UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2010] UKUT 412 (LC)
LT Case Number: LRX/67/2009

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – limitation on service charges where costs incurred more than 18 months before demand – advance payments and balancing charges – held no limitation on advance payments – held no limitation on balancing charges since relevant costs incurred less than 18 months before demand – appeal allowed – Landlord and Tenant Act 1985 s 20B

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE MIDLAND RENT ASSESSMENT PANEL

BETWEEN **Appellant**

HOLDING & MANAGEMENT (SOLITAIRE) LIMITED

and

MISS STEPHANIE SHERWIN **Respondent**

Re: 48 Florence Road,
Coombe Fields,
Coventry CV3 2AL

Before: The President

Sitting at Birmingham Civil Justice Centre, Priory Courts,
33 Bull Street, Birmingham, B4 6DS
on 10 November 2010

and at 43-45 Bedford Square, London WC1B 3AS
on 1 December 2010

Justin Bates instructed by Claire Banwell-Spencer, solicitor, Head of Legal, Peverel Property Management, Luton, for the appellant
The Respondent did not appear and was not represented

The following cases are referred to in this decision:

Gilje v Charlesgrove Investments Ltd [2004] 1 All ER 91
Islington London Borough Council; v Abdel-Malek [2008] L & TR 2
Brennan v St Paul's Court Ltd [2010] UKUT 403 (LC)
Paddington Walk Management Ltd v Peabody Trust [2010] L & TR 89

The following further cases were referred to in argument:

Redendale Ltd v Modi [2010] UKUT 346 (LC)
Capital & Counties Freehold Equity Trust Ltd v B L Plc [1987] 2 EGLR 49
Hyams v Wilfred East Housing Co-operative Ltd [2007] 1 EGLR 89

DECISION

1. This is an appeal by the landlord against a decision of the leasehold valuation tribunal for the Midland Rent Assessment Panel on an application under section 27A of the Landlord and Tenant Act 1985. The application was made by Miss Stephanie Marie Sherwin, who is the tenant of a flat, 48 Florence Road, Coventry CV3 2AL, under a lease for 125 years from 1 January 2004. In its decision of 28 February 2009 the LVT determined the amounts payable by Miss Sherwin in respect of service charges for the years 2005/6, 2006/7 and 2007/8 and the amount payable by her by way of advance payments for the year 2008/9. In determining the amounts for the years 2006/7 and 2007/8 the LVT made deductions from the amounts that would otherwise have been payable to reflect the application of section 20B of the Act, which places a limitation on service charges through a time limit on the making of demands. The appellant contends that the LVT wrongly applied this statutory provision, and it appeals with permission granted by me.

2. Section 20B provides as follows:

> "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."

3. "Service charge" is defined in section 18 as follows:

> "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.”

4. Under clause 3 of her lease the tenant covenanted as follows:

> “3.2 In respect of every Maintenance Year to pay the Service Charge to the company by two equal instalments in advance on the half-yearly days provided that in respect of the Maintenance Year current at the date hereof the Lessee shall on execution hereof pay a due proportion of the current Service Charge specified in paragraph 11 of the Particulars.
>
> 3.3 To pay the Company on demand a due proportion of any Maintenance Adjustment pursuant to paragraph 3 of Part II of the Fourth Schedule.”

5. “Maintenance Year” is defined (clause 1.6) to mean “every twelve monthly period ending on the 1st day of April the whole or any part of which falls within the term.” “Service Charge” is defined (clause 1.8) as follows:

> “1.8 ‘the Service Charge’ means the proportion set out in paragraph 12 of the Particulars (or such other proportion as may be determined pursuant to Part 1 of the Fourth Schedule) of the Annual Maintenance Provision for the whole of the Block and the Estate for each Maintenance Year (computed in accordance with Part II of the Fourth Schedule).”

“Annual Maintenance Provision” is defined (clause 1.7) as consisting of a sum calculated in accordance with Part II of the Fourth Schedule.

6. The half-yearly days are 1 April and 1 October (paragraph 10 of the Particulars). The “Service Charge Proportion” is specified in paragraph 12 of the Particulars as 4.57% “of the aggregate Annual Maintenance Provision attributable to the Block for the Block service set out in Part I of the Fifth Schedule and the Estate Services”, the Block and the Estate being identified on plans annexed to the lease.

7. Paragraph 2 in Part II of the Fourth Schedule provides that the Annual Maintenance Provision shall consist of a sum comprising three elements – (i) “the expenditure estimated as likely to be incurred in the Maintenance Year by the Company for the purposes mentioned in the Fifth Schedule”; (ii) an appropriate amount by way of reserve; and (iii) a reasonable sum for administrative and management expenses.

8. Paragraph 3(b) provides that “the Maintenance Adjustment shall be the amount (if any) by which the estimate in paragraph 2(i) above shall have exceeded or fallen short of the actual expenditure in the Maintenance Year.”

