LRX/159/2007

LANDS TRIBUNAL ACT 1949

LANDLORD AND TENANT –service charges – validity of notices - breach of natural justice.

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

BETWEEN **SWANLANE ESTATES LIMITED** **Claimant**

and

Respondents

MR T WOODS
MR AND MRS J FIELDUS
MR AND MRS M F CHARLES
MR AND MRS P J BRACKLEY
MR AND MRS THOMAS
MR A AIDO AND MS D REMY
MR A UNDERDOWN
MR B MTANDABARI
MR C BARBER
MR D BANKS
MR D COULSON
MR J MANLEY BIRD
MR S MARKWICK
MRS J DENYER
MS A COLGATE
MS A KENNARD
MS C PENNY
MS C SHANLEY
MS E RAMSAY
MS J GRIFFIN
MS S E NORMAN
MS T WINN AND MR M COOMBES
MS V VERMUNDSEN

Re: Stoke Abbott Court,
Stoke Abbott Road,
Worthing,
West Sussex BN11 1HJ

Before: His Honour Judge Mole QC

Sitting at Worthing County Court, The Law Courts,
Christchurch Road, Worthing, West Sussex, England, BN11 1JD
on Tuesday 29 July 2008

Mr Edward Denehan of Counsel for Claimant, instructed by Glinert Davis Solicitors of London.
Mr T Wood, Mr C. Harrity and Mr D. Coulson for the Respondents.

DECISION

1. This matter arises out of an appeal against the decision of the Leasehold Valuation Tribunal on an application under section 27A and 20C of the Landlord and Tenant Act 1985. The application was dated the 25th of May 2007 and was made by Mr T. Wood on behalf of himself and other tenants of Stoke Abbott Court, Stoke Abbott Road, Worthing, West Sussex. Swanlane Estates Limited is the registered proprietor of the head leasehold interest in the premises (and is referred to hereafter as 'the Landlord'). The application was in respect of service charges demanded for the years from 2004 to 2007 which were set out in a letter dated 16 April 2007. This demand did not itemise the amounts to which it related. It included 18 items that had been incurred more than 18 months earlier.

2. Mr Wood's application was made on the standard form. It is headed "application for a determination of liability to pay service charges." The note says "this is the correct form to use if you want to ask the Leasehold Valuation Tribunal to determine the liability to pay any service charge. This includes the question of whether or not the service charge is reasonable." Mr Wood listed the years for which a determination is sought as 2004 to 2007. In answer to a request on a subsequent page to give details Mr Wood described the question he wished the tribunal to decide in respect of the 2004 charges in this way: "REQUEST FULLY DETAILED ITEMISED DATED OF EACH CHARGE ON LIST (THIS HAS NOT BEEN FORTHCOMING) ASSESS WHAT SHOULD BE COVERED BY BUILDINGS INSURANCES ESTABLISH WHICH WORK ACTUALLY CARRIED OUT, AND BY WHOM. PROOF OF WHAT HAS BEEN PAID TO WHOM." Following pages in respect of the years 2005 2006 and 2007 referred to a list of April the 16th 2007. It is right to say that the application did not mention section 20 notices of any description at all. The other tenants listed joined in his application

3. The Landlord's Statement in Reply set out comments in respect of each of the disputed items. In paragraph 15.2, in dealing with the charges of Mr Peter Overill, the Landlord expressly said that "the tenants were served with the relevant notice under section 20 of the Landlord and Tenant Act 1985" and exhibited what was said to be a copy of the notice. The Landlord's statement did not make any other reference to the service of section 20 notices in respect of any item.

4. The Landlord and Tenant Act 1985, section 20 (as amended) provides:

> (1) where this section applies to any qualifying works or qualifying long-term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either –
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> (a) complied with in relation to the works or agreement, or
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> (b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal.

(2) in this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) this section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(5) an appropriate amount is an amount set by regulations made by the secretary of state....

(6) where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount

5. In accordance with regulations made under that provision the Secretary of State has set an appropriate amount of £12,000. The "consultation requirements" are prescribed by regulations made by the Secretary of State in accordance with section 20ZA (4) to (7).

