Neutral Citation Number: [2024] UKUT 400 (LC)

Case No: LC-2024-275

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL PROPERTY CHAMBER
REF: CAM/OOKA/LSC/2023/0019

5 December 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – whether costs reasonably incurred – whether it was reasonable for the landlord to incur, and charge to the service charge, the cost of electricity without using the solar panels installed on the building – landlord's failure to discharge the evidential burden - future costs not the subject of the application

BETWEEN:

AVON GROUND RENTS LIMITED (1)
HIGHVIEW MANAGEMENT LIMITED (2)

Appellant

-and-

MARK PILGRIM (1)
SUSAN PILGRIM (2)

Respondents

Flat 52, Highview Court,
Dudley Street,
Luton,
LU2 OFR

Upper Tribunal Judge Elizabeth Cooke
3 December 2024

Mr Richard Granby for the appellant, instructed by Scott Cohen Solicitors Limited
Mr Pilgrim represented the respondents

Introduction

1. Is it reasonable for a landlord to incur, and to charge to leaseholders, the cost of electricity to the building without using the solar panels on the roof which could have generated a cheaper supply? That is one of the issues in this appeal from a decision made by the First-tier Tribunal about service charges; the other issue is about management costs.

2. The appellants are respectively the freeholder of the building and the management company under the lease; the respondents are the long leaseholders of one of the flats, and were the applicants in the FTT. The appellants were represented in the appeal by Mr Richard Granby of counsel, Mr Pilgrim spoke for the respondents, and I am grateful to them both.

Background

3. Planning permission was granted in 2014 for the construction of Highview Court as a block of flats in Luton, on condition that

> "details of a scheme for renewable energy production equipment to provide at least 10% of the predicted energy requirements of the development shall be submitted to and approved by the Local Planning Authority, unless it can be demonstrated that there are overwhelming practical reasons why this is not appropriate. The scheme thereby approved shall be installed before first occupation or in accordance with a timetable agreed in writing by the Local Planning Authority and shall be used, retained and maintained thereafter for so long as the development remains in existence.

4. The building was constructed with solar panels on its roof, some of which were connected to 12 of the 53 individual flats for their private supply while others were set up to generate electricity for the common parts of the building. Long leases of the flats were granted; the second respondent, Mrs Pilgrim, was the original tenant on the 125-year lease of flat 52 and the first respondent, Mr Pilgrim, later became joint tenant with her. Flat 52 is one of the flats connected to solar panels.

5. The lease is tripartite, between the freeholder, the second appellant as the management company, and the tenant. It contains unsurprising covenants, made by both the freeholder and the second respondent as management company, for the maintenance and repair of the building and the common parts, including the provision of heating and lighting to the common parts and the maintenance of the lifts and security equipment. The lessee pays a service charge to reimburse the costs of compliance with those covenants.

6. There is no mention of solar panels in the respondents' lease. The appellants are obliged to maintain a supply of electricity to the common parts and the respondents are obliged to pay their share of the cost.

7. The first appellant purchased the freehold in 2016. It immediately appointed a related company, Y & Y Management Company Limited, to act as its managing agent. Since 2016 the management of the building has been carried out by Y & Y, and the annual management fee it charges has been recouped as part of the service charge.

8. In April 2023 the respondents applied to the FTT for a determination of their liability to pay service charges in the years 2017/18 onwards. For the five years from 2017/18 they challenged the charges demanded by reference to costs incurred, and for 2022/23 and 2023/24 they challenged interim charges based on estimated costs. A number of items were challenged in each year of which only two are relevant to the appeal; one is the respondents' share of the cost of electricity for the common parts and the other is the additional fee charged by Y & Y for the management of a consultation process in relation to the installation of a fob entry system for the building.

9. Section 27A of the Landlord and Tenant Act 1985 gives the FTT jurisdiction to decide whether and to what extent service charges are payable. Section 19 of the 1985 Act says this about service charges, which in this context means charges that vary with the costs incurred by the landlord:

> "(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—
>
> (a) only to the extent that they are reasonably incurred, and
>
> (b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;
>
> and the amount payable shall be limited accordingly.
>
> (2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable shall be so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise."

10. It will be seen that a service charge that reflects costs already incurred is payable only to the extent that the costs were reasonably incurred, while an estimated charge payable in advance is payable only to the extent that it is reasonable.

