UPPER TRIBUNAL (LANDS CHAMBER)

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LANDLORD AND TENANT – service charges – tenancy agreement of a bungalow in a sheltered housing scheme – landlord at all material times providing the maintenance of the grounds – proper construction of tenancy agreement – whether landlord entitled under a clause in the agreement to add (and in consequence charge for) ground maintenance as an "extra" service despite ground maintenance already being provided by the landlord

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

BETWEEN:

CURO PLACES LIMITED

Appellant

and

ANTHONY PIMLETT **Respondent**

Re: 30 Sherwood Close,
Keynsham,
Bristol,
Avon, BS31 1BZ

His Honour Nicholas Huskinson

Bristol Civil & Family Justice Centre
on
10 April 2019

Mr Christopher Baker of counsel, instructed by Anthony Collins, solicitors for the appellant
The Respondent appeared in person

The following cases are referred to in this decision:

Arnold v Britton [2015] UKSC 36

James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] AC 583

Introduction

1. This is an appeal from a decision dated 19 March 2018 made by the First-Tier Tribunal Property Chamber (Residential Property) (FTT) whereby the FTT decided that the appellant as landlord was not entitled to recover from the respondent as tenant certain expenses which had been claimed to be recoverable as service charges.

2. The dispute relates to a self-contained one-bedroom bungalow within a sheltered housing scheme for older persons and persons with disabilities which has open grounds including areas of lawn with mature trees. The respondent (who is now aged 87) holds 30 Sherwood Close upon a weekly assured tenancy which arises pursuant to a tenancy agreement dated 18 August 2008.

3. The landlord under the tenancy agreement was Somer Housing Trust (SHT). The appellant is a housing association formed in 2012 following the amalgamation of three housing associations one of which was SHT.

4. The services for which the appellant seeks to charge the respondent are referred to as clearance, communal grounds maintenance, management charge and tree maintenance. The document which enclosed the breakdown of the proposed charge to the respondent (page 116 of the bundle) shows that of the total charge (i.e. estimated for all homes) the communal grounds maintenance made up £7150 out of a total of £7560. The amount sought to be charged to the respondent was £66.90 per year or £1.29 per week. Clearly the amount involved is small. However I was told that the point raised in the present case is of wider application as there are other tenants who would be equally affected by the outcome of the present appeal.

5. There is a brief agreed statement of facts which records that it is common ground between the parties that, prior to the purported variation claimed to have been validly effected by the appellant, the services listed in the tenancy agreement did not include the services in question (which hereafter I will for convenience referred to as ground maintenance); the respondent did not pay a service charge for such services; and the work of ground maintenance (including management of such work) had in fact been carried out at Sherwood Close by the appellant.

6. In summary the appellant's case is to the following effect. At all material times (including at and before the grant to the respondent of his tenancy agreement) the appellant, or its predecessor, as landlord was carrying out ground maintenance; there was no obligation imposed upon the landlord to do so; there was no right for the landlord to charge the cost of ground maintenance through the service charge; that this was recognised by SHT in 2009/2010 as a problem; that for tenancies granted from 2010 onwards the wording was changed so as to require the tenants to pay a contribution by way of service charge towards ground maintenance; that as at that date no change was made in respect of existing tenants (such as the respondent) such that they continued not to pay any service charge in respect of

ground maintenance; but that in due course the appellant decided to operate a clause in the tenancy agreement which (so the appellant contends) entitled the appellant to change the situation and to commence thenceforth to charge the respondent a service charge in respect of ground maintenance.

7. The relevant clause in the tenancy agreement is clause 2.10.1 which is in the following terms:

> "2.10.1 The Trust agrees to provide the Services (if any) listed in the Tenancy Agreement and for which you pay a service charge providing that, subject to consultation with tenants:
>
> (i) the Trust may stop providing any of the Services if it reasonably believes it is no longer practicable to do so; or
>
> (ii) provide the same service in a different way; or
>
> (iii) it may provide extra Services if it believes this would be useful."

8. In summary the appellant argues that the expression "extra Services" means services extra to those listed in the tenancy agreement (and for which a charge is specifically made payable) and that the provision of ground maintenance is indeed the provision of such an extra service because ground maintenance is not a service listed in the tenancy agreement for which a charge is made payable.

9. In summary the FTT decided (see paragraph 34 of its decision) that extra services meant a service from which the respondent had not previously benefited. The Tribunal stated that in its view "a reasonable person would struggle with the notion that a service which has been provided for years without charge is somehow an "extra" service because the same service has been added to the list of services in the agreement for which there is a charge".

