LRX/170/2007

LANDS TRIBUNAL ACT 1949

LANDLORD AND TENANT – Service Charges – Landlord and Tenant Act 1985 as amended ss 18 and 19 – Housing Act 1988 ss 13 and 14 – Assured non-shorthold periodic tenancy – whether the landlord's ability (subject to any reference to a Rent Assessment Committee) to serve a yearly notice of increase of rent (which included a service charge) brought the payments for services within s.18(1) of the 1985 Act

IN THE MATTER OF AN APPEAL FROM THE LEASEHOLD VALUATION TRIBUNAL FOR THE MIDLAND RENT ASSESSMENT PANEL

BETWEEN **ARJUN CHAND** **Appellant**

and

CALMORE AREA HOUSING ASSOCIATION LIMITED **Respondent**

Re: Flats 1-19, Buckel Close, Caldmore Walsall WS1 3DL

Before: His Honour Judge Reid QC

Sitting at Procession House, 110 Bridge Street, London EC4V 6JL on 24 July 2008

The Appellant in person by written representation
Cobbetts LLP (solicitors) for the Respondents by written representation

DECISION

Introduction

1. The Appellant appeals to the Lands Tribunal, with permission, from the decision of the Leasehold Valuation Tribunal for the Midland Rent Assessment Panel ("the LVT"), being a decision given upon an application by the Appellant purportedly made under section 27A of the Landlord and Tenant Act 1985 for a decision regarding his liability to pay service charges in respect of flat 5 at the above mentioned premises. The application was made in respect of the years commencing 1 April and ending 31 March 1999 to 2006 as described in the LVT's decision.

2. I use the expression that the application was "purportedly made under section 27A" of the 1985 Act because the issue on this appeal is whether the LVT had jurisdiction to entertain the Appellant's application under section 27A. It is argued by the Respondent that, having regard to the terms of the tenancies and to the provisions of the 1985 Act and also of the Housing Act 1988, there was not payable under the tenancies any sum which constituted a "service charge" within the meaning of section 18(1) of the 1985 Act. Thus it is argued that s.18(1)(b) is not satisfied in relation to the sums payable under the tenancies, i.e. it is argued that it cannot properly be said that these are sums "the whole or part of which varies or may vary according to the relevant costs".

The Facts

3. The Appellant was the tenant at the material times of Flat 5, Buckle Close upon the terms of a tenancy agreement dated 11 January 1999 which was granted by the Respondent.

4. The tenancy agreement is stated to be an assured tenancy agreement and to commence on 16 January 1999

5. Details of the rent and service charge were stated to be:

"Rent	£48.19
Service Charge	£ 2.38
Weekly Total	£50.57"

Asterisks against each sum referred to a statement "Please note that these amounts may change". A dagger against the service charge referred to a note "The service charge you pay is for (see attached schedule)." There was a further note: "The service charge is part of the rent and will change at the same time." The attached schedule set out a list of items provided under headings "Expenditure" (eg communal lighting and door entry system maintenance) and "Other costs" (eg communal carpets). Against each item was set the relevant cost and the overall cost per unit per week was identified in the last line.

6. The agreement under the heading "Changes in rent" provided (so far as relevant) as follows: "All rent increases will be implemented in April of each year following our Annual Review of the Association's Rent Setting Formula…. The rent shall not … be increased more than once a year. No further increase shall take effect less than a year after the last increase. The revised rent shall be the amount of rent specified in the notice of increase unless you exercise your right to refer the notice to a Rent Assessment Committee to have a market rent determined. In this case the maximum rent payable for one year after the date specified in the notice shall be the rent so determined."

7. Under the list of tenant's duties the Appellant agreed "To pay rent and other charges weekly in advance." The rent day was identified as Saturday.

8. The Respondent in each year served a notice altering the amount (ie the rent plus service charge) payable under the tenancy agreements by the Appellant. For present purposes I assume without deciding that the various alterations in rent (being rent plus service charge) which have been sought by the Respondent through increase of rent notices were been notified to the Appellant in the appropriate form as required by the Housing Act 1988.

9. The manner in which the Respondent fixed the service charge element of the rent for each forthcoming year was, put broadly, by taking the actual cost from the previous period as the basis for calculating the costs of providing the services for the forthcoming year. Once set, the weekly service charge was a fixed charge for the financial year and did not vary according to the actual costs during the course of that year. If the Respondent's actual expenditure on the items for which a service charge was levied exceeded the amounts the tenants were contractually liable to pay, it absorbed the shortfall itself; if the actual expenditure was less, it retained the difference. There was no 'year end' accounting and no payment of a balancing charge. No service charge accounts were provided to the tenants.

The Law

10. Sections 18 and 19 of the Landlord and Tenant Act 1985 as amended provide as follows:

> "**18. Meaning of 'service charge' and 'relevant costs'**
>
> (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.
>
> (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.

19 Limitation of service charges: reasonableness

(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 is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.”

11. The Housing Act 1988 sections 13 and 14 provide so far as presently relevant as follows:

“**13. Increases of rent under assured periodic tenancies**

(1) This section applies to –

(a) a statutory periodic tenancy other than one which, by virtue of paragraph 11 or paragraph 12 in Part I of Schedule 1 to this Act, cannot for the time being be an assured tenancy, and

(b) any other periodic tenancy which is an assured tenancy, other than one in relation to which there is a provision, for the time being binding on the tenant, under which the rent for a particular period of the tenancy will or may be greater than the rent for an earlier period.

(2) For the purpose of securing an increase in the rent under a tenancy to which this section applies, the landlord may serve on the tenant a notice in the prescribed form proposing a new rent to take effect at the beginning of a new period of the tenancy specified in the notice, being a period beginning not earlier than –

.... [there then follow provisions regarding the dates from which an increase in rent can be made to take effect]

(3) ....