11. It will be convenient to consider separately the electricity charges and the management charges, looking in each case first at the FTT's decision and then at the arguments in the appeal.

The FTT's decision about the electricity charges

12. The respondents challenged the charges for the electricity supplied to the common parts. It seems that the situation changed dramatically after the first three years of the lease, as the FTT explained:

> "7.1 For a number of reasons, this was the main bone of contention between the parties, at least so far as the applicants were concerned. During the first three years of account no charges in respect of communal electricity usage were levied at all. In 2019/20 £9,141 was charged, in 2020/21 £10,442 was charged, in 2021/22 £29,200 was charged, in 2022/23 the provisional charge was £6,500 and in 2023/4 the provision was for £20,000."

13. Those figures are for the whole block. The respondents pay 1.37% of the whole, so £126.04 in 2019/20 and so on. But for the first three years of the term of the lease they had

not had to pay anything for the electricity supply to the common parts, and they inferred that that was because the electricity was generated by the solar panels. When payment started to be demanded they inferred that the appellants had diverted the supply for their own use. They took the view that that was not legitimate in view of the obligation in the planning permission (see paragraph 3 above). They also expressed concern that all the electricity bills from the supplier over the five years challenged had been estimated charges which had never been reconciled with actual usage. So while there was no dispute about their contractual obligation to pay the charges, their challenge was brought on the basis of section 19 of the 1985 Act; their case was that the costs paid by the appellants to the external electricity supplier were not reasonably incurred and that the estimated charges were not reasonable.

14. The FTT received witness statements from Mr Joe Gurvits, a senior manager for the appellants who had not been directly involved with this building. His witness statement is in the appeal bundle but it appears that more was said at the hearing. The FTT said this about the evidence it heard about the electricity charges:

> "7.2 The reasons for the absence of charging in the first three years are not clear. Mr Gurvits said in his evidence that there were problems with the metering but there was no documentary evidence to support that claim. The Applicants explained the absence of charges on the basis that the electricity was being supplied during that period by the solar panels installed on the roofs of the Building and that it was as a result of works done by Avon to divert that supply that the bills began to be levied."

15. The FTT recorded Mr Gurvits' evidence, given at the hearing, that

> "7.3 … i) Avon had not known anything about the solar panels on the roof of the Building when it purchased the Property at auction; ii) to the best of his knowledge the solar panels within the landlord's demise were not operational; and iii) he had referred the Applicants' queries in respect of the solar panels to Avon and that it was investigating them. …
>
> … the only result of Mr Gurvits' inability to provide us with any useful/reliable information is that there is no satisfactory evidence before us in relation to the position on Avon's part."

16. The FTT went on to say that it therefore had to rely on the evidence of Mr and Mrs Pilgrim and on its own observation of the fuseboard in the control room on the ground floor, where they saw that the solar panels were generating electricity for the flats (as Mr and Mrs Pilgrim said) but that the circuit for the common parts was switched off. The FTT concluded:

> "7.4 It is therefore our conclusion that unless and until Avon is able to establish that: the 50 or so solar panels which were installed on the roofs of the Building as a condition of the planning consent and which are required by that consent to be maintained in good working order so that 10% of the Building's total electricity needs are met from them are not operational; that they cannot economically be made operational, having regard to the feed in tariff revenue which they would generate; and/or that the feed in tariff which they do generate

is not sufficient to discharge the communal electricity costs, it will not be reasonable for the respondent to demand payment of any communal electricity charges from the leaseholders. That is to say, that these charges were not reasonably incurred. Consideration also needs to be given to how the condition of the planning consent that 10% of the energy being consumed by the whole development (i.e. not just to the common parts) should be supplied from the panels ought to be met – whether that be within the terms of the leases or, failing that, by means of enforcement action by the Local Planning Authority."

7.5 We leave on one side, as being outside the scope of our jurisdiction on this application, the question whether Avon may be liable to account to the leaseholders in respect of the benefit of any feed in tariff which it may have received from the solar panels.

7.6 Further or alternatively, it was clear to us from our perusal of the electricity bills supplied by Avon that a large number of bills were estimated, that those estimates appeared to be at substantial variance to the measured usage and that there were a large number of credit notes in the bundle, apparently on that account. It therefore seems to be very likely that there have been significant problems with the estimated bills being rendered and that the charging needs to be properly investigated before any further demands are made. That may well entail withholding payment of sums demanded on the basis that no proper statement of account has been delivered by the electricity provider."