10. That being the primary conclusion of the FTT, there was then conducted by the FTT an analysis of the tenancy agreement in the surrounding circumstances in which it was entered into including examination of a 2004 policy statement by SHT, a 2010 policy document and underlying 2009 report prepared by SHT, and an examination of certain discussions between the respondent and a housing officer for SHT (see paragraph 50 of the FTT's decision) in relation to which the FTT found that the housing officer informed the respondent that he would pay the rent and service charge recorded on the agreement and there would be no additional charges.

11. In paragraph 58 of its decision the FTT explained why it had looked at the surrounding circumstances. The FTT considered that the surrounding circumstances did not impinge upon the ordinary and proper construction of the relevant terms of the tenancy agreement – the FTT instead indicated it had looked at the surrounding circumstances to see if there were any support in them for the appellant's contentions (it found there was no such support).

12. It should be noted that one of the arguments raised on behalf of the respondent (in representations to the FTT prepared on his behalf by solicitors) was a point to the effect that if the proper construction of clause 2.10.1 was as contended for by the appellant then this was a provision which contravened the Unfair Terms in Consumer Contracts Regulations 1999. Argument was addressed to the FTT upon this point. However the FTT decided, in the light of its decision upon the principal point of construction which was a finding in favour of the respondent, that it was not necessary to examine this argument based upon the law regarding unfair contract terms. In the grant of permission to appeal to the Upper Tribunal it was recognised that the only issue in this appeal concerns the interpretation of the document. Neither party at the hearing before me had prepared any argument regarding unfair contract terms. Also I was told that there are other cases raising a similar point to that raised by the respondent which are pending before the FTT, being cases in which it is intended to argue (if necessary) the points regarding unfair contract terms. In these circumstances I was asked by both the appellant and the respondent not to consider the question of unfair contract terms. If my decision was favourable to the respondent the point would not arise. If my decision was favourable to the appellant then I was asked to remit to the FTT the question of whether clause 2.10.1(iii) was unenforceable by reason of being an unfair contract term.

The tenancy agreement and purported variation document

13. It is of importance to the appellant's argument that the tenancy agreement (prior to the purported variation) imposed no obligation upon the landlord to provide ground maintenance. This is because if the appellant was always obliged to provide ground maintenance it might be difficult for the appellant to argue that the provision of such ground maintenance could properly be considered an extra service which it would be useful to provide. Mr Baker submitted that even if there was originally an obligation to provide ground maintenance there remained an argument that the appellant could nonetheless operate clause 2.10.1 (iii) so as to add ground maintenance as a chargeable service. However it is not necessary for me to consider that argument by reason of the following matters.

14. I raised the question of whether the original tenancy agreement imposed an obligation to provide ground maintenance having regard in particular to the provisions of clause 2.3.1 and 2.3.2 and to the wide definition of the expression "home" given in the particulars of the tenancy. I drew attention to the fact that clause 2.3.1 imposed an obligation to maintain repair and keep in proper working order those parts of "the premises" including fixtures, fittings and service installations provided by the landlord. The expression "the premises" was different from the expression "the home" contained in the repairing covenant in clause 2.3.2. Mr Baker contended that the following matters were of significance. The language used in the tenancy agreement is somewhat loose in that it appears to use the expression "the premises" and "the home" and "the property" somewhat interchangeably in various provisions, for instance clause 3.2.3, clause 4.1.4, clause 5.18.1, and clause 5.21.1. He also drew attention to certain clauses which clearly differentiated the home (that is to say the property which was let) from the communal areas of the estate, see for instance clause 5.3.2, clause 5.4.1, clause 5.4.4, clause 5.4.6 and clause 5.5.1.

15. I accept Mr Baker's argument upon these points. The draughtsman of the tenancy agreement has clearly distinguished between the home (despite its wide definition) on the one hand and the communal areas including in particular the shared gardens on the other hand. It had not been raised at any stage on behalf of the respondent that the original terms of the tenancy agreement did impose an obligation upon the appellant to provide ground maintenance. I agree the original terms of the tenancy agreement imposed no such obligation on the landlord to provide ground maintenance. In these circumstances it is not necessary for me to examine this point further or to set out at length the terms of the clauses referred to above.

