



LRX/22/2007

LANDS TRIBUNAL ACT 1949

LANDLORD AND TENANT – service charges – construction of lease – estoppel – whether tenant estopped from denying that increased quarterly payments on account of service charges were due despite not having been increased in the manner provided for by the lease – whether estoppel being used as a sword not a shield

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

BETWEEN

MRS RATNA BHAMBHANI

Appellant

and

**WILLOWCOURT MANAGEMENT
CO (1985) LIMITED**

Respondent

**Re: Flat 4 Willow Court,
Fulbeck Way
Harrow
Middlesex HA2 6LH**

Before: His Honour Judge Huskinson

**Sitting at Procession House, 110 New Bridge Street, London EC4Y 6JL
on 19 February 2008**

Mr Peter John instructed by Malcolm Dear Whitfield Evans on behalf of the Appellant
No appearance or representation on behalf of the Respondent

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The following case is referred to in this decision:

White v Riverside Housing Association Limited [2005] EWCA Civ 1385

Baird Textile Holdings Limited v Marks and Spencer Plc [2001] EWCA Civ 274

Amalgamated Investment and Property Co Ltd v Texas Commerce International Bank Ltd [1982]
QB 84

DECISION

Introduction

1. The Appellant appeals to the Lands Tribunal from the decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel (“the LVT”) dated 20 October 2006 whereby the LVT gave a decision under section 27A and section 20C of the Landlord and Tenant Act 1985 regarding the recoverability by the Respondent of services charges from the Appellant in respect of the above mentioned flat.

2. The LVT granted to the Appellant permission to appeal in respect of grounds 1 and 2 of her grounds of appeal, but refused permission to appeal in respect of ground 3 which concerned a question regarding the issue of window cleaning. The Appellant applied to the Lands Tribunal for permission to appeal on this ground 3 and was refused by a decision of the President dated 26 February 2007. Accordingly, while the Appellant enjoys permission to pursue grounds 1 and 2 of her grounds of appeal, as developed in her statement of case dated 17 August 2007, she has no permission to pursue ground 3.

3. In its decision the LVT reached the following conclusions (inter alia):

- (1) Were it not for the point next mentioned in subparagraph (2) below, the Respondent was entitled to recover from the Appellant the service charges claimed in its application other than the matters referred to in paragraph 83 of the decision.
- (2) In the absence of any certificates from the Respondent’s surveyor regarding the actual amount of the relevant costs and expenses incurred in any relevant year ending on 24 June, the Respondent was unable at present to claim by way of service charge any additional sum (ie by way of balancing payment) over and above such payment as the Respondent was entitled to recover as the payment on account of management charge provided for by the lease.
- (3) The Respondent was not limited to recovering by way of maintenance charge payable on account the sum of only £100 pa but was instead entitled to recover £150 per quarter. This was because, although amount recoverable by way of maintenance charge on account had not been varied strictly in accordance with the provisions of the lease, the Appellant was estopped from raising any argument regarding the invalidity of this increase up to £150 per quarter.

4. At the hearing before me on 19 February 2008 there was no appearance or representation on behalf of the Respondent. Mr John, on behalf of the Appellant, accepted that only grounds 1 and 2 of the grounds of appeal were before the Lands Tribunal.

Facts

5. There is before me in the bundle provided by the Appellant a copy of an undated and apparently unexecuted lease which appears to be the standard form leaseholders lease (the document being made between Willow Court (Harrow) Limited as the lessor and Willow Court Management Company (1985) Limited (therein called “the Association”) and Mary Bridget Moriarty) as the lessee). I proceed upon the assumption that this unexecuted document represents the terms of the lease upon which the Appellant holds her flat in Willow Court.

6. By clause 3(g) the Appellant covenanted with the lessors in the following terms:

“(g) At all times during the said term to pay and contribute the maintenance charge hereinafter in this paragraph referred to in manner and at the times hereinafter appearing that is to say:-

To pay to the Lessors the yearly sum of £100 or such sum as may be substituted therefor as hereinafter provided (hereinafter called “the Maintenance Charge”) being 1/10th of the charge to the Lessor of:-

- (i) the lighting heating cleansing repairing decorating maintaining and renewing (as may be necessary of the Communal Parts the reserved parts of the structure and the reserved services
- (ii) the maintenance of the surrounding premises including the mowing of grass and the care and replacement where necessary of trees bushes hedges fences and footpaths
- (iii) such sum as shall be certified by the Lessor’s Surveyor to be held in a “sinking fund” for such future maintenance and expenditure as may be due under the terms of this Lease

