UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2017] UKUT 448 (LC)
UTLC Case Number: LRX/49/2017

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER) UNDER S.11 OF THE TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – residential property – service charges – construction of lease – whether supermarket car park a "lettable unit"

BY

PRESSFAB ENGINEERING LIMITED

Appellant

Re: Flats 2 and 3, Grange Point,
Northampton,
Northamptonshire,
NN4 5FB

Before: His Honour Judge David Hodge QC

Determination on written representations

No cases are referred to in this decision

DECISION

Introduction

1. This is a tenant's appeal from a decision of the First-Tier Tribunal (Property Chamber) dated 9 January 2017 by which it determined (so far as material to this appeal) that the cost of maintaining a car park adjacent to a supermarket at Zone D, Grange Park, Northampton was included in the Residential Headlease Service Charge which was payable by the tenant of Flats 2 and 3 Grange Point under their respective sub-leases. By a further decision dated 30 March 2017 the FTT decided not to review that part of its earlier decision, and it refused the tenant permission to appeal. In its statement of case in support of its appeal, the appellant points out that before the FTT it was seeking to challenge service charges levied by the intermediate landlord, and to challenge the right of the superior landlord to levy charges on the intermediate landlord of the appellant's residential block, for the maintenance of a car park for 103 cars situated next to the supermarket on the Grange Park estate.

2. On 27 June 2017 the Deputy Chamber President (Martin Rodger QC) granted the appellant, Pressfab Engineering Limited, permission to appeal the relevant part of the FTT's decision. He held that although the decision was coherent and logical, the conclusion that the tenant of the flats was liable to contribute to the maintenance of the supermarket car park, as well as the car park designated for their own use, was a surprising one. Without properly considering the relevant leases and the registered title, it was not possible to be confident that the proposed appeal had no realistic prospect of success. As the point was a short but significant one, and as the parties were agreed that it was suitable for determination on written representations, it was appropriate to grant permission to appeal. Procedural directions were given for the determination of the appeal. The application for permission to appeal was directed to stand as the appellant's notice and grounds of appeal. The appeal was to be a review of the decision of the FTT, to be conducted under the Tribunal's written representations procedure. Pursuant to the Deputy Chamber President's directions, the appellant submitted further written representations on 19 July 2017. The intermediate landlord, and respondent in the FTT, Pyghtle Properties Limited, wrote to the Tribunal on 25 July 2017 stating that, after some consideration, it felt that the leases were explicit in detailing the obligations as regards service charge, as well as the definitions relating thereto, and that accordingly it would stand with the decision of the FTT and would not be responding to the appeal. On 27 July the Tribunal acknowledged receipt of the respondent's letter, noting that it did not wish to become a party to the appeal, which would now proceed unopposed.

The leases

3. According to the charges register of Title No NN236193, the freehold land at Zone D, Grange Park, Northampton was transferred to Albermarle 4 LLP on 1 April 2003. On the same day Albermarle LLP granted a Headlease ("the Residential Headlease") of the residential apartments and land at Zone D to HDD Northampton Residential Limited for a term of 200 years from 1 April 2003. The benefit of the Headlease is now vested in Pyghtle Limited and is registered with title absolute under Title No NN236193. On 13 August 2004 HDD Northampton Residential Limited

granted separate underleases ("the Underleases") of the two apartments numbered 2 and 3 on the first floor of the block at Zone D Grange Park known as Grange Point for a term from 13 August 2004 to 27 March 2203, together with the exclusive right for each underlessee to use an identified parking space. The appellant now has the benefit of those two Underleases. By clause 3.5 and paragraph 2.3 of Part II of the Fourth Schedule to each of the Underleases, the appellant is obliged to pay, by way of further rent payable on demand, one eighth of the Service Charge payable by the intermediate landlord under and as defined in the Residential Headlease. Under the terms of the Residential Headlease, the intermediate landlord is liable to pay a due proportion of the costs associated with the "Serviced Areas" (as defined in clause 1.30). Thus, in order to ascertain the extent of the service charge liabilities of the appellant under the Underleases, it is necessary to consider the liabilities of the intermediate landlord under the Residential Headlease.