16. The particulars of tenancy section of the tenancy agreement make provision for the payment of rent and service charge. The weekly rent is stated to be £65.85. On the same line as that dealing with rent there is written in manuscript the following "Supporting People Charge 11.70". On the next line there is a printed entry for "Weekly Service charge" and this has a line against it and no entry of any amount. Underneath the line for weekly rent and the line for weekly service charge there is the following: "Total £77.55." The document then states "Rent and Service Charges: Rent £65.85". Under that line there is then given the following information under the manuscript heading of "Supporting People Charge" namely: "Emergency Alarm 2.19 Sheltered Housing Officer 9.51". The total is then again given the £77.55.

17. Clause 1.4 of the tenancy agreement has the heading "Service Charges (where applicable)". There is only one clause under this heading namely clause 1.4.1 which reads as follows:

> "1.4.1 If you receive any services with specific charges from the Trust they will be listed in the Particulars of Tenancy.
>
> You will pay a service charge for those services."

18. Clause 1.5 is entitled "Changes in the Service Charge". This provides that the annual service charge will be based upon how much the landlord estimates it is likely to spend during the year to provide the services. Provision is made for the working out within six months after the end of each year as to whether the estimate was too high or too low compared with what was actually spent to provide the services. There is then provision for dealing with any overpayment or underpayment.

19. Clause 2.10.1, which is central to the present case and which is headed "Services" has already been set out above in paragraph 7.

20. Clause 6.3.1 provides that, except for changes in rent and service charges, the terms of the tenancy may only be changed if the tenant and the landlord agreed to the changes in writing.

21. By a document dated 16 January 2017 the appellant served on the respondent a document entitled "Notice of Variation". This stated that the notice was to be accepted as formal notice of variation under the tenancy agreement that with effect from 28 February 2017 the appellant will provide the list of services on the back of the notice as additional services. The additional services listed were: "Clearance, Communal Grounds Management, Management charge (Curo), Tree Maintenance".

22. In September 2016 the appellant had served upon the respondent (and other tenants) a document by way of consultation upon this proposed variation. It was accepted by the FTT (and no issue arises about this before me) that the consultation was a proper consultation for the purposes of clause 2.10.1. Accordingly there is no question for me to consider regarding the adequacy of any consultation. The question is whether under the terms of the tenancy agreement the appellant had power to vary the lease in the manner it purported to do.

Appellant's submissions

23. On behalf of the appellant Mr Baker advanced the following submissions.

24. He accepted that as at the date of the tenancy agreement the ground maintenance works were being carried out by the landlord. They were not being charged for through the service charge. There was no obligation on the landlord to provide this ground maintenance. There was not any provision in the tenancy agreement entitling the landlord, if it provided ground maintenance, to charge for it. That was the position when the tenancy was originally granted.

25. Mr Baker drew attention to the wording of clause 2.10.1 (iii). He submitted that the fact that ground maintenance services were being provided at the date of the tenancy agreement and thereafter (without obligation to provide them or right to charge for them) was not sufficient to prevent ground maintenance works from being extra services which the respondent may decide (subject to consultation and subject to believing such services would be useful) to provide and in consequence to charge for. What must be examined for the purpose of understanding the word "extra" is not what was happening as a matter of fact at the date of the grant of the tenancy but instead is what was provided for as a matter of contractual provision in respect of services in the tenancy agreement. The tenancy agreement made no provision requiring the appellant to maintain the grounds. The tenancy agreement made no provision for the respondent being entitled to maintain the grounds and charge for such provision of maintenance. Accordingly the provision of ground maintenance did constitute the provision of an extra service – it was extra to what the respondent was entitled to require and the appellant was obliged to provide.

26. As regards the question of what services the landlord was required to provide and the respondent was required to pay for, so far as concerns the position at the date the tenancy was granted, the position was one or other of the following (it matters not which). Either the landlord was required to provide and the respondent was required to pay for nothing at all by way of services – with the charge of £11.70 per week by way of "Supporting People Charge"

being a separate contractual requirement which was not intended to represent a service. Alternatively, despite the omission of any figure entered in respect of weekly service charge, the true position was that the supporting people charge was properly to be considered as a service charge for the purposes of the tenancy agreement. Whichever the true position the tenancy did not list ground maintenance as a service which the landlord was to provide or for which the respondent was to pay. Accordingly the provision of ground maintenance constituted an extra service within clause 2.10.1 (iii).

27. Mr Baker submitted that the FTT was wrong in looking at the factual position on the ground as at the date of the tenancy agreement regarding whether ground maintenance was being provided and in construing the word "extra" service as requiring a service beyond that which was actually being provided.

