UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2011] UKUT 407 (LC)
UTLC Case Number: LRX/118/2010

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT - service charges – Landlord and Tenant Act 1985 s19 - reasonableness of service charge - evidence required to support LVT findings

IN THE MATTER OF AN APPEAL AGAINST THE DECISION OF THE LONDON LEASEHOLD VALUATION TRIBUNAL

BETWEEN **COUNTRY TRADE LIMITED** **Appellant**

and

MARCUS NOAKES AND OTHERS **Respondents**

Re: 11 Chrome Drive,
Breydon Park,
Great Yarmouth,
Norfolk NR31 0HR

Before: His Honour Judge Gerald

Sitting at: 43-45 Bedford Square, London WC1B 3AS
on 26 September 2011

The following cases are referred to in this decision:
Skilleter v Charles [1991] 24 HLR 421
Arrowdale Limited v Coniston Court (North) Hove Limited LRA/72/2005
Schilling v Canary Riverside Development PTE Limited LRX/26/2005
Yorkbrook Investments Limited v Batten [1985] 2 EGLR 100
Daejan Investments Limited v Benson [2011] EWCA Civ 38

DECISION

Background

1. This is an appeal against the decision ("the Decision") of the Leasehold Valuation Tribunal ("LVT") made on 15th July 2010. The sole ground of appeal relates to the LVT's findings concerning what are described as "secretarial/agents charges." The other findings of the Decision are not challenged.

2. After Ms Crampin Counsel for the Appellant had completed her submissions, Mr Ogunnow, who spoke on behalf of himself and also Mr Noakes and Ms Alps who were also present as well as the remainder of the twenty-six Respondents who were not, accepted that the Decision could not stand.

3. Both parties agreed that the matter should be remitted to a differently constituted LVT and then retried and substantially agreed directions ("Directions") for both parties to follow in order to ensure that the re-hearing is effective.

4. It therefore is not necessary for me to embark on a detailed exposition of the reasons why the appeal was acceded. The purpose of this Decision is to make some remarks which are intended to be of assistance to the subsequent hearing.

5. There is one preliminary observation to make. The Decision is redolent with contentious language casting implied aspersions on the probity of the management arrangements reached between the Appellant and Robbert Limited ("Robbert"). Those arrangements, described variously as being a "device" or "incestuous" by the LVT, arose out of commonality of ownership and directorship of some of the legal entities involved about which the Appellant had been open and frank throughout.

6. Unless, which is not the case here, it is asserted that the management arrangements were a mere "sham" *i.e.* an arrangement which disguised the true relationship or agreement between the parties, there is nothing in principle objectionable to a management company such as the Appellant employing a company it owns or is involved in to provides services: see *Skilleter v Charles* [1991] 24 HLR 421.

7. Whilst such arrangements may well justify a rigorous scrutiny of the fees being charged and the services provided, sight must not be lost of the fact that (a) the question is whether or not the costs are reasonable within the provisions of section 19 of the Landlord and Tenant Act 1985 and (b) there is nothing objectionable to such arrangements – unless, as I have said, which was not the case here, it is alleged they were a mere "sham" or artifice. It is therefore preferable to avoid the use of such descriptions not least because it may give the impression that the tribunal is not focused on what is or are the real issues – "reasonableness".

8. When considering whether service charges, or elements of them, are reasonable it must also be born in mind that any decision of the LVT must be evidence-based. In *Arrowdale Limited v Coniston Court (North) Hove Limited* LRA/72/2005 it was said, at paragraph 23:

> "It is entirely appropriate that, as an expert tribunal, an LVT should use its knowledge and experience to test, and if necessary to reject, evidence that is before it. But there are three inescapable requirements. Firstly, as a tribunal deciding issues between the parties, it must reach its decision on the basis of evidence that is before it. Secondly, it must not reach a conclusion on the basis of evidenced that has not been exposed to the parties for comment. Thirdly, it must give reasons for its decision. In the present case the tribunal rejected that evidence of both the experts on relativity, and it was entitled to do this provided its reasons for doing so were explained. But in basing its decision on "its own knowledge and experience, particularly in relation to relativities which have been agreed between parties or their valuers in other similar cases" it was in error because those agreements on relativity had not been identified nor had the parties had the opportunity to comment on them. As expressed, the decision contravened the second requirement. In said that it did not rely on any specific case or cases, but on this basis the first requirement was contravened. As for the third requirements, reasons that state that the decision was based on no evidence or on evidence that was not disclosed to the parties are adequate in one sense: they enabled the invalidity of the decision to be established. But it support a valid decision the reasons must enable the parties to understand why it was that the tribunal reached the conclusion that it did rather than some other conclusion, so as to show that the conclusion was one to which the tribunal was entitled to come on the basis of the evidence before it."

9. That case of course concerned the question of expert evidence and the basis of that evidence, which is somewhat different to the usual issues raised in service charge disputes which frequently concern straightforward (but detailed) issues of fact about the appropriate level of the costs of goods or services provides. In *Schilling v Canary Riverside Development PTE Limited* LRX/26/2005 it was said at paragraph 15:

> "If the landlord is seeking a declaration that a service charge is payable he must show not only that the cost was incurred but also that it was reasonably incurred to provide services or works of a reasonable standard, and if the tenant seeks a declaration to the opposite effect, he must show that either the cost or the standard was unreasonable. In discharging that burden the observations of Wood J in the *Yorkbrook* case make clear the necessity for the LVT to ensure that the parties know the case which each has to meet and for the evidential burden to require the tenant to provide a prima facie case of unreasonable cost or standard."

10. The relevant citation from *Yorkbrook Investments Limited v Batten* [1985] 2 EGLR 100 at 102K (CA) is:

> "During argument on the issue of garden maintenance, it was indicated that registrars of county courts and those practising in this field were finding difficulty in dealing with the burden of proof when considering applications for declarations under the Housing Acts [that is the predecessor provisions to s19 of the landlord and Tenant Act 1985]. Having examined those statutory provisions, we can find no reason for suggesting that

there is any presumption for or against a finding of reasonableness of standard or of costs. The court will reach its conclusion on the whole of the evidence. If the normal rules of pleadings are met, there should be no difficulty. The landlord making his claim for maintenance contributions will no doubt succeed, unless a defence is served saying that the standard of the costs are unreasonable. The tenant in such a pleading will need to specify the item complained of and the general nature – but not the evidence – of his case. No doubt discovery will need to be ordered at an early stage, but there should be no problem in each side knowing the case that it has to meet, provided that the court maintains a firm hold over its procedures. If the tenant gives evidence establishing a *prima facie* case, then it will be for the landlord to meet those allegations and ultimately the court will reach its decisions. The question of a reasonable charge arises in claims for a quantum meruit, and the courts over the years have not been hampered by problems about the burden of proof."

11. When considering the effect of these authorities, the observations made by the Court of Appeal in *Daejan Investments Limited v Benson* [2011] EWCA Civ 38 in relation to the burden of proof in the context of an application for dispensation under of consultation requirements under section 20ZA of the Landlord and tenant Act 1985 should also be borne in mind. Lord Justice Gross said at paragraph 76(ii):

"… there was some debate as to the burden of proof with regard to prejudice suffered by the Respondents. As will be apparent, it did not seem to me that the outcome in this appeal turned on the incidence of the burden of proof. Insofar as it rested on the Respondents and as already discussed, they have satisfied the burden. I am accordingly reluctant to express a concluded view on a point, not without complexity, which does not require resolution in this case."