4. Previously, on 15 June 2004, Albermarle 4 LLP had granted a lease ("the Supermarket Lease") of the premises shown and hatched red on the attached plan together with (by clause 3.4(a)(v)) the right to use the "Serviced Areas" (as defined in clause 1.30) for purposes ancillary to the tenant's use of the premises. By clause 8.31 the permitted use of those premises was as a retail food store. As a matter of the true construction of the Supermarket Lease, the Tribunal is satisfied that the 103 car parking spaces shown to the south-west of the premises thereby demised are not included in the subject-matter of that lease; but the tenant has the right to use those car parking spaces for purposes ancillary to the use of the food store because they fall within the definition of "Serviced Areas" in clause 1.30(a) of the Supermarket Lease, which expressly includes "car parking spaces" (and also "any trolley bays"). In this respect, the definition of "Serviced Areas in clause 1.30(a) of the Supermarket Lease is wider than the corresponding definition in clause 1.30.1 of the Residential Headlease, which comprises only "roads footpaths and verges forming part of the estate and designated for use generally by occupiers of the Estate". As a matter of the true construction of the Residential Headlease, the Tribunal is satisfied that the area occupied by the 103 car parking spaces shown on the plan attached to the Supermarket Lease does not fall within the more restricted definition of "Serviced Areas" in clause 1.30.1 of the Residential Headlease because that restricted definition does not extend to car parking spaces, and the car parking spaces cannot properly be classed as either "roads", "footpaths" or "verges". It is therefore unnecessary to consider whether the supermarket car parking spaces have ever been "designated for use generally by occupiers of the Estate". Even if they had, they would still not be "roads", "footpaths" or "verges" and so could not fall within the restricted definition of "Serviced Areas" in clause 1.30.1 of the Residential Headlease.

5. In both the Residential Headlease and the Supermarket Lease the defined expressions "Estate" and "Lettable Unit" bear the same meaning. Apart from the express inclusion of "car parking spaces" and "any trolley bays" in the definition in the Supermarket Lease (but not, as noted above, the Residential Headlease) the defined expression "Serviced Areas" is also substantially the same in the two instruments. For the purposes of this appeal, the only potentially relevant element of the definition of "Serviced Areas" in the residential Headlease is that contained in clause 1.30.6: "any other parts of the Estate which do not from time to time form part of a Lettable Unit". By clause 1.22 "Lettable Unit" is defined as meaning "any

building and ancillary areas on or part of the Estate (including the premises) which is designed constructed or adapted so as to be the subject of a separate letting or occupation". It should be noted that the definition does not look to whether the building or ancillary area is actually separately let or occupied, but whether it is designed constructed or adapted so as to be the subject of a separate letting or occupation. In construing the true meaning of the Residential Headlease, in the Tribunal's judgment it is also permissible to have regard, as part of the admissible background, to the facts: (1) that the Supermarket Lease had not been granted at the date the Residential Headlease was created, and (2) that the plan attached to the residential Headlease shows both the supermarket and also 103 car parking spaces laid out to the southwest of the supermarket.

The FTT's decision

6. So far as material to this appeal the FTT's decision is set out at paragraphs 49 and 50 of its original decision, as restated, explained and supplemented at paragraphs 46 to 53 of its further decision. The FTT started from the position that whether or not the cost of maintaining parts of the estate fell within the service charge provisions depended upon the wording of the relevant lease and not upon whether the relevant lessee benefitted from that part of the estate. The FTT found that car park adjacent to the supermarket fell within the Serviced Areas, the maintenance of which was a Service Charge cost. It did so essentially for three reasons: (1) There was nothing in the wording of the relevant lease to prevent occupiers of the estate from using the car park. (2) The car park had not been "designed constructed or adapted so as to be the subject of a separate letting or occupation" as required by Clause 1.30. (3) The Supermarket Lease did not include the 103 car parking spaces within its demise so the car park had not been demised to the supermarket as part of its lease. In its further decision, the FTT expressed the opinion (at para 48) that "the car park would need to be both (1) designed, constructed or adapted and (2) demised to be a Lettable Unit. On the day of the inspection and hearing it was neither." The FTT also commented (at para 50) that the words (in Clause 1.30.6 "…which do not from time to time form part of a Lettable Unit" did appear "subject to other terms of the leases granted by the Superior Landlord and provided the area or unit had been adapted and demised, to enable the Superior Landlord to change a serviced area to a Lettable Unit and thereby changing [sic] the liability of the tenants for its maintenance accordingly". The FTT's further decision expressly recorded the lack of any signage restricting parking to customers of the supermarket at the time of the inspection and hearing, and also that the appellant's representatives had referred to the presence of such signage in the past (as noted at paragraph 49).