AND it is expressly agreed and declared that so long as the Association performs and observes the Lessor’s covenants and obligations contained in clause 4 hereof the Association shall receive and collect the Maintenance Charge as if the words “the Association” were substituted for the words “the Lessor” wherever these words appear in this paragraph such yearly sum to be paid and recoverable as rent in advance on each quarter day in each year PROVIDED HOWEVER that if in any year ending on the Twenty Fourth day of June such cost and expense to the Lessor shall be more or less than the said sum of £100 then the difference shall be certified by the Lessor’s Surveyor whose decision shall be final and binding on the parties hereto and any balance shown by the such Surveyor’s Certificate as being in excess of the said sum of £100 charged shall be paid by means of a single payment on the quarter day next following the date of the Surveyor’s Certificate together with the quarterly instalment due on that quarter day and PROVIDED FURTHER that in every year of the said term the Lessor may by prior notice in writing increase the maintenance charge to an amount which the Lessor’s Surveyor certifies as being the future estimated cost and

expense to the Lessor of fulfilling its obligations as aforesaid and 1/10th of the amount so certified shall be substituted for the said sum of £100 PROVIDED FURTHER that if the Surveyor's Certificate shall show that the said sum of £100 exceeds the amount actually expended by the Lessor the difference shall be credited against the next quarterly payment of Maintenance Charge

(iv) the management and general administration work and expenses incurred in connection with the above terms”

7. No certificate from the Lessor's Surveyor (as contemplated in this Clause) has been issued in respect of any of the service charge years with which this case is concerned (indeed it seems that no such certificate has been issued at any stage in respect of any of the service charge years, even including the service charge year earlier than those with which the present case is concerned). Thus there has not been any Surveyor's certificate issued under the first proviso to clause 3(g) – ie no Surveyor's certificate issued after the conclusion of any service charge year whereby it is certified how much the cost and expense to the lessor actually has been during that year under subparagraphs (i) to (iv) of the clause. Accordingly there has not been, in respect of any of the service charge years with which this case is concerned, any final reckoning by a Surveyor's certificate as to how much should actually be paid by the Appellant for that year. It was for this reason that the LVT reached the decision recorded in subparagraph 3(2) above.

8. Also no certificate from the Lessor's Surveyor was obtained for the purposes of the further proviso. Thus although the Respondent indicated in writing to the relevant tenants the amounts to which the maintenance charge was being from time to time increased, such increases were not strictly in accordance with the terms of the lease because of this lack of a certificate from the Lessor's Surveyor. Accordingly if the Appellant is entitled to rely on the absence of a certificate from the Lessor's Surveyor justifying these increases, the amount recoverable by way of the maintenance charge payable on account remains at the original sum of £100 pa.

9. The LVT found the following facts:

“It is clear from the evidence that from the inception of the leases neither Swingacre nor the Applicants who are their successors in title have operated in accordance with the terms of the lease. Over a period of time the annual maintenance charge has been increased by resolution of the company passed in accordance with its Articles of Association. This has usually arisen on the consideration of the audited accounts and financial forecasts of the needs of the company to manage the block. In no case has a surveyor certificated the accounts or given a report to the company supporting the increase in the charge. At the time of the hearing the maintenance charge stands at £200 per quarter and is paid regularly by each of the lessees. It is also clear that at the time when the Respondent was Chairman of the company up to 2000 that the charge was £150 per quarter (see her letter to leaseholders at page 17).

At no time did she challenge the validity of the increase and accepted that it was necessary for this sum to be paid in order to manage the block. Further even in her

evidence to the Tribunal she accepted that she should pay the service charge account subject to the exclusion of the specific matters which were challenged. This included general maintenance, insurance, gardening electricity, cleaning of common parts. She did not say to the Tribunal that she thought she should only pay £100 per annum for these services. She also accepted that she herself had vigorously enforced the service charge payments against defaulting lessees during her period of office.”

However as regards this latter paragraph it should be observed that in her Statement of Case for the LVT the point was clearly taken that, in the absence of any relevant Surveyor’s Certificate, the Respondent was not entitled to recover payments in respect of service charges at a rate higher than £100 pa.

10. The Tribunal went on to consider a question raised by Mr John on behalf of the Appellant as to whether the LVT had jurisdiction to consider an argument as to whether the Appellant was estopped from relying upon the absence of a certificate from the Lessor’s Surveyor. The LVT decided this point of jurisdiction contrary to the Appellant and there is no appeal from this part of the decision.

11. On the substance of the estoppel argument the LVT decided as follows in paragraph 42:

“42. Since the facts giving rise to the estoppel are in the view of the Tribunal clear and since the obvious merits of the case point to the Respondent paying at least the sums which she herself was levying on the other leaseholders of the block before her dismissal the Tribunal is prepared to hold that she is estopped from denying that she herself is liable to pay the sum of at least £150 per quarter for service charges. This figure had been agreed by resolution of the company during her period of office and she supported and implemented it. Notwithstanding that such payment does not literally accord with the provisions of the lease in that it has not been certified by a surveyor.”

