UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2012] UKUT 457 (LC)
UTLC Case Number: LRX/108/2011

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – invalid demand because name of landlord not given – whether made valid for purposes of operation of section 20B by later valid demand – section 20C decision – whether reasons adequate – whether discretion properly exercised – appeal and cross-appeal dismissed – Landlord and Tenant Act 1985 ss 20B and 20C – Landlord and Tenant Act 1987 s 47

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF A LEASEHOLD VALUATION TRIBUNAL FOR THE SOUTHERN RENT ASSESSMENT PANEL

BETWEEN	**HARRY JOHNSON** **JUNE JOHNSON** **AND OTHERS**	**Appellants**
	and	
	COUNTY BIDEFORD LTD	**Respondent**

Re: Holiday Park
Lenwood Country Club
Lenwood Road
Bideford
Devon EX39 3PN

Before: The President

Sitting at: 43-45 Bedford Square, London WC1B 3AS
on 22 October 2012

Mr Charles E S Knapper of Fursdon Knappers, solicitors of Plymouth, for the appellants
Sebastian Kokelaar instructed through direct professional access for the respondent

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The following cases are referred to in this decision:

London Borough of Brent v Shulem B Association Ltd [2011] EWHC 1663 (Ch)
Tenants of Langford Court v Doren Ltd LRX/37/2000
Schilling v Canary Riverside Developmemt PTE Ltd LRX/26/2005

The following further cases were referred to in argument:

Drew-Morgan v Hamid-Zadeh [1999] EGLR 13
Beitov Properties Ltd v Martin [2012] UKUT 133 (LC), LRX/59/2011
Akorita v Marina Heights (St Leonards) Ltd [2011] UKUT 255(LC) LRX/134/2009

DECISION

Introduction

1. This appeal by a number of lessees of holiday chalets on an estate owned by the respondent arises out of an application made by the respondent landlord under section 27A of the Landlord and Tenant Act 1985. The leasehold valuation tribunal that heard the application made two decisions. In the first, dated 2 June 2011, it determined that certain amounts, specified in a schedule to its decision, for the three accounting years 2007/08 to 2009/10 were costs that were reasonable for the purposes of section 19 of the Act, and in so doing it made reductions in a number of items of expenditure relied on by the landlord. It also held that the service charge demands had not complied with the requirements of section 47 of the Landlord and Tenant Act 1987, so that the amounts that it had found to be reasonable were not payable "pending service of valid service charge demands compliant in all respects with the law including section 47". It said that the applicant had leave to apply to the tribunal for determination that any service charge demands served or to be served complied with section 47. The LVT also made an order under section 20C of the 1985 Act that any costs incurred by the lessor in connection with the proceedings were not to be regarded as relevant costs for the purpose of any service charge. Following the service on the lessees of demands on 8 June 2011 the landlord sought the determination that it had been given leave to seek, and in a further decision dated 27 August 2011 the LVT determined that the service charge demands for the three years complied with section 47 and had been duly served.

2. Following the first decision the lessees sought permission to appeal to the Upper Tribunal in respect of a number of matters in the decision. On 11 July 2011 the LVT granted permission limited to one item only, the sewage pump maintenance costs for 2007/08. On 18 July 2011 the lessees made a further application for permission to appeal. They said that a decision of the High Court on 30 June 2011 in *London Borough of Brent v Shulem B Association Ltd* [2011] EWHC 1663 (Ch) showed that under section 20B of the 1985 Act certain of the amounts that the LVT in its decision of 2 June 2011 had found to be payable (subject to compliance with section 47) were not payable, and they sought permission to enable them to challenge this part of the decision. The LVT refused permission. However, I granted permission to the lessees to appeal on this ground on 23 December 2011. I also granted the landlord permission to appeal on two grounds: firstly whether the LVT's decision of 2 June 2011 had been correct in determining that the original service charge demands were not section 47 compliant; and secondly whether the LVT had been correct to make an order under section 20C in favour of the lessees.

3. At the hearing before me Mr Knapper for the appellants withdrew the appeal in relation to the sewage pump maintenance costs, and Mr Kokelaar for the respondent withdrew the cross-appeal in relation to whether the original demands had been section 47 compliant. This left for determination the appellant's contention in relation to section 20B and the respondent's cross-appeal in relation to 20C. It is only necessary, therefore, to refer to such facts as are relevant, or claimed to be relevant, to these matters. I will deal with the section 20B point first.