17. Later at its paragraph 15 the FTT summarised its various decisions and said:

> "15.1. That it is not reasonable for the Landlord to incur any communal electricity costs without first ascertaining the functionality of the solar panels from which the property benefits. In addition, the estimated bills which have been rendered need to be properly investigated and challenged as necessary. Again, until that process is complete no such costs would be either reasonably incurred or reasonable in amount."

18. The consequence of that determination for the years in dispute is that nothing is payable in respect of the costs incurred in 2019/20, 2020/21 and 2021/22. The FTT did not explicitly say whether the estimated charges for 2022/23 and 2023/24 were reasonable, since it expressed itself only in terms of whether costs were reasonably incurred. Mr Granby suggested that it could be inferred that the FTT regarded the estimated charges as unreasonable, and I agree.

The appeal about the electricity charges

The arguments in the appeal

19. For the appellants Mr Granby focused on the way the FTT expressed its decision in paragraph 7.4 and following, beginning with the words: "…unless and until Avon is able to establish…". He argued that the FTT has set up a condition precedent to the appellants' being able to make any charge at all for the electricity to the common parts, and that that was not something the FTT could do in the absence of any such provision in the lease. Moreover, it is not a condition precedent that the appellants can satisfy because they have

no means of knowing what is the total electricity usage of the building (including the private usage of all the flats) and therefore cannot show that the solar panels have generated 10% of it. He pointed out that it is necessary for the building to have mains electricity in order to provide back-up for when the sun is not shining and insufficient power is produced by the solar panels; the effect of the FTT's decision is that the appellants cannot even recoup the standing charge.

20. Mr Granby also pointed out that there is no obligation at all on the freeholder and management company to use the output from the solar panels to power the common parts. They are free – to take a purely hypothetical example – to devote all the output to operations of their own in the retained parts of the building, or – again hypothetically – to devote just to one individual flat the output from the solar panels installed to service the common parts. There is nothing in the lease or in the planning permission that says the output from the solar panels has to be used to power the common parts nor that the benefit of the solar panels is to be shared between the leaseholders.

21. As to the shortcomings of Mr Gurvits' evidence, Mr Granby explained that the case the appellants thought they had to meet was that the respondents were saying they had used the power output for their own ends and pocketed a feed-in tariff. The appellants' answer to that was that the solar panels connected up to power the common parts were in fact switched off; they had therefore met the respondents' challenge.

22. Mr Pilgrim said that the simple issue is that in the respondents' view they are paying too much for electricity. As to the feasibility of the FTT's condition, he pointed out that at the hearing before the FTT the appellants had produced certificates from the manufacturers of the solar panels serving the flats indicating that the capacity of each panel, and that it is therefore easy to see what is the production capacity of all the panels and perfectly possible to meet the FTT's condition.

Discussion and conclusion

23. I agree with the appellants that the lease makes no reference to solar panels and that the appellants are under no contractual obligation to use solar-powered electricity at all. Nor does the planning condition require them to use the solar panels for the common parts of the building; it requires only the use and maintenance of the approved system, without saying what the power output is to be used for, although it was obviously the intention of the local planning authority that it be used to supply power to the building.

24. More generally, where the freeholder of a building with solar panels on its roof has chosen to grant long leases of flats in the building, it is under no contractual obligation to use those panels for the benefit of its leaseholders unless it has covenanted in the leases to do so.

25. However, the factual background to the present proceedings, and the nature of the FTT's jurisdiction, mean that that is not the end of the matter.

26. The FTT's jurisdiction under section 27A of the 1985 (set out at paragraph 9 above) Act is to determine whether service charges are payable, and if so in what amount. When it is invoked by leaseholders, they must raise a prima facie case that indicates that a cost was

not reasonably incurred, or that an estimated charge was not reasonable. Once they have done so the evidential burden shifts to the landlord or management company (both in this case, although the FTT focused on the first respondent as landlord) to show that the expenditure, or the charge (as the case might be), was reasonable.