12. At paragraph 86, Lord Justice Sedley said:

"Lastly, I would add a word to what Lord Justice Gross says in §76(ii) about the burden of proof. It is common for advocates to resort to this when the factual case is finely balanced; but it is increasingly rare in modern litigation for the burden of proof to be critical. Much more commonly the task of the tribunal of fact begins and ends with its evaluation of as much of the evidence, whatever its source, as helps to answer the material questions of law. In nine cases out of ten this is sufficient to resolve the contest. It is only rarely that the tribunal will need to resort to the adversarial notion of the burden of proof in order to decide whether an argument has been made out, and tribunals ought in my view not to be astute to do so: the burden of proof is a last, not a first, resort."

13. It is an every day occurrence for the LVT to be faced with an application relating to the reasonableness of various elements within a service charge of a detailed and factual nature frequently involving quite small sums of money relating to goods or services which are part of most people's broad knowledge and experience of every day life. Frequently all or most of the adduced evidence will be from the landlord. The tenant, often in the absence of any comparative evidence, will be asserting that the costs are too high usually for a variety of interacting reasons – the rate is too high, too many hours are claimed, the work was not done to a reasonable standard to justify the sum charged.

14. It is not in my judgment the effect of the above-cited authorities that the LVT must accept the evidence of the landlord without deduction if there is no countervailing evidence from the tenant. The evidence required in these types of service charge disputes is quite different from the sort of complex largely non-factual evidence and issues addressed in cases such as *Arrowdale*.

15. The LVT does not have to suspend judgment or belief and simply accept the landlord's evidence. It is entitled to robustly scrutinise the evidence adduced by the landlord (and, of course, the tenant) which, after examination, it is entitled to accept or reject on grounds of credibility. The course of scrutiny is not just looking through the invoices or other documents, but identifying issues of concern and asking the landlord's (or tenant's) witnesses for explanations and observations. It is not necessary for each and every invoice to be minutely examined, but sufficient for them to be dealt with on a sample basis. It is only once this process has been gone through that the LVT will be able to reach any decision on the credibility of witnesses which will be based on the answers given and any other available evidence.

16. The difficulty comes where the LVT accepts that "some" work has been done but does not accept that the "rates" or "charges" claimed as reasonable are credible or justified but there is no other comparative or market evidence (in the form of estimates, or quotes or such like) of what those rates or charges might be. The LVT will not be able to reject the sum claimed because it has accepted that some work has been done to justify a charge, but will have concluded that the amount claimed is too high.

17. In those circumstances, the LVT is entitled to apply a robust, common sense approach and make appropriate deductions based on the available evidence (such as it is) from the amounts claimed always bearing in mind that it must explain its reasons for doing so. The circumstances in which it may do so will depend on the nature of the issues raised and service charge items in dispute, and will always be a question of fact and degree. In some instances, such as insurance premiums, it will be very difficult for the LVT to disallow the landlord's claim in the absence of any comparative or market evidence to the contrary. In other cases, such as gardening, cleaning or such like, the position might be different where the nature and complexity of the work is fairly straightforward. It is only where the issue is finely balanced that resort need be had to the burden of proof.

18. Moving on, the principal objections to those aspects of the Decision (mainly paragraph 28) which related to "secretarial/agents charges" were as follows:

(a) The LVT appears to have misunderstood that the £60 hourly rate was *not* confined to the fees of Mr Wright and Mr Curry, both of whom provided services to Robbert, but covered overhead costs such as the renting of office space, use of office equipment, site visits and so on. This appears to have coloured the LVT's finding that high-grade staff were employed for menial tasks.

(b) The LVT failed to take into account that the relevant provisions of the lease (see further below) permitted the charging of administration charges relating not only to the estate but also to the management company (the Appellant). The LVT

therefore appears to have erred in considering that the actual administration costs incurred by the Appellant could not be recovered (or "loaded", as the LVT described it) onto the service charge "with a 15% profit margin on top" (as to which, see further below).

(c) Having made that error, the LVT concluded that most of the invoices exhibited in section 6 of the Trial Bundle "concern the running of a business, not the business of managing property". The additional objection here is that the LVT made that finding without putting any of the invoices to the Appellant's witness Mr Wright. What must be borne in mind here is that before any such finding can be made, the person against whom they are to be made (Mr Wright) must first be asked about them. It is not necessary to go through each and every document, but the examiner, whether the tenant or the LVT itself, must ask the witness for his or her evidence on at the very least a sample of documents which trouble the tribunal.