(3A) ....

(3B) ....

(4) Where a notice is served under subsection (2) above, a new rent specified in the notice shall take effect as mentioned in the notice unless, before the beginning of the new period specified in the notice, –

(a) the tenant by an application in the prescribed form refers the notice to a rent assessment committee; or

(b) the landlord and the tenant agree on a variation of the rent which is different from that proposed in the notice or agree that the rent should not be varied.

(5) Nothing in this section (or in section 14 below) affects the right of the landlord and the tenant under an assured tenancy to vary by agreement any term of the tenancy (including a term relating to rent).

"**14. Determination of rent by rent assessment committee**

(1) Where, under subsection (4)(a) of section 13 above, a tenant refers to a rent assessment committee a notice under subsection (2) of that section, the committee shall determine the rent at which, subject to subsections (2) and (4) below, the committee consider that the dwelling-house concerned might reasonably be expected to be let in the open market by a willing landlord under an assured tenancy –

(a) which is a periodic tenancy having the same periods as those of the tenancy to which the notice relates;

(b) which begins at the beginning of the new period specified in the notice;

(c) the terms of which (other than relating to the amount of the rent) are the same as those of the tenancy to which the notice relates; and

(d) in respect of which the same notices, if any, have been given under any of Grounds 1 to 5 of Schedule 2 to this Act, as have been given (or have effect as if given) in relation to the tenancy to which the notice relates.

(2) to (3B) ....

(4) In this section 'rent' does not include any service charge, within the meaning of section 18 of the Landlord and Tenant Act 1985, but, subject to that, includes any sums payable by the tenant to the landlord on account of the use of furniture, [in respect of council tax] or for any of the matters referred to in subsection (1)(a) of that section, whether or not those sums are separate from the sums payable for the occupation of the dwelling-house concerned or are payable under separate agreements.

(5) ....

(6) ....

(7) Where a notice under section 13(2) above has been referred to a rent assessment committee, then, unless the landlord and the tenant otherwise agree, the rent determined by the committee (subject, in a case where subsection (5) above applies, to the addition of the appropriate amount in respect of rates) shall be the rent under the tenancy with effect from the beginning of the new period specified in the notice or, if it appears to the rent assessment committee that that would cause undue hardship to the tenant, with effect from such later date (not being later than the date the rent is determined) as the committee may direct.

(8) ....

(9) ...."

The LVT Decision

12. The LVT considered the statutory material and also two LVT decisions placed before it by counsel for the Respondent: *LondonQuadrant Housing Trust v Muclair* LVTP/SC/CR/008/027100 and *Hailemichael v Community Housing Association* LVT/SCC/002/002103. It took the view that the essential distinction between a fixed and a variable service charge in this type of tenancy is the lack of any mechanism within the agreement for the collection of any underprovision or the repayment of any surplus. It therefore took the view that the service charge in this case was not one which varied according to the relevant costs and so did not fall within the ambit of section 18.

Conclusions on jurisdiction

12. I have had the advantage that since the decision of the LVT there has been a decision of Judge Huskinson in the Lands Tribunal dealing with the same point: *Home Group Limited v Lewis and others* LRX/176/2006. He covered the same ground as the LVT in the present case and came to the same conclusion. In my judgment his reasoning is convincing and I gratefully adopt it.

13. In the present case the Appellant's tenancy agreement contemplated, in accordance with the scheme under the Housing Act 1988 for assured non-shorthold tenancies which are periodic tenancies, that the rent can be altered by the Respondent on a yearly basis. The tenancy agreement expressly informed the Appellant of his right on receipt of a notice altering the rent to refer the matter to the Rent Assessment Committee. The Respondent was thus subject to the statutory code for the alteration of rents so far as concerns the contents of and restrictions upon notices of increase. Indeed the Appellant did apply to the Rent Assessment Committee in respect of the notice of increase for the year 2005-2006: the Committee fixed the rent at the amount sought by the Respondent.

14. There is nothing in the tenancy agreements indicating that any altered rent is to be calculated in any particular manner, or linking an alteration in rent (including service charge) with an alteration in the costs of providing any relevant services. It is true that it can be said that the Respondent in deciding whether to serve a notice of increase and, if so, how much that increase should be may well inform itself (as indeed it accepts it does) by reference to the estimated costs of providing services in the forthcoming year. However the ability in someone to serve a notice increasing the rent, if it chooses to do so, and to calculate that proposed new rent taking into account increases in the costs of services in my judgment does not enable it to be said that the rent (including service charge) is a payment "the whole or part of which varies or may vary according to the relevant costs". The sum payable does not vary in accordance with the relevant costs. Nor in my judgment can it be said that it "may vary" in accordance with those costs. There is no direct relationship between the amount of the costs as a cause and the amount of the service charge as a consequence. Interposed between the amount of the costs and the amount of the service charge is the independent decision of the landlord (here the Respondent) or of the Rent Assessment Committee as to how much the new rent/service charge

should be. The Respondent and that Rent Assessment Committee may take into account the reasonably estimated amount of the service costs in the forthcoming year, but that in my judgment is at least one remove from a situation where a rent varies or may vary according to the relevant costs.

15. In my judgment it cannot be said that the whole of part of the rent or service charge varied or might vary "according to the relevant costs" and section 18(1)(b) is therefore not satisfied. It follows inevitably from this that the LVT had no jurisdiction to deal with this application which was purportedly made under section 27A of the 1985 Act. The decision of the LVT that it did not have jurisdiction is correct and the appeal must be dismissed.

16. Neither the Appellant nor the Respondent made any application for costs and no order for costs is made.

Dated 25 July 2008

His Honour Judge Reid QC