28. As regards what happened after the grant of the tenancy, in particular the report in 2009 and the review in 2010 and the changes made for the new tenancies granted from 2010 onwards, those matters could throw no light upon the proper construction of this tenancy agreement entered into in 2008. He referred to *Arnold v Britton* [2015] UKSC 36 and to *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583.

29. Mr Baker submitted that the FTT was in error in placing any weight upon the question and answer session which it found had occurred between the respondent and a housing officer of SHT (see paragraph 10 above and paragraph 50 of the decision). This was an entirely new point volunteered for the first time at the hearing. The FTT was in error in relying upon it at all. Further the only way it could have been relevant was if the conversation could be elevated into some form of collateral contract – but no such argument was relied upon nor was any such collateral contract found.

30. Clause 1.4.1 deals with services for which there are specific charges. It should not prevent the charging for services in respect of which there are no specific charges – provided those services are properly added in accordance with clause 2.10.1(iii). The necessary implication of that clause is that if extra services are properly provided in accordance with that clause then they will become additional to any services for which a specific charging provision is made and the appellant will be entitled to charge for them. Once the power under clause 2.10.1 (iii) has been properly exercised the appellant will become liable to provide and entitled to charge for this extra service.

31. The respondent will of course have the protections afforded tenants in relation to service charges and in particular sections 18 and 19 of the Landlord and Tenant Act 1985.

32. As regards a point raised by the respondent in argument, namely that there existed some form of accepted custom and regular practice which prevented the respondent from adding a service of garden maintenance and charging for it, he submitted that there was no such

finding by the FTT and no basis on which the Upper Tribunal could make any such finding. There was no reliance upon (or justification for) any form of implied term.

Respondent's arguments

33. The respondent appeared in person before me. He relied upon the skeleton argument which had been prepared on his behalf by his solicitors dated 23 February 2018 for the hearing before the FTT. He advanced the following further arguments.

34. He contended that there did exist some form of accepted custom and regular practice preventing the appellant from adding a service of ground maintenance and adding a charge for such service.

35. The respondent's basic point was that the word extra meant extra. Thus when clause 2.10.1 (iii) speaks of the provision of extra services, these must be services which the tenant under the tenancy agreement was not already receiving (albeit without being charged for) as at the date of the grant of the tenancy agreement.

36. Further the prime requirement for a service, if the appellant is to be entitled to charge for it, is that it is a service which is listed in the tenancy agreement, see clause 1.4.1 which tells the tenant "you will pay a service charge for those services". Those services are the ones mentioned in the immediately preceding text, namely the services listed in the particulars of tenancy. The respondent accepted that the listed services can be taken to be the services embraced within the Supporting People Charge namely the provision of an emergency alarm and the provision of a sheltered housing officer. There were no other services specified. Accordingly the appellant was not entitled to charge by way of service charge in respect of any other services.

37. Even if, contrary to the respondent's primary point, the provision of ground maintenance can be said to be an extra service the position is as follows. Clause 2.10.1(iii) entitles the appellant to provide such a service but does not give the appellant the right to charge for it – the only items that can be charged for are those contemplated by clause 1.4.1.

38. The respondent referred to paragraph 77 of the decision in *Arnold v Britton*. He submitted that the appellant's argument amounted to an attempt to rewrite the bargain made between the parties. The terms of the tenancy agreement in clauses 1.4.1 and 2.10.1 and 6.3.1 gave the basic protection for the tenant as to what could and could not be charged for. The respondent submitted that (as he put it) it would be a massive retrograde step for all the tenants if this appeal was allowed. He submitted it cannot be correct to allow the appellant to designate any extra work at will as constituting an extra service and then (subject to consultation) to put a price on it and to charge it to the tenants as a service charge.

Discussion

39. I have already recorded my conclusion, in agreement with Mr Baker's submissions, that the tenancy agreement as entered into did not impose upon the landlord any obligation to maintain the grounds nor did it impose upon the respondent any obligation to contribute towards the costs of ground maintenance (supposing such ground maintenance was provided).

40. This may be thought a somewhat surprising position because it results in the appellant not being in any way in breach of covenant if the grounds (leaving aside certain parts in respect of which specific provision is made such as paths) were entirely neglected and allowed to become overgrown – this would be subject solely to a limitation that the deterioration in condition of the grounds was not so great that the covenant for quiet enjoyment was broken or rights of access were unreasonably interfered with.