6. Section 20B limits service charges by imposing a time limit on the making of a demand. It does so in these words:

(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.

7. The application was heard by the Leasehold Valuation Tribunal on the 17th of September 2007. The LVT inspected the exterior and common areas of the property before the hearing. The LVT evidently formed a poor view of what it saw, concluding that "the general impression of the property was that it was in a serious state of neglect and disrepair." (paragraph 18).

8. The LVT then considered the service charges in dispute. The relevant passages of the decision are these:

"22. The schedule of charges produced by the (Landlord) ... was also undated and it was only possible to identify the dates of the various charges by reference to the (Landlord's) statement of case.

23. It appeared that a number of the items included in the schedule related to charges incurred more than 18 months before the service of the demand.

24. The Tribunal asked the (Landlord) to provide evidence of their compliance with s 20B of the Landlord and Tenant Act 1985 which provides that items of service charge are not recoverable unless a demand is made within 18 months of the charge being incurred.

25. The (Landlord) produced an undated and unaddressed photocopy page (not included within their bundle) which purported to demonstrate their compliance with section 20B. The Tribunal was not satisfied with this evidence and adjourned the hearing for 30 minutes to allow the (Landlord) the opportunity to obtain a faxed copy of further evidence to show their compliance with this provision."

9. I break into the quotation to say that I was shown a photocopy of an unaddressed "section 20 (b)" (sic) notice, which I was told was the document referred to in paragraph 25. I note that it was dated 27th June 2006.The LVT continued:

"26. The (Landlord) failed to produce any further evidence relating to this matter over the adjournment and the Tribunal decided that all items predating 16 October 2005 should therefore be disallowed because of the respondent's failure to comply with section 20B.

27. Following the lunch recess the (Landlord) produced a further copy letter addressed to one tenant of the property (the addressee was not one of the Applicants in the present case) which purported to demonstrate their compliance with section 20B. The Tribunal adjourned for a short time to allow the Applicants to consider this letter. On resumption the Applicants said that none of them had received a copy of the letter. The Tribunal's initial decision on this matter therefore remains unaltered.

28. This means that the (Landlord) is unable to recover items 1 -- 18 of their schedule... and listed as items 15.1 -- 15.18 in their statement of case, starting with Block premium (£10,182.85) down to and including Peter Overill (£3,198.06).

29. The Tribunal noted that the (Landlord) had had the benefit of legal advice and representation and considered that evidence to comply with section 20B (if it existed) should have been included in the (Landlord's) bundle and referred to in their statement of case. Neither was done."

10. After dealing with several items on the schedule the LVT turned to item 15.24 at paragraph 36 of their decision in these words:

"Major drainage works were carried out at the property in order to resolve a recurrent flooding problem which affected the ground floor of the building. Mr Overill, the (Landlord's) surveyor said that the problem had arisen because the original drainage system, installed when the building was constructed, was inadequate to deal with the amount of waste water and effluent generated by modern living. We accept Mr Overill's evidence that the cost of the works would not have been substantially lower

> if they had been carried out earlier. While the tribunal accepts the (Landlord's) explanation for the need for the works and considers that the work carried out was both necessary and done to a reasonable standard it is not satisfied that proper notice under section 20 Landlord and Tenant Act 1985 as amended were served on the Applicants. Such a notice is necessary where landlord proposes to carry out works which will cost in excess of a certain sum. That sum is specified by statutory instrument and in the present case amounts to £12,000.
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> 37. Page 54 of the (Landlord's) bundle contains a single sheet of a letter purporting to be a section 20 notice. The letter is incomplete, part of the page supplied had been obscured by a note written or pasted over it and it was impossible for the Tribunal to read. No copies of the Estimates accompanied the letter. The (Landlord) produced a specification of the works (prepared by their surveyor) on the morning of the hearing, but this did not show any of the contractors' estimates for the works. We accept the (Landlord's) evidence that they engaged the lowest priced contractor and that the work was completed under budget. However we have not seen evidence that a proper notice was served on the Applicants nor of the certificates provided by the surveyor and therefore restrict the sum allowable under this invoice to the statutory limit of £12,000."