9. The tenant's service charge obligations are thus to pay two instalments in advance on each of the half-yearly days; and, if the estimates on which the payments in advance are based are exceeded by the actual expenditure, to pay on demand an amount that represents the tenant's share of the excess.

10. In accordance with the provisions of the lease Miss Sherwin was invoiced for the advance payments for the year 2006/7 (together amounting to £866.93) and for the year 2007/8 (together amounting to £977.92), and she paid these amounts. On 11 September 2008 she was invoiced for "Balancing Service Charge" for the period 1 April 2006 to 31 March 2007 (£129.81); and on 2 December 2008 she was invoiced for the balancing charge for the period 1 April 2007 to 31 March 2008 (£354.63).

11. In its decision the LVT held that the relevant costs incurred by the landlord for 2006/7 should be limited under section 19(1) to £17,893.93 (in contrast to the landlord's expenditure of £20,181.53) and that for 2007/8 the relevant costs should be limited to £26,222.75 (in contrast to expenditure of £27,081.50). Applying the tenant's share of 4.57% to these amounts produced amounts that would have been payable by her of £817.75 for 2006/7 and £1,198.38 for 2007/8. However, the LVT held that these amounts should be reduced further by reason of the provisions of section 20B.

12. The LVT said:

> "34. The 2006/07 Adjustment Accounts were signed off by the Auditors on 9 September 2008 and the Adjustment Demand is dated 11 September 2008. We assume it was served on the First Applicant shortly thereafter.
>
> Even if (in favour of the Respondent) we ignore the days between 1 September 2008 and the date of service, 18 months prior to 1 September 2008 is 1 March 2007, which means that, if Section 20B(1) applies only costs incurred in March 2007 are now payable in respect of the 2006/7 service charge year…
>
> Mrs Banwell-Spencer submitted that the demands of advance payments satisfied section 20B. We reject that submission. In our view, the purpose of Section 20B is to ensure that a tenant is able to calculate the actual amount of his service charges within 18 months of costs being incurred.
>
> In our view, none of the documents adduced in evidence satisfy Section 20B(2).
>
> It follows that the First Applicant is only liable to pay for costs incurred in March 2007 for the 2006/7 service charge year.
>
> As indicated above, voluminous documentation was adduced in evidence – much of it during the hearing. Whether or not the documents produced would suffice for a calculation to be carried out which divided the costs incurred after service of the Adjusted Demand from those incurred previously is unclear. In our view, the appropriate and proportionate way of dealing with the matter is to

allow one twelfth of the £817-75 which would have been payable but for Section 20B. Accordingly, we allow £68-15.

35. The 2007/8 Adjustment Accounts were signed off by the Auditors on 2nd December 2008 and the Adjustment Demand sent to the First Applicant is also dated 2nd December 2008 and we assume it was served shortly thereafter.

As I pointed out at the hearing this meant that costs incurred in April and May 2007 were over 18 months before the Adjustment Demand.

Again, we rejected the submission that the advance demands satisfied Section 20B and again we found that none of the documents produced in evidence satisfied Section 20B(2).

We considered it appropriate and proportionate to deduct one sixth (£199-73) from the amount which would otherwise have been payable for the 2007/8 service charge year. Thus, we allow £998-65."

13. The amounts held to be payable for each of the years in issue were set out by the LVT under the heading "Decisions", and the decisions so set out also included the following:

"F. The Respondent has liberty to apply to the Tribunal for a reconsideration of its decision to reduce the service charges by reason of Section 20B of the Act.

Such an application must be made in writing and must be received by the Tribunal within one month of the date of this Decision/Reasons Notice and must include full legal argument with all relevant documents, authorities and legislation attached. 4 copies of the application must be served on the Tribunal and one copy on the First Applicant.

If the Respondent wishes to make oral representations on this issue, it must so indicate in the written application and give reasons – in which event the Tribunal will consider whether or not to grant an oral hearing."

14. Following the decision of the LVT the appellant applied to the LVT for permission to appeal, stating five grounds of appeal. Ground 1 was that payments on account were outside the scope of section 20B. Ground 2 was that section 20B could only have applied to the balancing charges and could only have applied from when each item of expenditure which comprised the balancing charges was incurred. Each of the grounds was explained and reference was made to *Gilje v Charlesgrove Investments Ltd* [2004] 1 All ER 91. Ground 4 said that there had been a breach of natural justice in that the section 20B issue had been raised for the first time at the hearing and the solicitor appearing for the appellants had been refused an adjournment to enable her to deal with it.

15. On 9 April 2009 the LVT gave "Directions of the Chairman to the Respondent arising from the Respondent's application for permission to appeal." (The "Respondent", of course, is the present appellant.) These directions consisted of three pages of detailed requirements.

Among them the appellant was required to inform the LVT whether it wished to apply to the LVT for a reconsideration of the decision concerning section 20B, and reference was made to Decision F. In relation to grounds 1 and 2 the appellant was required to provide copies of "all relevant authorities and documents", "Full reasoning" and to set out "in precise terms the identifications and determination that the Respondent submits (at No.10) the Tribunal should have made – identifying (and providing copies of) all relevant documents and specifying when such documents were produced to the Tribunal." If the appellant was not applying for a reconsideration of the decision it was required to give the reason for not so applying.