4. The respondent, County Bideford Ltd, became the owner of Lenwood Country Club, the estate that contains the appellants' chalets, when it purchased the freehold from the previous owners in 2008. On 1 October 2008, in a letter headed "County Bideford (Management) Ltd" Mr Simon Kyriacou, who gave his name above his "countygroup.co.uk" email address, wrote to the lessees as follows:

> "You may or may not be aware County Bideford Ltd, have now completed the purchase of the freehold of Lenwood Country Club to include the freehold of your Bungalow.
>
> County Bideford have appointed County Bideford (management) Ltd to manage the estate on their behalf.
>
> I am therefore taking this opportunity to introduce myself as the person responsible for Lenwood on a daily basis.
>
> I also attach a September Rent demand and Insurance confirmation of cover.
>
> Further to a recent meeting with Jane Mills Chair of the Residents Association my client has considered the request for rent and service charges to be paid monthly in advance via direct debit.
>
> On the basis that the September and October Rent and Service charges are paid immediately my clients will accept monthly payments, commencing from 13th November on this basis…"

5. The original service charge demands on which the landlord relied were dated between 1 October 2008 and 12 July 2010. Each of these was headed "County Bideford Management Ltd, 156 High Street, Bushey, Hertfordshire WD23 3HF". The landlord accepts that these demands failed to comply with the requirement in section 47(1)(a) that any written demand must contain the name and address of the landlord. They did not contain the name of the landlord but only that of the management company. Notwithstanding, therefore, that the lessees who had received the letter of 1 October 2008 could have been in no doubt about the name of the landlord, it was accepted that the demands did not contain its name and so failed to comply with the requirement.

6. So far as is material for present purposes section 47 of the 1987 Act provides:

> "47 Landlord's name and address to be contained in demands for rent etc
>
> (1) Where any written demand is given to a tenant of premises to which this Part applies, the demand must contain the following information, namely–
>
> (a) The name and address of the landlord…
>
> (2) Where–
>
> (a) a tenant of any such premises is given such a demand, but
>
> (b) it does not contain any information required to be contained in it by virtue of subsection (1)
>
> then…any part of the amount demanded which consists of a service charge or an administration charge…shall be treated for all purposes as not being due from the tenant

to the landlord at any time before that information is furnished by the landlord by notice given to the tenant…

(4) In this section 'demand' means a demand for rent or other sums payable to the landlord under the terms of the tenancy"

7. Section 20B of the 1985 Act provides:

"20B Limitation of service charges: time limit on making demands

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge."

8. It is the lessees' case that a service charge demand which does not comply with section 47(1) is not a valid demand and cannot therefore be treated as "a demand for payment of the service charge" within the meaning of section 20B(1). Mr Knapper submitted that the invoices sent to the lessees on which the landlord relied were not demands for the purposes of these provisions because they were not demands from the landlord. I cannot accept this. They were documents requiring the payment of sums due to the landlord under the terms of the tenancies, and the fact that they were sent by the landlord's management company did not mean that they were not demands. In the event that they were held to be demands, but deficient ones, Mr Knapper submitted that there were two ways in which the deficiencies could have been corrected. One way was to serve notice under section 47. If that were done it might be that it would have some kind of retrospective effect. The other way was to serve fresh demands. It was this latter course that the landlord chose to take. But the fresh demand was not a notice for the purposes of section 47(2). Mr Knapper drew attention to clause 6(v) of the standard lease, which provides that the rules about serving notices in section 196 of the Law of Property Act 1925 applied to any notice given under the lease. I can see no reason at all, however, why the notice contemplated by section 47(2) should not be contained within a later demand, and I accept Mr Kokelaar's submission that the demands of June 2011 were sufficient for this purpose.

9. Mr Knapper relied on the decision of Morgan J in *Shulem B* for his submission that a demand for the purposes of section 20B(1) must be a valid demand, so that the original demands, being invalid by reason of their failure to meet the requirements of section 47(1), could not constitute demands for this purpose. The invalidity with which *Shulem B* was concerned, however, was a contractual invalidity. At paragraph 53 Morgan J said this:

"The reference to a demand in section 20B(1) presupposes that there had been a valid demand for payment of the service charge under the relevant contractual provisions. In this case, I have held that the letter of 23 February 2006 was not a valid demand for

> service charge under clause 2(6) of the leases. It follows that it was not 'a demand for payment of the service charge' within section 20B(1)."