11. The effect of the two section 20 points was to reduce the costs recoverable by the landlord by the sum of £71,019 .18.

12. At paragraph 91 of their decision the LVT granted the tenants' application under section 20C. Part of their reason was the Landlord's "failure to follow the correct procedures under s 20"

13. The Landlord sought leave from the LVT to appeal. A number of grounds were advanced which may be summarised as submitting that it was not open to the LVT to take the section 20 and section 20B points of its own motion but even if it was the points had not been taken in a way that gave them a fair hearing. The LVT refused permission on the 17th of October 2007 saying:

> "4. The application is misconceived. The Landlord was in receipt of legal advice throughout the proceedings and failed to include in the agreed bundle any evidence of compliance with section 20B Landlord and Tenant Act 1985. This is a section with which it is mandatory for the Landlord to comply and the Tribunal is within its rights to ask for evidence of compliance.
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> 5. The Tribunal extended a discretion to the Landlord by adjourning the hearing to allow them to obtain such evidence which was not forthcoming in the time permitted by the Tribunal. When some evidence was produced after the lunchtime adjournment the Tribunal once again exercised its discretion by allowing production of the late evidence. Such evidence as was produced did not however satisfy the Tribunal that there has been proper compliance with the section.

> 6. The Landlord's argument in respect of section 20 is similarly misconceived. It is the Landlord's duty to ensure that it comes to the Tribunal with sufficient evidence to satisfy the Tribunal as to compliance with the requirements of the section. Such evidence as the Landlord had included in the hearing bundle was inadequate for this purpose. The copy supplied was also incomplete and did not demonstrate that there had been proper compliance with the section. It is noted that the Landlord had the benefit of legal advice throughout the proceedings.
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> 7. The Tribunal is entitled to ask to see proper compliance with both these issues even in the absence of the matters being raised by the Tenants who were not legally represented."

14. On the 2nd of January 2008 the President of the Lands Tribunal granted permission to appeal, observing:

> "There is a reasonable prospect of success on the point that the LVT acted unfairly in relation to the issue of compliance with section 20 and in consequence came to a wrong decision and on the section 20C point which is consequential on the first point. Permission to appeal is limited to these issues, and the appeal will be by way of review."

15. Mr Edward Denehan, for Swanlane Estates Ltd, in his succinct submissions, made two main points. He submitted that the LVT first erred in law in taking the two section 20 points on its own motion and then, having taken those points, erred again in failing to accord the landlord a fair hearing by not allowing sufficient time to deal with them. I heard from three tenants in reply, Mr T. Wood, Mr C. Harrity and Mr D. Coulson, who made measured and thoughtful submissions. I believe I fairly condense the essence of their submissions as being that it was for the LVT to judge their procedures in general and the length of adjournments in particular in the light of everything that they had seen and heard of the Landlord and the premises. Given the tenants' difficulties in obtaining details of the charges and lack of legal representation it was reasonable and just for the LVT to raise the question of notices. In all the circumstances, the LVT was entitled to be sceptical about the general efficiency and ability to produce evidence of the Landlord. It was a proper exercise of the LVT's discretion to be reluctant to waste time waiting for the production of evidence they had reason to suspect would not be forthcoming however long the Landlord was given.

Conclusions

16. I reject the submission that the LVT was not entitled to raise the section 20 points of its own motion. What the LVT may usefully raise on its own initiative will depend upon all the circumstances. It is clear to me that the LVT may be properly concerned to clarify issues of law where parties are not legally represented and where those issues of law go directly to the central question of liability. Although it is not strictly accurate to say that it is mandatory for the landlord to comply with section 20B, if the landlord does not do so then section 20B (1) provides that the tenant is not liable to pay so much of the service charge as reflects costs incurred more than 18 months before the demand. It is quite possible that a tenant may not be aware of this provision, which Parliament has enacted expressly for his benefit. The LVT was

not obliged to sit in silence and find the applicants liable for service charges when the LVT had reason to query whether they were really liable. It was entitled to explore the matter on its own initiative, if that is what it considered justice required.