The submissions

7. The appellant submits: (1) That the residential tenants have no use of, nor benefit from, the large car park adjoining the supermarket or some other "common areas" of the estate so it is unfair and unreasonable that they should be required to contribute towards their upkeep. (2) The supermarket car park does not fall within the definition of "Serviced Areas" at clause 1.30.1 of the Residential Headlease and is a "Lettable Unit" and so falls outside clause 1.30.6. By way of contrast, the supermarket car park does fall within the extended definition of "Serviced Areas" at clause 1.30(a) of the Supermarket Lease, and clause 3.4(a)(v) confers the right to use the supermarket car park for purposes ancillary to the tenant's use of the premises. The car park is therefore said to be a "Lettable Unit", being an area ancillary to the supermarket premises. (3) The pedestrianised areas of the estate are not designated for use generally and thus fall outside clause 1.30.1 of the Residential Headlease. Thus they are not areas towards the maintenance of which the residential tenants are required to contribute. The appellant developed these arguments in its further written representations dated 19 July 2017 to which the Tribunal has had due regard and which it has taken into account in its decision.

8. The respondent simply relies upon the reasoning and decision of the FTT

Discussion

9. The Tribunal considers that the FTT was correct in finding that that whether or not the cost of maintaining parts of the estate fall within the service charge provisions depends upon the wording of the relevant lease and not upon whether the relevant lessee benefitted from that part of the estate. Since, by clause 3.5 and paragraph 2.3 of Part II of the Fourth Schedule to each of the residential underleases, the appellant is obliged to pay, by way of further rent payable on demand, one eighth of the Service Charge payable by the intermediate landlord under and as defined in the Residential Headlease, the FTT was right to have regard to the terms of the Residential Headlease in order to determine the appellant's service charge liability. Under the terms of the Residential Headlease, the intermediate landlord is liable to pay a due proportion of the costs associated with the "Serviced Areas" (as defined in clause 1.30). Thus, in order to ascertain the extent of the service charge liabilities of the appellant under the Underleases, the FTT was right to consider the liabilities of the intermediate landlord under the Residential Headlease, and to focus upon whether the supermarket car park fell within the definition of "Serviced Areas" in the Residential Headlease. Since the Supermarket Lease post-dated the Residential Headlease, the extended definition of "Serviced Areas" in clause 1.30(a) of the Supermarket Lease, with its express reference to "car parking spaces", was not admissible as an aid to construing the more restricted wording of clause 1.30.1 of the Residential Headlease. The Tribunal considers that the FTT was right, as a matter of construction, to hold that the Supermarket Lease did not include the 103 car parking spaces within its demise, and that the car park had not been demised to the supermarket as part of its lease. However, the FTT was entitled to take, and should have taken, into account, as part of the present factual matrix, the fact that the supermarket car park does fall within the extended definition of "Serviced Areas" at clause 1.30(a) of the Supermarket Lease, and that clause 3.4(a)(v) therefore confers the right to use the supermarket car park for purposes ancillary to the tenant's use of the supermarket premises. The Tribunal

considers that the FTT was right to observe that there is nothing in the wording of any relevant lease to prevent occupiers of the estate from using the supermarket car park; but it is also worthy of note that since there is nothing in any relevant lease to give the residential tenants an express right to do so, it would be open to the owner or occupier of the supermarket car park to restrict such use to customers visiting the supermarket, as the FTT accepted (at paragraph 49 of its further decision) had been done in the past.