41. However I note that the position at the date of the grant of the tenancy agreement was as follows. The bungalow let to the respondent was part of a sheltered housing scheme and was set within substantial garden grounds which were properly maintained by the landlord SHT. SHT was a responsible social landlord. Accordingly the tenancy was granted in circumstances where both landlord and tenant knew that the grounds were maintained by the landlord and where there was nothing to indicate any prospect of alteration in this position. Despite this being the case the tenancy agreement made no provision for payment by the tenant of a service charge towards the landlord's costs of maintaining the grounds.

42. Clause 1.4.1 is of importance. This made clear that the only matters to be charged for by way of service charge were those falling within the following words: "If you receive any services with specific charges from the Trust they will be listed in the Particulars of Tenancy". After the grant of the tenancy the landlord was not entitled to charge for ground maintenance – the only route by which the landlord (now the appellant) could become entitled to charge for ground maintenance is if the appellant is correct in its argument that it was entitled pursuant to clause 2.10.1 to add ground maintenance to the services and to charge for it.

43. The respondent could only operate clause 2.10.1(iii) for the purpose it seeks if ground maintenance can properly be said to fall within the following words: "it may provide extra Services if it believes this would be useful."

44. In my view the word extra here means extra to services that as a matter of fact are being provided by the appellant prior to the purported reliance upon clause 2.10.1(iii). This in my judgement is the natural meaning of the words.

45. My view upon this point is strengthened by the inclusion of the words "if it believes this would be useful". The addition of the extra service must be something which can properly be believed to be of some use (or benefit) so as to make the post-addition position on the estate better than the pre-addition position. However on the facts of the present case the pre-addition position (i.e. prior to the purported exercise of clause 2.10.1(iii)) is exactly the same as regards ground maintenance to the post addition position. There is no way in which the operation by the appellant of clause 2.10.1 (iii) can be said to be useful save only the use to the appellant of being able to charge money for something it was not previously charging money for. A financial benefit of this kind to the appellant is in my view not what is contemplated by the word "useful".

46. I consider that there is further support for my view in the following point. Clause 2.10.1 opens with a provision that the landlord "agrees to provide the Services (if any) listed in the Tenancy Agreement and for which you pay a service charge…". Accordingly as regards these services there is an agreement by the landlord to provide the services – in other words the landlord is contractually obliged to do so. However subparagraph (iii) merely states that the landlord "may" provide extra services. It seems that if this provision is operated then, although the landlord is entitled to provide the services, the landlord is not obliged to do so. Accordingly these services, supposing they had properly been introduced as constituting "extra" services, would be services which stood in a different position from the ones which the landlord had actually contracted to provide. These services are not of a type which it is contemplated should be paid for having regard to clause 1.4.1.

47. For the foregoing reasons I conclude that the appellant was not entitled pursuant to the provisions of clause 2.10.1 (iii) to add ground maintenance as an extra service for which a charge could be made.

48. Testing the foregoing conclusion further, it is helpful to have regard to the principles in paragraph 15 of *Arnold v Britton*. I have already examined what I consider to be the natural and ordinary meaning of the relevant provisions in the tenancy agreement in the light of any other relevant provisions in the agreement. As regards the overall purpose of the clause and the tenancy agreement, the purpose of the tenancy agreement was to grant to the respondent a tenancy of a bungalow in attractive garden grounds which could be expected to be kept maintained (rather than be allowed to become neglected and overgrown) by the landlord. These were the facts and circumstances known or assumed by the parties at the time the tenancy agreement was executed. However despite this the tenancy agreement made no provision for the payment of any service charge by the tenant in respect of ground maintenance. Also there is nothing inconsistent with commercial common sense for the respondent to be taking a tenancy of a bungalow in maintained grounds in circumstances where, although there was no contractual obligation on the landlord, the landlord was a responsible provider of sheltered accommodation and could be expected to continue to maintain the grounds – such that the rent paid by the respondent would be a rent appropriate for a bungalow in grounds which could be expected to continue to be maintained without further charge to the tenant.

49. I do not consider that there has been established any relevant accepted custom or regular practice as contended for by the respondent (see paragraph 34 above).

50. I agree with Mr Baker's submissions that the proper construction of the tenancy agreement cannot be affected by events which occurred after the making of the agreement, such as the events mentioned above in 2009/10. I reach my conclusions without any reliance upon these matters.

51. I also reach my conclusions without placing any reliance upon the discussions between the respondent and a housing officer (see paragraph 10 above).

Conclusion

52. In conclusion I dismiss the appellant's appeal.

His Honour Nicholas Huskinson

18 April 2019