17. There is always a tension between the role of a tribunal seeking to do justice between the parties according to law where one of the parties is not legally represented and the tribunal's duty to remain, and conspicuously remain, impartial. This tension is particularly acute in the case of the LVT because the LVT itself decides the facts. Resolution of the problem can usually be achieved by scrupulous fairness in giving the party against whom a point is raised or prompted by the LVT every opportunity to deal with it. If a party has no justifiable ground for complaint about having been given a fair and proper chance to deal with a point, he can have no justifiable complaint about a good point being raised by the tribunal if it is decided against him.

18. It is for the LVT to make its own procedural decisions, in the exercise of its discretion, in the light of all the circumstances in front of it at the time. The LVT sees the parties and how they behave. The LVT is entitled to be robust in its decisions and unsympathetic to what it may regard as a delaying tactics. The Lands Tribunal will not interfere with the exercise of the LVT's discretion unless it is satisfied that the conduct of the LVT has been contrary to natural justice in the sense that it has denied one of the parties a fair hearing. A party will not have a fair hearing if he has not been given a fair chance to deal with an important point.

19. The LVT said that it was the landlord's duty to come to the tribunal with sufficient evidence to satisfy it as to its compliance with the requirements of section 20 and to refer to those documents in its statement of case. It would have been prudent, in my view, for the Landlord to plead in relation to each item where it was relevant, that section 20 notices had been served. Given the broad terms of Mr Wood's application and the lack of any indication that he had received legal advice, it might be thought to have been rash to rely too strictly on the application and assume that no point would be taken on section 20 notices. That is not to say, however, that the Landlord was - or is - under a duty to satisfy the LVT that section 20 was complied with. It is for the parties to decide how they run their cases. A party can choose not to deal with a potential issue in his initial case and wait and see if it is raised. The same goes for s.20; there is no initial burden on a landlord to prove that notices have been served. But, on the other hand, all a tenant has to do to raise the issue is to give evidence that no such notice has been received, whereupon the landlord will either have to lead credible evidence that the notices were served or lose on that issue. In this case the Landlord chose to run the case in a way that was not without risk and perhaps should not have been very surprised when things went wrong. I am not impressed with the suggestion that it would impose much of a burden on landlords to be ready to prove service of necessary section 20 notices. Rather than relying on silence in an application drafted by a tenant without conspicuous legal skills, a better tactic for a landlord confident that the service of appropriate section 20 notices can be proven, might be to raise the issue at an early stage, to see if it really is in contention. By the same token, the LVT could be forgiven for the suspicion that silence from a landlord on that issue may imply a lack of confidence that section 20 notices can be proven.

20. I turn to consider whether, the issue of the notices having been properly raised, the Landlord had a fair hearing on it.

21. There was a suggestion by those representing the tenants that, in reality, the Landlord had been given longer than half an hour and in practice had at least over the luncheon adjournment to obtain whatever evidence was needed. The point was made that the Landlord could have pressed for a longer adjournment but did not do so. Mr Wood also made the powerful point that the LVT had inspected the premises, with which, as the decision makes clear, they were unimpressed, and had heard the Landlord put a case on the merits. They were thus in a strong position to assess the general efficiency and credibility of the Landlord and its agents and were entitled to take that into account in deciding how long an adjournment it would be worth granting.

22. As for the first of those points, the length of the adjournment to produce s. 20B notices, it seems to me that the answer is clearly given by the LVT itself in paragraphs 26 and 27 of its decision. Paragraph 26 reads as if the decision to disallow items immediately followed the adjournment. The LVT refer to it as an adjournment "for 30 minutes". That the LVT reached an immediate decision is confirmed by the last sentence of paragraph 27. The LVT records that a further copy letter was produced and considered after lunch and evidence about it was taken from the tenants. The LVT then says "the Tribunal's initial decision on this matter therefore remains unaltered." (My underlining) To my mind this confirms that an "initial decision" was indeed made immediately after the 30 minute adjournment and before lunch. Given that the LVT says it had reached a decision, it may well be that counsel for the Landlord was simply accurately gauging the mood of the tribunal in not pressing for a longer adjournment.