12. The service charge years in dispute before the LVT were those commencing 25 June 2001, 2002, 2003, 2004 and 2005. The documents provided by the Respondent included a list of allegedly unpaid service charges which showed that as at 2 August 2001 there was a total due of £0. Thus all of the allegedly unpaid sums fell due after that date. So far as concerns the Appellant’s role as an officer of the Respondent, it appears that she ceased to be a director in 1999, see paragraph 17(a) of the LVT’s decision and paragraph 2 of the affidavit of the qualifying tenants (page 81 of the bundle). It appears that thereafter there was disagreement between the Appellant and the Respondent and that she did not participate in the running of the Respondent either formally (as an officer of the company) or informally. It also appears that since 1999 the Appellant has not in any significant manner involved herself in attending any of the Annual General Meetings of the Respondent.

Appellant’s Submissions

13. On behalf of the Appellant Mr John advanced the following arguments:

- (1) That the Appellant was not estopped from denying that payments on account of service charge could only be recovered from her at the rate of £100 pa.
- (2) That the terms of the lease contemplated a yearly reckoning, on the basis of a Surveyor's Certificate, as to the amount actually payable by way of Service charge for the relevant service charge year, such that the amount of any shortfall to be paid by the Appellant could be calculated. He argued that if this was not promptly done on a yearly basis, then the ability to rely upon the first proviso of clause 3(g) was lost and the Respondent was limited to recovering, for the relevant service charge year, whatever was properly payable as the on account payment. He therefore contended that the LVT was wrong in paragraph 47 and 84 in concluding that it was still open to the Respondent to obtain a Surveyor's Certificate and to seek to recover any shortfall in the service charge liability on the basis of such certificate.

14. So far as concerns the argument that the LVT was wrong in finding the Appellant was estopped from disputing that she was obliged to make payments on account of service charge at the rate of £150 per quarter. Mr John relied upon the following two arguments:

- (1) He contended that, quite apart from the matters raised in point (2) below, an estoppel could not arise having regard to the terms of the lease. The lease in clause 3(g) contemplates that for every year of the term the on account payment is £100 pa, but that this on account payment can be displaced if a valid Surveyor's Certificate is provided as contemplated in the second proviso. The situation therefore is not that this an upwards only provision regarding the on account payment, such that once the on account payment for any particular year has been increased to, say, £x then in future years this £x is the minimum sum which must at any event be paid on account (with the possibility of more than £x being paid if an appropriate Surveyor's Certificate as contemplated in the second proviso is obtained). Instead Mr John argued that for every year the basic figure to be paid on account is £100 and it is this figure of £100 (rather than whatever figure may have been payable in the previous year) which is payable on account unless properly displaced in accordance with the second proviso. Mr John therefore argue that even if (contrary to his second argument) the Appellant had become estopped in certain earlier years (when she was a director of the Appellant) from disputing that more than £100 was payable on account for that earlier year, she was not so estopped in respect of any of the years relevant to this case because she had ceased to be an officer of the company in 1999.
- (2) Further Mr John argued that having regard to the terms of the lease only £100 pa was payable in the absence of any relevant Surveyor's Certificate. He argued that a claim by the Respondent for payment at a rate higher than that could not be founded upon an estoppel (even supposing an estoppel was capable of arising on the facts) having regard to the principle that estoppel cannot be used as founding a cause of action (estoppel can be used only as a shield rather than as a

sword). He referred to Halsbury's Laws of England 4th Edition Vol 16(2) at paragraphs 951, 1065 and 1087. He also referred to the Court of Appeal decision in *White v Riverside Housing Association Limited* [2005] EWCA Civ 1385 (reversed by the House of Lords but on a point not concerning estoppel) and also to *Baird Textile Holdings Limited v Marks and Spencer Plc* [2001] EWCA Civ 274 at paragraph 34.

15. So far as concerns the separate points mentioned in paragraph 13(2) above Mr John referred to the terms of the lease and contended that there has to be this annual reconciliation. When asked how long after the relevant 24 June the Respondent had for the purpose of obtaining the necessary Surveyor's Certificate under the first proviso to clause 3(g) Mr John contended that, although there was no express time limit laid down, it must be done within the currency of the next service charge year such that if the Respondent delayed more than 364 days it would lose the right to seek any balancing charge by way of shortfall between the amount paid on account and the actual cost of the relevant matters.

Conclusions

16. With respect to the LVT I am unable to agree with its conclusion that the Appellant is estopped in the manner it found. In defence of the LVT I should observe that, while the point clearly was taken that no estoppel arose against the Appellant, the matter would seem to have been argued more fully before me, including the development of the points summarised in paragraph 14 above. Also I am unclear as to the extent of the legal authorities that were laid before the LVT.