27. In my judgment the respondents did all that was required to shift the burden to the appellants in the FTT. The essence of their case was this: first, that the development was given planning permission on condition that it benefited from solar power up to at least 10% of its needs, second, that the solar panels are connected up so as provide power for the common parts, and third, that for three years they appear to have done so with the result that the leaseholders were not required to pay anything. The respondents therefore wanted to know why the appellants were paying an outside supplier for electricity for the common parts from 2019/20 onwards. It is hardly surprising that they took the view that the appellants must be using the panels for their own ends. Why waste them?

28. At first sight the FTT's decision lacks findings of fact. The FTT did not decide whether the absence of a charge in the first three years was because the solar panels were providing it for free, nor did it decide when they were switched off, nor why. It did not make any finding of fact to the effect that the panels would provide all the power needed for the common parts. My initial reaction, which I discussed with the parties at the hearing, was that the matter needed to be remitted to the FTT for further findings to be made.

29. On reflection, I take the view that the FTT did not make those findings because it did not need to. It heard the respondents' prima facie case and it looked to the appellants (as respondents in the FTT) to show that the costs and charges were reasonable. It heard Mr Gurvits' evidence and rejected it as neither useful nor reliable. It concluded that "there is no satisfactory evidence before us in relation to the position on Avon's part"; in other words, the appellants had not discharged the evidential burden. The FTT was left with the respondents' prima facie case that the power for the common parts could be and had been provided by the solar panels. That was consistent with its own observation that the solar panels were connected to a switch on the control panel labelled "Communal solar" and that it is off, whereas the panels for the individual flats are switched on (there is a picture of the control panel in the appeal bundle). In the circumstances, where the appellants had provided nothing to refute the respondents' evidence that the solar panels had powered the common parts for three years, and no explanation for their being unused and apparently wasted, the FTT found that the costs for the first three years in issue had not been reasonably incurred and (as I agree we can infer) that the estimated charges for the last two years were not reasonable.

30. I see no flaw in that finding and the appeal fails insofar as it is a challenge to the FTT's findings about the years 2019/20 to 2023/24.

31. That does of course leave the appellants unable to charge the respondents for their share of the communal electricity for the three years from 2019/20. But the appellants did not adduce any satisfactory evidence to explain why a mains supply was needed from that year onwards when it apparently had not been in the first three years. The FTT's finding was therefore inevitable.

32. As to the two years 2022/23 and 2023/24, only the estimated charges were in issue before the FTT. If the leaseholders choose to challenge the final charges for those or any later

years then the appellants will need to answer that challenge, and the FTT's decision gives them a lot of assistance by setting out the points on which they will probably need to produce evidence.

33. However, the appellants' concern is that the FTT's decision in paragraphs 7.4 to 7.6 appears to impose a precondition that they must satisfy before any future charges, including presumably the final demands for 2022/23 and 2023/24, can be regarded as reasonable.

34. It is not entirely clear to me whether that was what the FTT intended to do. But it is easy to see the appellants' point; it appears that the FTT was making a judgment, rather than merely obiter observations, about future charges. And in its refusal of permission to appeal the FTT appeared to confirm that view of what it said in paragraph 7.6 by saying:

> "Our decision is that unless and until the obvious discrepancies in the estimated charges on which the bills are based has been investigated with the supplier and if necessary challenged, it is not reasonable for the Respondent either to pay those bills or to seek to recover them from the lessees."

35. The FTT has jurisdiction under section 27A(3) to decide "whether, if costs were incurred for services … of any specific description, a service charge would be payable for the costs…". But in the present case the respondents did not apply for any such determination; their application was made only in relation to the electricity charges for the years 2019/20 to 2023/24. There was no application to extend the scope of the application to future years and to costs then not yet incurred, and the appellants did not know they had to meet a case that related to future charges. For that reason paragraphs 7.4 to 7.6 are set aside insofar as they purport to make a judgment about the reasonableness of future charges or to restrict the appellants' ability to incur costs or demand service charges after the date of the FTT's decision.

36. That said, as a matter of commonsense it will be apparent to the appellants that there are points they will probably need to address if further service charges are challenged, and they may find it useful to contemplate the FTT's words in paragraphs 7.4 to 7.6. It may or may not be right that it is not possible to tell whether the solar panels are providing 10% of the building's electricity needs, but the planning condition is something of a red herring; the real question they are likely to have to answer is why are the solar panels are not all being used. There may or may not be a good answer to that. And even if charges to external providers are found in principle to have been reasonably incurred, again the appellants can anticipate that it may be difficult to justify charges that are all estimates and have never been reconciled. I say that by way of *obiter* comment intended to assist both parties to the appeal, and of course the Tribunal makes no determination about what points will have to be proved in future proceedings.