10. As already observed, as a matter of the true construction of the Residential Headlease, the Tribunal is satisfied that the area occupied by the 103 car parking spaces shown on the plan attached to the Supermarket Lease does not fall within the more restricted definition of "Serviced Areas" in clause 1.30.1 of the Residential Headlease because that restricted definition does not extend to car parking spaces, and the car parking spaces cannot properly be classed as either "roads", "footpaths" or "verges". It is therefore unnecessary to consider whether the supermarket car parking spaces have ever been "designated for use generally by occupiers of the Estate". Even if they had, they would still not be "roads", "footpaths" or "verges" and so could not fall within the restricted definition of "Serviced Areas" in clause 1.30.1 of the Residential Headlease. The Tribunal notes that at paragraph 50 of its original decision, the FTT found that "there was nothing to restrict the use of the car park to supermarket customers and nothing to prevent the use of the car park by occupiers of the Estate". However, the Tribunal notes that this falls short of an express finding that the supermarket car park had been "designated for use generally by occupiers of the Estate".

11. For the purposes of this appeal, therefore, the Tribunal is satisfied that the only potentially relevant element of the definition of "Serviced Areas" in the residential Headlease is that contained in clause 1.30.6: "any other parts of the Estate which do not from time to time form part of a Lettable Unit". By clause 1.22 "Lettable Unit" is defined as meaning "any building and ancillary areas on or part of the Estate (including the premises) which is designed constructed or adapted so as to be the subject of a separate letting or occupation". As previously stated, this definition does not look to whether the building or ancillary area is **actually** separately let or occupied, but whether it is designed constructed or adapted so as to be the subject of a separate letting or occupation. The Tribunal is satisfied that in expressing its opinion (at para 48) that "the car park would need to be both (1) designed, constructed or adapted **and** (2) demised to be a Lettable Unit", the FTT fell into error in its construction of clause 1.30.6 of the Residential Headlease. There is no requirement for an area to be actually demised in order for it to constitute a "Lettable Unit". After all, the defined expression is "Lettable Unit" and not "Let Unit", and the definition reflects that difference. In construing the true meaning of the Residential Headlease, it is in the Tribunal's judgment permissible to have regard, as part of the admissible background, to the facts: (1) that the Supermarket Lease had not been granted at the date the Residential Headlease was created, but (2) that the plan attached to the residential Headlease showed both the supermarket and also the 103 car parking spaces laid out to the southwest of the supermarket. In the Tribunal's judgment, any reasonable reader of the Residential Headlease, viewing the attached plan, would conclude that the supermarket car park was a Lettable Unit (as defined by clause 1.22) in that it was an ancillary area on the Estate which was "designed constructed or

adapted so as to be the subject of a separate letting or occupation". It was designed constructed or adapted to be separately let or occupied with the supermarket. The FTT was correct to find that the words in Clause 1.30.6 "…which do not from time to time form part of a Lettable Unit" require one to focus upon the particular point in time at which the issues falls to be considered, and would potentially enable the Superior Landlord to change a Serviced Area to a Lettable Unit (and vice-versa) and thereby change the liability of the residential tenants for its maintenance accordingly. However, at any particular point in time, the focus must be upon whether the area "is designed constructed or adapted so as to be the subject of a separate letting or occupation". This cannot turn upon the sole question whether or not there is signage expressly restricting the use of the car park to customers of the supermarket; and to the extent that the FTT may have regarded this as determinative of the issue, in the judgment of the Tribunal it took too narrow a view of the issue. In the judgment of the Tribunal, the supermarket car park "is designed constructed or adapted so as to be the subject of a separate letting or occupation", either as the subject of a separate letting (or for occupation with) the supermarket for use ancillary thereto, or as the subject of a separate letting to (or occupation by) a car park operator for the provision of car parking for customers of the supermarket.

Decision

12. For these reasons, the appeal is allowed.

13. The First-Tier Tribunal's determination that the cost of maintaining the car park adjacent to the supermarket at Zone D, Grange Park, Northampton was included in the Residential Headlease Service Charge which was payable by the tenant of Flats 2 and 3 Grange Point under their respective sub-leases is set aside.

14. The Tribunal determines that such cost is not included in the Residential Headlease Service Charge which is payable by the appellant as the tenant of Flats 2 and 3 Grange Point under their respective sub-leases.

David R. Hodge

His Honour Judge David Hodge QC

15 November 2017