(d) The conclusion that "in the instant case, with a brand new estate, the maintenance and services required are minimal". This, unfortunately, was not put to Mr Wright. As a matter of common sense, that may well be so in the majority of new builds. However, it does not necessarily follow that that is the case in all new builds, let alone the instant property. There is some indication that there were problems relating to electricity and other features, such as door knobs, which indicated poor quality finish which would have justified higher level involvement of managing agents.

(e) The conclusion that a Sage accounting package was far more than was required by 126 units was not put to Mr Wright for his reasons as to why same was required.

(f) The conclusion that if work needs to be contracted out then it "should" be to a firm of professional managing agents for whom an additional 126 units will make little difference to its operational overheads again was not put to Mr Wright.

19. Moving on to paragraph 30:

(a) The finding that the LVT "does not accept that this incestuous relationship is legitimate where it acts against the interests of the service charge payer" was unwarranted, given that there was no suggestion that it was a sham, and unspecific as to just what *acts* were done *against the interests of the* tenant. If it is a reference to the fact that the Appellant was now charging for services it had not previously charged for, it was plainly inappropriate as a landlord is always entitled to charge for services provided in subsequent years for elements which in previous years it was prepared to make no charge for. If it is a reference to something else, it should explicitly state what that something else is.

(b) The LVT's determination that "a more cost effective and reasonable approach to managing this development would be for [the Appellant] to sub-contract the management to a professional agent, charging on a normal unit cost basis" was based principally upon the *RICS Service Charge Residential Management Code* which, again, was not put to Mr Wright for his observations on.

(c) In referring to the 15% management charge which the Appellant was entitled to charge on top of the usual service charge as "a profit element", the LVT failed to properly consider the nature and effect of the provisions of the lease but merely accepted Mr Wright's interpretation of that percentage as "the profit element" – again, more on this below. The point here is that the meaning and effect of a lease is a matter of law for the tribunal of law to determine, not layman's opinion. Moving on to paragraph 30:

20. In my judgment, the first question for determination is whether the "management charge" of 15% is intended to be a pure profit uplift on permissible expenditure or whether (as its description might perhaps suggest) a charge for management provided. If the latter, it would follow that it must then be determined whether any of the elements of "secretarial/ agents charges" claimed properly fall with the "management charge" or do they all fall within those charges permitted by the service charge provisions of the lease.

21. This will necessarily involve the LVT considering the meaning of the lease, what sums may be recovered thereunder and then considering whether as a matter of fact which if any of the charges claimed come under which category of authorised expenditure.

Re-hearing by the LVT

22. Given the findings I have made, it would appear appropriate that the issue of "secretarial/agents charges" for service charge years 2008 and 2009 be remitted to the LVT to be heard by a differently constituted tribunal.

23. The re-hearing will include a consideration of (1) the extent to which "secretarial/agent charges" are recoverable on a true interpretation of the provisions of the leases, in particular, clauses 1.10, 7.1 and Schedule 3 paragraph 1(a); and (2) whether and to what extent those charges were reasonable within the meaning of section 19(1) of the Landlord and Tenant Act 1985.

24. The parties agreed procedural directions to facilitate resolution of that issue as follows:

(a) The lessees do file and serve a Statement of Case by 4pm on 3rd October 2011

(b) Country Trade Limited do file and serve a Statement of Case by 4pm on 17th October 2011

(c) The lessees do reply to Country Trade Limited's Statement of Case in order to refine (if so advised) the precise issues or issues which are to be raised in relation to "secretarial/agents charges" by 4pm on 7th November 2011.

(d) The parties do exchange any evidence (documents, witness statements or otherwise) additional to that already served by 4pm on 31st December 2011.

Dated: 7 October 2011

His Honour Judge Gerald