The FTT's decision about the management charges

37. Two different sets of management charges were in issue before the FTT. The conclusion on one of them is not appealed but it has a bearing on the other which is.

38. As I said above the building is managed by Y & Y Limited. The respondents challenged the annual fee, which was reflected in the service charge, on the basis of poor management, and the FTT determined at paragraph 12.5 of its decision that the charge was to be reduced by 50%; in other words, 50% of the annual fee charged by Y & Y was a cost reasonably incurred by the appellants and only to that extent was the service charge payable. Neither party appeals that conclusion.

39. The FTT had sight of the contract setting out Y & Y's terms and charges. It contains an Appendix listing matters not covered by the annual charge and for which an additional charge would be made, and the list includes monitoring building works, "dealing with s20 consultations, including serving the required notices". The additional charge for such work is set at 15% + VAT, meaning 15% of the contract price.

40. The management charge that is in issue in the appeal is a charge made in accordance with that item in the Appendix, for the management of a consultation (as required by section 20 of the Landlord and Tenant Act 1985) in relation to the installation of a key fob entry system for the building. Both the contract price of £10,800 and the management fee of 15% of that sum were challenged by the respondents.

41. The FTT found that the contract price was reasonably incurred. As to Y & Y's management charge it said:

> "It is manifestly inappropriate that Y & Y should be paid a management charge of 15% of the contract price of £10,800. Quite apart from any question as to the competence with which Y & Y has managed the s.20 process, Y & Y is already being paid a management fee at the top end of the normal range for its work in relation to the Building. That work includes or ought to include, the management of projects which are integral to that management function, such as the security of the entrance doors. It is not therefore reasonable for Landlord to incur any additional costs paying it to manage a project which it ought to have been managing anyway."

42. That is the decision the appellants appeal.

The appeal about the management charges

43. The appellants' point is simple. First, the contract with Y & Y did not include work done in connection with a section 20 consultation. Second, the FTT had already decided what was a reasonable cost for Y & Y's management on the terms of that contract, i.e. without including work on a section 20 consultation. Therefore it was illogical for the FTT then to decide that that price was also a reasonable charge for work that was not within the scope of that contract; put another way, it was inconsistent for the FTT to approve a management charge as reasonable in amount and then say that that charge should have included further work by the agent, at no extra cost, that was not within the terms of the agreement.

44. The respondents' argument focuses on the poor quality of the section 20 consultation and of the work done; they said that the building remains insecure.

45. In my judgment the appellants are right as a matter of logic. There is some doubt as to whether the FTT was right to say that the annual fee was "at the top end"; the appellants say that that is not what Mr Gurvits said, although Mr Granby acknowledged that it is not open to them to appeal that finding of fact. But that "top end" fee was in any event reduced by 50%, to produce what the FTT regarded as a reasonable annual charge for the regular work done by Y & Y. That must have been intended as a charge for the work done in return for the annual fee according to the terms of the contract. To then say that further work should have been done at no extra charge is inconsistent, because that reasonable charge for the regular management should not have included any slack, so to speak, for additional work that was not within the terms of the contract.

46. Accordingly I take the view that the FTT's conclusion was illogical and has to be set aside.

47. The respondents' share of that management charge was £16, and it is not proportionate to remit the matter to the FTT for it to be decided afresh. The FTT made clear the very dim view it took of Y & Y's management performance. I substitute the Tribunal's decision – taken on an extremely broad brush pragmatic basis – that the charge for the section 20 work was reasonable at half the level charged, namely 7.5% of the contract price plus VAT, and that the respondents' share should be adjusted accordingly.

Conclusion

48. On the main point in issue, namely the charge for communal electricity for the years in issue, the appeal fails. The appeal succeeds in so far as the appellants ask the Tribunal to set aside any determination made by the FTT about future electricity charges. The appeal also succeeds in relation to the management fee and the Tribunal has substituted its own decision that a charge of 7.5% of the contract price was reasonably incurred.

Upper Tribunal Judge Elizabeth Cooke

5 December 2024

Corrected under rule 53 of the Tribunal's rules on 9 December 2024

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.