Mr Vishwaveer Ramjotton

-and-

Mr Bhavin Prafulchandra Patel

[2020] UKUT 0019 (LC)

Observations

At the end of 2020, save for three ongoing cases, I stepped away from practice.

My reasons for doing so were many and varied, but amongst them was a long-held desire to take a good long look at residential service charge law. Life at the practising Bar can sometimes resemble Balzac's bachelor's house in *Petites misères de la vie conjugale* – trembling in all its timbers and shaking upon its keel – whereas I felt that I needed the tranquillity of a Kenneth Grahame riverbank in order to collect my thoughts.

This appeal gave me one my first opportunities to do so, because I found myself wondering whether, if experienced FTT judges make a mistake such as the one made in this case, the law is too complex for the amounts and issues that are often in dispute.

The issues

The issues in the case were simple: Mr Patel, the landlord, wanted the FTT to decide whether Mr Ramjotton, the lessee, had twice breached the covenants in his lease.

He also wanted the FTT to decide Mr Ramjotton's liability to pay three demands. One of those demands related to future expenditure, and the other two were demands for money spent in dealing with the two alleged breaches of covenant.

For his part, Mr Ramjotton, the lessee, did not want to pay any of the legal costs that Mr Patel might incur in the course of the proceedings before the FTT. In fact, he wanted Mr Patel to pay all or some of his.

How then did it all go wrong? Was it quantity of applications? The complexity of the law? Something else?

I do not know, but it allows me to try to crystallise some thoughts that I have brewing (and metaphors that I have been mixing) about service charges and variable administration charges.

The landlord's applications

The non-money application

Mr Patel made only one application that was not about money.

It was an application under section 168, Commonhold and Leasehold Reform Act 2002 for a decision whether the tenant had breached the terms of his lease.

That decision was needed because the landlord could not proceed to the next stage of the procedure for forfeiting the lease until it was confirmed that there had been a breach of covenant.

There were two elements to the application:

a) The leak from the tenant's bathroom;
b) The partial collapse of the ceiling of the common parts.

These observations are not concerned with that application.

The money applications

Mr Patel also wanted a determination that Mr Ramjotton was liable to pay the following:

a) An eye-watering demand for £26,141.33, as budgeted expenditure for the year;

b) A demand for £880, for costs incurred in dealing with the bathroom leak, and

c) A third demand for £853.84, for costs incurred in dealing with the partial collapse of the common parts ceiling.

It is not unlikely – I have seen it in other cases – that the amounts demanded of the tenant were all combined on a "statement", a little like a bank statement, setting out amounts demanded and paid over time.

The Upper Tribunal held that the demands were for items that the lease required the tenant to pay in the proportions specified by the lease.

So far, so consistent.

And yet…

… those costs, which relate to the same flat, and were demanded by the same landlord from the same leaseholder, are treated differently by the law.

Treatment of the £26,000 demand

Both the FTT and the Upper Tribunal treated the demand for £26,141.33 as one for payment of a service charge, as defined in section 18 of the Landlord and Tenant Act 1985.

Indeed, Mr Patel and Mr Ramjotton must have treated the demand that way too, because under section 21B of the 1985 Act, Mr Patel had to serve a service charge-specific summary of rights and obligations with it.

Treatment of the two £800+ demands

Again, the landlord, tenant, FTT and Upper Tribunal were of one mind: the £880 and £853.84 demands were for payment of a variable administration charge as defined in paragraph 1 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

Again, I anticipate that Mr Patel and Mr Ramjotton agreed.

The question

Several questions spring to mind – first – and not least – how anyone who is not a residential landlord and tenant technician would know that the charges are different in the eyes of the law, and how they would find Schedule 11 to the 2002 Act.

Secondly, on reflection, does anyone need to be able to find Schedule 11?

I ask the question in all seriousness.

When a landlord incurs costs such as those claimed in the two £800-odd bundles of costs that were claimed here, why are those costs not service charges?

The definition of a service charge

Service charges are defined in section 18, Landlord and Tenant Act 1985:

(1) A service charge is an amount payable by a tenant of a dwelling as part of or in addition to the rent—

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements, or insurance or the landlord's costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose—

(a) "costs" includes overheads, and

(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

The definition of administration charge

The definition of administration charge in paragraph 1 of Schedule 11 to the 2002 Act undoubtedly owes something to the definition of service charge, but differs in other respects:

(1) An administration charge is an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—

(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,

(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,

(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or

(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

The two definitions together

The gateway

Looking at the two definitions, there is what might be described as a gateway test: to fall within the definition of either charge, the amount must be

> "payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly"…

The payee

The identity of the payee is swept into the gateway in the definition of "service charge", in the definition of "administration charge", where necessary, that person is detailed in the relevant sub-paragraph.

I am not sure that much, if anything, turns on that difference. The phrase "the landlord or a person who is party to his lease otherwise than as landlord or tenant" covers third party management companies who would in any event fall within the meaning of "landlord" in the 1985 Act by virtue of section 38 of that Act.

The purpose of the payment

The definitions appear to diverge in the purpose of the payment:

- A service charge is payable for "services, repairs, maintenance, improvements, or insurance or the landlord's costs of management";
- An administration charge is payable for or in connection with the four types of cost listed in paragraph 1(a) to (d) – approvals; information, documents; failure to pay sums due and breaches of covenant.