23. I acknowledge the force of the submission that the LVT is in a better position to form a view of the Landlord's credibility and competence than this Tribunal. The LVT is entitled to bear that in mind when deciding how long an adjournment to grant. But part of the circumstances to consider in exercising the discretion to grant more time is the potential inconvenience in doing so. (I do not lose sight of the fact that it might not have been easy for the LVT to reconstitute itself at short notice.) However, if the LVT had simply granted an adjournment until the next day (or the next convenient day) for the Landlord to produce evidence, it seems to me that they would have been quite beyond criticism. If no notices had been produced that would have been the end of the point; if notices had been produced and accepted, that would equally be the end of the point. If notices had been produced, but service was not accepted, which seems to be the most likely outcome, that would raise a short issue of fact upon which the LVT was well placed to make up its mind.

24. I remind myself that the question is not whether I would have exercised my discretion differently if I had been sitting on the LVT: it is whether the way the LVT exercised its discretion deprived the Landlord of a fair trial of the issue. In my judgment it did so. True, the Landlord might possibly be thought a little incautious and unimaginative in the preparation and handling of its case. True, the LVT were evidently not impressed with many aspects of the management of the premises and were entitled to have that in mind. But, having been instrumental in raising the section 20B point, for the LVT to proceed to reach a decision on that point after an adjournment of only 30 minutes (or indeed an adjournment until after lunch) was not simply robust, it was, in my judgment, unfair and denied the Landlord a fair trial.

25. So far as the s. 20 consultation point is concerned, the Landlord's case expressly asserted the service of a s. 20 notice and exhibited what was said to be such a notice to one tenant. This was only partially legible although I have been shown a legible copy. It is clear from the legible copy (though not from the illegible one) that this notice, dated 30th June 2005, purportedly follows an alleged notice of intention issued on 18th April 2004, the consultation period in respect of which ended on 19th May 2004. The legible copy gives some brief details of estimates and invites comments within a month. It does not seem to me to enable a reader to say whether the Service Charges (Consultation Requirements) Regulations 2003 have been satisfied or not. It related to only one tenant and was not served at Stoke Abbott Court. But, again, this was not a point challenged by the tenants.

26. I am told by Mr Denehan that the LVT asked the Landlord to prove that proper section 20 notices had been served. (This is not a matter which is, I think, as a result of my questions to them, denied by the tenants, despite being in the disputed section of the 'Agreed Facts') The Landlord was unable to do so and neither asked for nor was offered an adjournment to enable evidence to be produced. In my judgement the Landlord was not given a fair chance to deal with this point either.

27. I therefore allow the appeal on both the section 20B notice point and the section 20 consultation notice point, I set aside the determination of the LVT on those points and remit those issues to a differently constituted LVT. Since the result of the LVT's decision on the s. 20 points may have a bearing on the question of costs under section 20C, it seems to me that that issue must also be remitted.

28. It remains, of course, for each tenant to consider his or her position and, if he or she believes it to be the fact, to raise the issue by stating in evidence that the requisite notices were never received. It will then be for the Landlord to seek to rebut that by producing notices under both s. 20 and 20B and producing evidence of proper service in respect of each applicant tenant and compliance with any relevant requirements. To assist that process I make the following directions:

i. Copies of any relevant section 20 or section 20B notice to be relied upon by the Landlord in rebuttal, together with evidence of service, must be served upon each applicant tenant 28 days before the date set for a resumed hearing.

ii. Each tenant must notify the LVT and the Landlord in writing 14 days before the date of the resumed hearing if he or she intends to contest the validity or service of a notice.

Dated 5 August 2008

His Honour Judge David Mole QC