in the absence of any other document, the service schedule included with the notice of increase served in February 2012 will be the best evidence of the services which the parties understood to be covered by the service charge. For Mrs Peacock's tenancy of Flat 9, which began in 2014, the notice given in February 2015 will do the same. Unless the 2012 letter refers to the introduction of any new services, it may therefore be assumed that the services listed in the schedule were those on which the original estimate was based and for which the landlord was entitled to charge.

23. Any costs which were being incurred by the landlord from the commencement of each tenancy and for which there was no corresponding charge in the first service charge schedule, such as repairs to the fabric of the building, were not services for which the landlord was entitled to charge. Payment for those services must be taken to have been included in the rent.

24. Clause 57 of the tenancy agreement allows the landlord "to increase, add, alter, vary, reduce or remove any service(s) for which you pay a Service Charge". Ms Cunningham suggested that this clause did not restrict the landlord's entitlement to change the composition of the schedule of services, but in my judgment it clearly does. In particular, the landlord may "add" a new service, but only after consultation and notice. What the landlord may not do is to reclassify an existing service which it has already been providing without separate charge and include it instead as a service for which a charge is now payable. That would not be adding a "new service", although it would be adding a new charge. Clause 57 of the tenancy agreement does not allow for any downward adjustment of the rent to reflect a transfer of an existing service item into the service charge schedule, and the parties cannot have intended that the landlord would be free, even after consultation, to begin charging for items for which there had previously been no separate charge without an opportunity to make any corresponding change to the rent. Hence, additions to the service charge schedule can only have been intended to be possible where a genuinely "new service" was being provided.

25. When I first read Mr Peacock's grounds of appeal, I thought his complaint was that new services were being added without consultation, but having heard his explanation, I now understand his complaint to be that new charges were being added for old services. He suggested that from time to time the landlords had illegitimately included existing services in the annual February service schedule and added a charge for them, in order to get round government restrictions on the amount by which they were permitted to raise rents.

26. The FTT does not appear specifically to have considered this issue, and I do not criticise it for that. It used the schedule prepared by the parties as the basis of its consideration, but it is apparent that not all of the very many questions included in the original application form were repeated on the schedule and it is possible that some which may have touched on this issue might have been overlooked. Additionally, in view of the very general nature of the challenges mounted by the tenants I consider that the issue of additions to the service schedule can fairly be said to have been within the scope of the application. The overarching issue raised by the tenants in their application was how much were they required to pay by way of service charges in the disputed years, and they challenged many individual items in quite general terms. A party with skilled professional representation can fairly be expected to identify the issues they wish to raise with some precision. Unrepresented individuals are less likely to focus on specifics and may simply ask the FTT to determine what they are liable to pay.

27. I have nevertheless found it very difficult to determine from the documents whether Mr Peacock's suspicion about existing services being added to the schedule is correct. The 2012 service schedule was not provided to the FTT, because it related to a year which it had directed was not to be considered and which was therefore thought not to be relevant. It is not possible to say what services were on the original list, and without being able to do that it is not possible to know what, if anything, may have been added in later years. It is also possible that items have been described differently in different years, especially after the landlord and service provider changed.

28. In his application for permission to appeal Mr Peacock made the following assertion, on the basis of which permission was granted:

> "What has happened is that items that were originally paid from rent were now going to be charged to services. The Cyclical Maintenance, Compliance Testing, Help Points and Monitoring appeared in 2014/15 and more recently Water Hygiene and PAT testing were all new services and should have been consulted upon even though s.20 may not have been necessary."

29. In the tenants' original application to the FTT they listed the service charge items which were in issue for 2014/15. No mention was made in the list for that year (or any other year) of cyclical maintenance or compliance testing, nor did they feature in the schedule. Two charges were identified as new. They were a new standard charge for smoke alarms, fire panel, and door entry, which I now understand were charges for a new remote monitoring contract. But the service of remotely monitoring fire safety installations and door entry in the building was not a new service, and separate charges for monitoring each category of installation had appeared in the previous years (as can be seen from challenges to those charges in the FTT application form). What changed in 2014 was the service provider, but there is no contractual restriction on the landlord's ability to commission the service from a

different supplier. As for the charge for help points, this does appear to have been a new charge introduced in 2014, but only after consultation and the written agreements with individual tenants. I can see no objection in principle to a charge being introduced with the specific agreement of tenants. As for the cost of these items, where they were challenged, the FTT found that they were reasonable.

30. The other point about any additional services which may have been introduced in 2014/15 is that they would not be "new services" as far as tenancies commencing after April 2014, including Mrs Peacock's tenancy of Flat 9 which began on 7 July that year. There was no restriction on what the landlord and any new tenant could agree should be classified as a service for which a separate charge would be made.

