UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2022] UKUT 173 (LC) UTLC Case Number: LC-2021-603

Written representations

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – conditions precedent to tenant's liability – validity of insurance policy

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

BETWEEN:

ASSETHOLD LIMITED

Appellant

-AND-

WILLIAM JONATHAN & KIRSTY LAUREN HOYE (1)
NICOLA FOX (2)

Respondents

Re: 16b and 16c St Johns Road,
Epping,
Essex
CM16 5DN

Judge Elizabeth Cooke

Decision Date: 1 July 2022

Introduction

1. This is a landlord's appeal from a decision of the First-tier Tribunal ("the FTT") on the lessees' application for a determination of the reasonableness and payability of service charges. The appeal was determined under the Tribunal's written representations procedure, and the appellant has been represented by Scott Cohen Solicitors Limited. The respondent lessees have chosen not to take part in the appeal.

The factual background

2. 16 St John's Road, Epping, was originally a semi-detached house on a corner plot with a large garden. In 2015 it appears that the freeholder sold the garden, and the purchaser built two flats, 16b and 16c, attached to the house and sharing an entrance. The freeholder of the two flats and the freeholder of the house entered into a Deed of Easement dated 13 October 2015 whereby the freeholder of the house was granted access to its front door through the shared entrance, a right to park, and various rights to access service media.

3. The two flats were let on 125-year leases in October 2015.

4. In 2021 the lessees of flat 16b, Mr and Mrs Hoye, and of flat 16c, Ms Fox, applied to the FTT for a determination of the reasonableness and payability of service charges for 2018, 2019 and 2020, pursuant to section 27A of the Landlord and Tenant Act 1985. They challenged a number of items, ranging from insurance charges to window cleaning, and the FTT made its decision on 3 September 2021. The Tribunal has given the appellant permission to appeal on two grounds, both relating to the charges it made for insurance.

The relevant provisions of the lease

5. The leases of the two flats require the lessee to pay rent, an insurance rent, and a service charge. The insurance rent is defined as follows:

> "A fair and reasonable proportion determined by the Landlord of the cost of any premiums (including any IPT) that the Landlord expends … in effecting and maintaining insurance of the Building in accordance with the obligations contained in this lease."

6. The insurance rent is therefore, for the purposes of the Landlord and Tenant Act 1985, a service charge; section 18(1) of the 1985 Act reads as follows:

> "(1) In the following provisions of this Act *"service charge"* means 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."

Accordingly the FTT has jurisdiction to determine whether the insurance rent is reasonable and/or payable under section 27A of the 1985 Act.

7. The landlord's obligations as regards insurance are set out in Schedule 6 to the lease and include the following:

> "2.1 To effect and maintain insurance of the Building against loss or damage caused by any of the Insured Risks with reputable insurers, on fair and reasonable terms that represent value for money, for an amount not less than the Reinstatement Value subject to:
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> > 2.1.1. any exclusions. Limitations, conditions or excesses that may be imposed by the insurer; and
> >
> > 2.1.2 insurance being available on reasonable terms in the London insurance market.
>
> 2.2 To serve on the Tenant a notice giving full particulars of the gross cost of the insurance premium payable in respect of the Building (after any discount or commission but including IPT. Such notice shall state:
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> > 2.2.1 the date by which the gross premium is payable to the insurers: and
> >
> > 2.2.2 the Insurance Rent payable by the tenant, how it is calculated and the date on which it is payable."

The FTT's decision about the validity of the demands for insurance rent

8. The lessees asserted that because the demands did not comply with paragraph 2.2 of the Sixth Schedule, set out above, in that they did not specify the gross cost of the insurance excluding commission, the date by which the gross premium is payable and how the insurance rent was calculated, the demands were invalid so that insurance rent for the years in question was not payable.

9. The FTT said this:

> "70… the Tribunal looked at the Insurance Rent and found that the lease required that the Demand should include a notice which must state full particulars of the gross cost of the insurance premium after any discount or commission but including [Insurance Premium Tax], the date by which the gross premium is payable to the insurers and how it is calculated and the date on which it is payable. …
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> 72 The Tribunal found that the Notices in the Demand for all the Years in Issue were not compliant with the Lease in that they only specified the gross premium including IPT and broker's fee. They did not state the date when the premium was

payable to the insurers or broker or how it is calculated. The broker's fee was also required to be stated separately, which it was not.

73. The Insurance Demands were therefore defective and are not payable until they are re-served…"

10. The appellant does not dispute that the demands for insurance rent did not contain the particulars referred to in paragraph 72 of the FTT's decision, but points out that the requirements of paragraph 2.2 of Schedule 6 to the lease are not pre-conditions for the validity of the demands.