17. The LVT took the decision that the Appellant was estopped from denying that service charge was payable on account at at least the rate at which it was demanded on account while she was an officer of the company. If the relevant service charge years in respect of which the present dispute is concerned included service charge years while the Appellant was an officer of the company, then there would be much to be said on the merits for a finding of such an estoppel in respect of those years (but the argument would still be subject to the legal point mentioned in paragraph 14(2) above). However, the relevant service charge years are those which fall after the Appellant had ceased to be an officer of the Respondent and after, so it seems, she had become estranged from the running of the Respondent and was in effect standing on her rights. I accept Mr John's argument that the provision for payments on account start every year from a default figure of £100 pa, which is capable of being displaced on the basis of a Surveyor's Certificate as contemplated in the lease. The lease does not contemplate some form of upwards only on account payment such that once in respect of any year the on account payment has been increased above £100 then this new figure becomes the floor below which on account payments can never sink in any future year. The provisions of clause 3(g) in my judgment contemplate that "in every year of the said term" the Respondent may (on the basis of a Surveyor's Certificate) increase the amount payable on account to a sum so certified which "shall be substituted for the said sum of £100". In other words if the provisions of the second proviso are not followed through the amount payable is £100. Even if the Appellant's conduct was such as to estop her, during the years in which she was a director

of the Respondent, from disputing that the amount payable on account should be the sum decided upon by the Respondent (but without the benefit of a Surveyor's Certificate), I do not see any factual basis (either as identified by the LVT or at all) for concluding that she has so conducted herself in respect of any subsequent year as to estop herself out of being able to rely upon the terms of clause 3(g) when it provides that the basic figure to be paid on account in each year is £100 unless displaced in accordance with the second proviso (which has not occurred).

18. Accordingly having regard to the facts of the case and the proper construction of the lease I conclude that the amount payable on account for the relevant service charge years was the base figure of £100 pa and that the Appellant was not estopped from denying that the figure of £150 per quarter (as found payable by the LVT) was payable.

19. Having regard to the foregoing finding, the point of law raised by Mr John in paragraph 14(2) above does not arise. Accordingly it is not necessary to conclude whether the case could be brought within what was described in the *White* case as the somewhat special circumstances of *Amalgamated Investment and Property Co Limited v Texas Commerce International Bank Limited* (1982) QB 84 (and in particular within the passage of the judgment of Brandon LJ quoted in paragraph 64 of the *White* case) on the one hand or whether the present case would have been squarely covered by the decision in *White*. Bearing in mind that the point does not arise for decision and also that I have only heard argument on this point of law from one side, I merely state that as at present advised I see potential difficulty for the Respondent in arguing that Mr John is wrong in his contention that this case is covered by the *White* case.

20. As regards the second ground of appeal (see paragraph 13(2) above) I do not accept Mr John's contentions. No time limit is placed in the lease for the obtaining of the relevant Surveyor's Certificate in respect of any particular service charge year, ie the end of year certificate which certifies how much was actually payable by way of service charge for that relevant year. There is no basis on which to imply any such time limit. It may be noted that delay can work to the disadvantage of the Respondent rather than of the Appellant (or other tenant) because there is no provision for payment of interest on the shortfall once it is eventually certified. It would be artificial (and not justified by the terms of the lease) to conclude that the Respondent had 364 days (but not a single day more) in which to obtain the relevant Surveyor's Certificate. Accordingly I agree with the LVT's conclusion in paragraph 47 that the absence of a Surveyor's Certificate can still be rectified, anyhow so far as concerns the calculating of the final amount payable for the relevant year pursuant to a certificate under the first proviso to clause 3(g). If any such Surveyor's Certificate shows less to be payable than was found by the LVT to be payable (ie found to be payable if one ignores the limitation of £600 per annum which the LVT found to apply) then the shortfall payable by the Appellant must be calculated by reference to the lower figure in the Surveyor's Certificate. If the Surveyor's Certificate purports to show that more is payable by way of shortfall than would be payable on the basis of the LVT's decision (ignoring the £600 per annum limitation found by the LVT to apply) then the amount of any shortfall payable by the Appellant must be calculated by reference to the lower figure found payable by the LVT.

21. So far as concerns the present limitation on the amount payable in respect of the relevant service charge years by way of service charge (ie the limitation which applies unless and until the Surveyor's certificate is obtained in accordance with clause 3(g) as to the final amount payable for the relevant year) I conclude that this limitation remains at the original figure of £100 per annum.

22. To the foregoing extent the Appellant's appeal is allowed.

23. The Appellant, understandably, made no application for costs and no costs order is made.

Dated 14 April 2008

His Honour Judge Huskinson