10. The invalidity with which Morgan J was concerned was thus not one that was capable of retrospective correction. An invalidity that arises by virtue of a failure to comply with the requirements of section 47(1) is by contrast one that can be corrected and can be corrected with retrospective effect. That is what subsection (2) provides. In my judgment, therefore, the lessees' contentions based on section 20B necessarily fail. The service of the demands in June 2011 had the effect of validating the earlier demands, and the amounts payable, therefore, are those set out in the schedule to the LVT's decision of 2 June 2011.

11. I turn to consider the respondent's appeal in relation to section 20C. Under section 20C(1) a tenant may make an application for an order that all or any of the costs incurred by the landlord in proceedings before an LVT are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person named in the application. Subsection (3) provides that the tribunal to which the application is referred may make such order on the application as it considers just and reasonable in the circumstances. The LVT in its decision dealt with the lessees' section 20C application very shortly. It said:

> "33) Section 20C application. While we do not consider the Applicant has the right to charge the cost of these proceedings to service charge, we nevertheless made an Order as the Respondents have made their case in some respects."

12. Mr Kokelaar submitted that this reason was totally inadequate and the order was wrong in law. He referred to two decision of HH Judge Rich QC in the Lands Tribunal, *Tenants of Langford Court v Doren Ltd* LRX/37/2000 and *Schilling v Canary Riverside Developmemt PTE Ltd* LRX/26/2005. In the latter case at paragraph 13 the Member said that the ratio of his earlier decision was: "there is no automatic expectation of an Order under s 20C in favour of an unsuccessful tenant." He had in that case upheld the refusal of the LVT to make an order to "follow the event" of the tenants' success, even where the LVT's decision necessarily meant that the landlord had been at least to some extent at fault. Referring at paragraph 14 to that part of his earlier decision where he had said that the "outcome of the proceedings" was one of the circumstances to which subsection (3) required the consideration of what was just and equitable, he went on:

> "In service charge cases, the 'outcome' cannot be measured merely by whether the applicant has succeeded in obtaining a reduction. That would be to make an Order 'follow the event'. Weight should be given rather to the degree of success, that is the proportionality between the complaints and the Determination, and to the proportionality of the complaint, that is between any reduction achieved and the total of service charges on the one hand and the costs of the dispute on the other."

13. Mr Knapper submitted that the LVT had been right to conclude that the landlord did not have the right to charge the cost of the proceedings to the service charge. By clause 3(13) of

the lease the lessee covenanted "To pay all costs charges and expenses which may be incurred by the Lessors or their agents in connection with the recovery of arrears of rent or insurance premium from the Lessee…" Clause 1 provided for the payment of rent, and "secondly…by way of further or additional rent" the insurance premium and "thirdly by way of further or additional rent a service charge…" The fact that the service charge was payable as rent did not make clause 3(13) applicable: the inclusion of "insurance premium" implied that service charges were not included, and in the event of ambiguity the provision was to be construed contra proferentem against the landlord. There could be no doubt, Mr Knapper said that the tenants had been successful. The ruling on section 47 had been in their favour, and very substantial reductions had been made on the basis that expenditure had been unreasonable.

14. While I tend to think that Mr Knapper is correct on the construction of the lease, since his clients' application under section 20C was founded on the assumption that the costs in question at least might be included in the service charge, I see no reason to refuse to decide the question raised in the appeal on the basis that the application did not need to be made. There can be no doubt, in my judgment, that as the sole reason for making a section 20C order the fact that the tenants "have made their case in some respects" is inadequate. A decision based on the outcome of the case and no other circumstances must have regard to the degree of success, and the tenants' making out a case "in some respects" could not be sufficient to justify an order that none of the landlord's costs should be regarded as relevant costs. However, the decision shows that of the items of expenditure in dispute slightly more than half were the subject of reductions made by the LVT on the basis of reasonableness, and some of the reductions were for very substantial amounts. When there is added the fact that the tenants were successful in relation to payability on the basis of section 47, it is clear that the degree of their success was considerable. Despite the inadequacy of the tribunal's reason, it did in my view come to a decision that was plainly within its discretion, and I do not consider that it would have come to a different conclusion if told that its reason was inadequate. The cross-appeal is therefore dismissed.

Dated 17 December 2012

George Bartlett QC, President