Variability

The definition of service charge is satisfied if the amount "varies or may vary according to the relevant costs".

By paragraph 1(3) of Schedule 11, "variable administration charge" means "an administration charge payable by a tenant which is neither—

(a) specified in his lease, nor

(b) calculated in accordance with a formula specified in his lease."

In other words, to be a "service charge" or a "variable administration charge", the charge must vary in ways that cannot be calculated in advance.

Individual or collective

It is striking that neither charge is defined by whether the cost is payable by the collective or the individual. Nowhere in section 18 is service charge even obliquely defined as the proportion of the relevant costs payable by a tenant in concert with the collective.

Points of (no) difference

So far, so – sort of – clear(ish):

- If the charge falls within the purposes given in section 18, it's a service charge;
- If it falls within the purposes listed at paragraph 1(a)-(d) of Schedule 11, it's a (possibly variable) administration charge.

So how can the one be the other?

I don't think that they are interchangeable, but by analogy with the adage that all jets are planes but not all planes are jets, I do think it possible to say that all variable administration charges are service charges, but not all service charges are variable administration charges.

It seems to me arguable that the charges listed at paragraph 1(a)-(d) fall within the meaning of "landlord's costs of management" in section 18 of the 1985 Act.

(a) Approvals

The consideration and grant of approvals are part of the management of a building.

For example, by section 96(2) of the 2002 Act, on the acquisition of the right to manage, the RTM Company takes over the landlord's "management functions". Those function are (rather unhelpfully) defined in section 96(5) as "functions with respect to services, repairs, maintenance, improvements, insurance and management".

The power to grant of approvals is addressed separately in sections 98 and 99 of the 2002 Act.

It does not seem to me however that the separation means that the power to grant approvals is not a "management function". Sections 98 and 99 provide a mechanism that operates to include the landlord when a lessee is obliged to obtain an approval before taking certain action, thereby ensuring that the landlord is not entirely deprived of the right to control potentially significant changes to what is, at the end of the day, their property.

(b) Provision of information and documents

The provision of information and documents is also part of the management of a building.

When a landlord makes facilities available to a person under section 22 so that they can inspect and take copies of "the accounts, receipts and other documents that support the summary" of the relevant costs provided under section 21, that obligation is to make facilities available "free of charge".

However, by section 22(6):

> "the requirement imposed on the landlord by subsection (5)(a) to make any facilities available to a person free of charge shall not be construed as precluding the landlord from treating as part of his costs of management any costs incurred by him in connection with making those facilities so available".

Does that subsection mean that the costs of providing the facilities can be recovered as a service charge or an administration charge?

Either way, it is rather confusing:

- If the costs can be recovered as part of a collective service charge, that must mean that the cost of providing facilities must not be charged to the service charge of the tenant who inspected/copied the accounts, receipts and other documents, given that "free of charge" is not qualified to mean "free of charge at the time of inspection/copying". The upshot then is that everyone pays but the person actually causing the landlord to incur the costs;
- There is a direct overlap between the definition of service charge ("the landlord's costs of management") and administration charge ("the provision of information and documents").

(c) Failure to make a payment

Collection of rent and service charges, including action to recover arrears, regularly forms part of the management duties of a property manager/managing agent. See, for example, §47 of *Urban Splash Works Ltd v Ridgeway* or *Union Pensions Trustees Ltd v Slavin* [2015] UKUT 103 (LC), to name but two.

(d) In connection with a breach or alleged breach of covenant

Action to prevent/remedy a breach of covenant can also constitute a management activity.

Nearly every lease contains an express covenant by which the landlord covenants to give the tenant quiet enjoyment of the demise, and it does not seem unreasonable to describe action to ensure compliance with that covenant as part of the management activities of a landlord or management company.

For example, where a landlord puts up notices drawing the attention of leaseholders to an obligation in the lease not to use their property for short term sub-lettings on Air BnB, it can fairly be anticipated that the cost of those notices would be charged to the service charge.

If however, a landlord takes action to obtain an injunction to prevent a leaseholder from letting property on Air BnB, are the landlord's legal costs a service charge (the landlord's costs of management) – or a variable administration charge under (1)(d) (connected with a breach (or alleged breach) of a covenant or condition in his lease)? Or both? Can they be both? If so, who chooses?

Why it matters

The Landlord and Tenant Act 1985 had just turned 17 when the Commonhold and Leasehold Reform Act 2002 received Royal Assent.

It was at that in-between age when it was old enough to drive a car, but not quite of an age to be entrusted with a vote – an age where the arrival of a considerably longer and more complicated-sounding Act will have done nothing for its self-esteem.

Amongst the innovations in the 2002 Act was the simplification of the "reasonableness" extravaganza that accompanies section 19 of the 1985 Act.

Whereas a service charge must be reasonably incurred for works that are reasonable in standard, a variable administration charge must simply be "reasonable".

So, when a charge falls within the definition of both "service charge" and "variable administration charge", which test is engaged?

I do not know the answer: if you do, please don't commit it to a postcard, but let me know in the comments or send me an email: law@lawandlease.co.uk.