31. The two services which Mr Peacock mentioned as having been introduced "more recently" were water hygiene and PAT testing. These were not disputed in the original application to the FTT, but they did appear in the schedule, but without highlighting any difficulty over the introduction of the charge; the challenge in each case was simply that water and appliance testing were the responsibility of the landlord. Karbon's response was equally general, describing the item as an "eligible service". In each case the charges were allowed in full by the FTT on the grounds that the cost had been reasonably incurred and was reasonable in amount. The FTT did not consider whether these were new services or had been provided in earlier years without a separate charge, but that had not been clearly identified as the basis of challenge. The cost of these services in 2019-20 was £940, equivalent to 95 pence per week for each tenant. The cost for the same items in 2020-21 was £1,046, or £1.06 a week. Had the issue of whether these were new services been raised in clear terms it might, on investigation, have been found that this was an example of an item which had been supplied in the past without separate charge and which Karbon was not entitled to switch on to the service schedule. But there might also have been a different explanation. I am satisfied that the issue was not raised in clear terms, and the necessary facts have not been found to enable me to determine whether the charge was appropriate or not.

32. I would only be justified in interfering with the FTT's decision if I could see that it was wrong. Because the issue was not raised in clear terms, because the FTT was not supplied with the necessary documents, and because even now it has not been demonstrated that charges have been added improperly, I am not satisfied that the FTT was wrong to allow the items in each year's service schedule. For these reasons I dismiss the appeal on all three of the topics for which permission to appeal was given.

Section 21B, Landlord and Tenant Act 1985

33. In his original application for permission to appeal Mr Peacock wanted to challenge the FTT's conclusion that the service charges for the years after the Karbon became the landlord were not irrecoverable because of a failure to provide notice of the tenant's statutory rights, as required by section 21B, 1985 Act. It was not clear from the FTT's decision how this issue had arisen or whether it had been part of the tenants' challenge to the service charge for those years, so I deferred consideration of the application until the hearing of the appeal.

34. With the assistance of Mr Peacock and Ms Cunningham, I now have a much clearer understanding of this issue and I refuse permission to appeal. The question whether the requirements of section 21B had been satisfied was not raised by the tenants as an issue. It was brought up by the FTT itself at the hearing, not having been identified as contentious at earlier case management hearings. Whether that was an appropriate course to take on an issue which required evidence, and which neither party had prepared to deal with, is questionable.

35. The service charge is payable by weekly instalment together with the rent. It was assumed by the FTT that the annual notice of increase served in February which informed tenants of the rent and service charge for the forthcoming year was a "service charge demand" within the meaning of section 21B(1). The notice does not demand payment of anything, and the rent and service charges were payable without any separate demand, but it is not necessary to consider whether the FTT's assumption was correct.

36. When the issue was raised, Mr Robson informed the FTT that he did not know if the annual notices of increase served by Karbon's predecessor had included the statutory information to tenants. He also said that the notices of increase given by Karbon had done. The FTT asked Mr Peacock for his comments and gave him time to look through documents. The impression given in the FTT's decision is that Mr Robson did not disagree with what Mr Robson had said, but he informed me that he did. The FTT nevertheless accepted Mr Robson's version.

37. I refuse permission to appeal for two reasons. First, because it now appears that the FTT heard such evidence as was available and reached a decision on a straightforward issue of fact. It was entitled to accept Mr Robson's account and there are no grounds for this Tribunal to interfere with its decision.

38. Secondly, I refuse permission because no purpose would be served by this issue being considered further. The consequence of a landlord's failure to include the required statutory information with a service charge demand is that the service charge is not payable until the omission has been put right by the service of a new demand including the information. But in this case the service charges have long since been paid in full. Nothing in section 21B gives a tenant who has paid without receiving a proper demand the right to require repayment. The FTT recorded that Mr Robson told it that the charges for earlier years would not be "pursued". Karbon is of course free to repay, or give credit for, service charges collected by its predecessor if it wishes to do so. But if the parties were given the impression that Karbon was obliged to repay those sums, that was not correct.

Apportionment

39. Karbon is a large organisation and commissions services covering a number of its properties under large contracts. There has been a long running issue over the apportionment of charges under such contracts. The dispute has been made more difficult to resolve by the change in the approach to apportionment introduced by Karbon when it became landlord in 2017. It had been the practice of its predecessor to divide the cost of a large contract equally between the number of sites which the contract covered, irrespective of the number of flats or houses at each site. Karbon changed to a system of apportioning by the number of units

(houses or flats). The intention is that all those who benefit from a service should pay the same amount, rather than tenants at sites with fewer properties paying a great amount for the same service than those at larger sites.

40. The tenants approved of this change, and so did the FTT, which was satisfied that the figures for earlier years in the schedule had been recalculated using the preferred method. What was unclear from the decision was whether the FTT had taken account of Mr Peacock's case that the number of tenants between whom the cost of the monitoring contract was being divided was too low, and ought to have included not only the tenants of 295 flats, but also 104 bungalows which also benefitted from remote monitoring of help points.

41. On closer investigation it became apparent that the cost of remote monitoring per unit was not in dispute, and Mr Peacock had accepted that the relevant charge was £1.77. Ms Cunningham was able to demonstrate from the terms of the contract between Karbon and BDS Northern Ltd that £1.77 was the price per connection for the 2256 connection points at the 19 sites with fixed (or "hard-wired") call points. A different charge was attributable to 452 "dispersed" units installed temporarily in homes which were not part of a sheltered development but where the tenant opted to pay for access to the remote monitoring service. I am therefore satisfied that the FTT did not omit to deal with a live issue, and I therefore also refuse permission to appeal on the second of the deferred issues.

Disposal

42. The appeal is dismissed.

Martin Rodger KC,

Deputy Chamber President

14 August 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.