11. Indeed they are not. There is no suggestion of a pre-condition in the lease. Paragraph 2.2 of Schedule 6 is a free-standing obligation; if it has not been complied with then the lessees may pursue the landlord for breach of covenant and claim damages to compensate them for any loss caused to them by failure to comply with that covenant (hard though it is to imagine what loss that could be). The FTT's decision on this point was irrational and is set aside. The demands for insurance rent were valid.

The FTT's decision about the reasonableness of the insurance rent

12. Section 19 of the 1985 Act requires that a service charge be reasonable, as follows:

> "(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—
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> (a) only to the extent that they are reasonably incurred, and
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> (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;
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> and the amount payable shall be limited accordingly."

13. The lessees argued before the FTT that the insurance rent was not reasonable because the landlord might not have told the insurer about the Deed of Easement and the shared access arrangement. Thus their argument was not that it was unreasonable to incur insurance costs (section 19(1)(a)); the challenge appears to have been to the standard of the service provided. The FTT's summary of what the lessees said was as follows:

> "The Applicants doubted whether the Respondent notified the insurer of the Deed of Easement and the related third-party interest. The Applicants said that there is no evidence that the Respondent complied with paragraph 1.1.1.3 of Part 2 of Schedule 7 of the Lease to inform the insurers of the Deed of Easement benefitting the house next door or that it complied with the recommendations or requirements of the insurer in respect of this information. Therefore, the policies taken out may not take account of the use of shared common parts with the house next door. As a result, the Insurance may not be valid. It was submitted that if the insurance is not valid then there was no obligation upon the Applicants to pay the premium."

14. Schedule 7 to the lease does not itself contain any obligations or requirements; it contains two extended definitions of terms used elsewhere in the lease. Part 1 sets out the "Services" which Schedule 6 obliges the landlord to provide; Part 2 sets out the "Service costs", the term used elsewhere in the lease to define the service charge (which is the lessee's proportion of the Service Costs). Those costs include at 1.1.1.3 the cost to the landlord of:

> "complying with the recommendations and requirements of the insurers of the building…"

15. The appellant's representative, Mr Gurvitz of the appellant's agent Eagerestate told the FTT that the insurance broker was aware of the shared access, but could not point to any correspondence where this information was passed on.

16. The FTT's finding was as follows:

> "148 The Tribunal is of the opinion that a failure to inform the insurer of the shared access which is part of the Retained Parts is material information which ought to be known by the Respondent and which could lead to a claim being repudiated or reduced. … The Applicants have since 2018 raised the point with the Managing Agent and had asked for confirmation that the insurer was in fact aware of the shared access. In the face of this the Tribunal considered that the Respondent or its Managing Agent should have obtained confirmation that the insurers were aware of the shared access and this should have been evidenced in correspondence or some other document.
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> 149. The Tribunal finds that the Respondent has omitted to inform the insurers of a material fact of which the Applicant made the Respondent aware which is likely to cause the insurance to be repudiated or reduced. The Tribunal therefore determines the insurance premiums to be unreasonable and not payable."

17. In granting permission to appeal the Tribunal observed that there was no evidence that the insurer had repudiated the insurance cover or that it considered the existence of a right of way to be a material consideration in determining the risk being insured, and that arguably the decision that the policy was invalid was based on speculation.

18. It would appear that although there was no positive evidence that the appellant had not told the insurer about the shared access, the FTT may have made its finding of fact on the basis that if the appellant had done so it would have had correspondence that would have put the mater beyond doubt, yet had failed to disclose any. But even if that is right, the FTT did not have any evidence that the insurance policy had been invalidated or repudiated as a result of that failure to disclose. It was indeed a matter of speculation that the sharing of the access was material to the insurance policy; the finding that the insurance was likely to have been repudiated or reduced was not open to the FTT on the evidence before it.

Conclusion

19. The FTT's finding that the demands for insurance rent were invalid is set aside, because it was irrational, and the Tribunal substitutes its own decision that the demands were valid. The FTT's decision that the insurance charges were unreasonable because the landlord's failure to disclose the shared access was liable to have invalidated or reduced the insurance is also set aside because that finding was not open to the FTT on the evidence, and again the Tribunal substitutes its own decision that the charges were not for that reason unreasonable.

20. Despite having made those two findings the FTT helpfully made further findings as to the amount that would have been reasonable for the appellant to charge by way of insurance rent, being £856.11 for each of the three years in question. The appellant does not have permission to appeal that finding and therefore that aspect of the FTT's decisions stands.

Judge Elizabeth Cooke

1 July 2022

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.