16. On 27 April 2009 the appellant's solicitor wrote to the LVT in response to the Directions. She said that the LVT had no power to change its decision and that "it is respectfully contended that the LVT must determine the application for permission to appeal and either grant or refuse permission." She said that the appellant was reluctant to engage in further legal argument with the LVT, but that it would provide clarification in order to assist the LVT in coming to a decision on the application for permission to appeal. It did this in respect of four of the grounds of appeal, and attached to the letter were copies of the decisions to which reference had been made in its submissions.

17. On 19 May 2009 the Chairman refused permission to appeal. Under the heading "Observations" the notice of refusal said:

> "These observations are in addition to those expressed and implied in Annex D." (Annex D to the notice was the Directions of 9 April 2009.)

Then, in relation to the section 20B grounds, it went on:

> "A. Having regard to the decision of Etherton J. in *Gilje & ors v Charlegrove Securities Limited (Gilje)* – referred to in Annex C and provided in Annex E, the Tribunal would have granted permission to appeal on Ground 1 (only) but for Decision F of Annex B.
>
> However, the Tribunal disagrees with the judgement in *Gilje* (see Paragraph 34 of Annex B – "In our view, the purpose of Section 20B is to ensure that a tenant is able to calculate the actual amount of his service charges within 18 months of costs being incurred") and we consider that it may be possible to distinguish *Gilje* (e.g. because the powers and procedures of the Tribunal differ from those of the Court)."

18. The procedure adopted by the LVT chairman in relation to the application for permission to appeal was in my view inappropriate in two respects. Firstly there is no provision in the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 giving a tribunal the power to reconsider a decision that it has given, whether on the application of a party or on its own initiative. The only power to alter a decision once given is that in regulation 18(7), to correct clerical mistakes or errors arising from an accidental slip or omission. It would no doubt be a good thing if the tribunal did have power to review a decision, and it is almost certain that after the functions of LVTs are transferred to the First-tier Tribunal there will be such a power of review. Such a power would arise on an application for permission to appeal and the tribunal would be under a duty to consider review (and it could not refuse to consider

review on the basis that the would-be appellant had not requested it); but review could only be undertaken if the tribunal was satisfied that there was an error of law in the decision: see eg the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, rules 43 and 44. LVTs, however, have no power to review a decision; and to refuse permission to appeal on the ground that the applicant had not requested the tribunal to review its decision was plainly misconceived.

19. Secondly it was inappropriate for the LVT, having received application for permission to appeal, to demand (as it did in what was a somewhat challenging way) further details and documentation. It is for an applicant for permission to appeal to set out in its application why it says permission to appeal should be granted. If what it sets out is insufficient to persuade the LVT that permission should be granted, the LVT should refuse permission. And in refusing permission the LVT should state concisely its reasons for doing so in terms that both enable the applicant for permission to understand why permission is refused and assist the Upper Tribunal in the event that a further application is made to it for permission to appeal.

20. The tribunal's decision was in my judgment clearly wrong in its application of section 20B. I received full and helpful submissions from Mr Justin Bates, and since I accept, substantially for the reasons that he advanced, that the appeal should succeed I will not summarise those submissions but will set out my reasons for allowing the appeal.

21. Section 20B(1) has potential application where a "demand for payment" of a "service charge" is made. Relevant for present purposes were the six demands for payment referred to in paragraph 9 above: the invoices relating to the two advance payments for 2006/7, the invoices relating to the two advance payments for 2007/8, the invoice for the balancing charge for 2006/7 and the invoice for the balancing charge for 2007/8. Each of the amounts to which each of these demands related (whether advance payment or balancing charge) was a service charge within the meaning of section 18, and the application of section 20B(1) has to be considered, therefore, in relation to each of the demands. The section would apply so as to limit the tenant's liability to pay if any of the relevant costs taken into account in determining the amount of the service charge to which the demand related were incurred more than 18 months before the demand. Since the costs taken into account in determining each of the advance payments were prospective costs they clearly had not been incurred more than 18 months before each of the demands for advance payments. Thus section 20B(1) does not apply so as to limit the tenant's liability in respect of the advance payments. That is what was held to be the case in *Gilje*, to which I will refer shortly.

22. The demands for balancing charges, on the other hand, related to costs that had been incurred. The balancing charges represented the Maintenance Adjustment provided for by paragraph 3(b) of the Fourth Schedule to the lease (see paragraph 8 above), ie the amount by which "the expenditure estimated as likely to be incurred in the Maintenance Year by the Company for the purposes mentioned in the Fifth Schedule" fell short of the actual expenditure in that year. One possible application of section 20B(1) in relation to these provisions of the lease would be to treat as "the relevant costs taken into account in determining the amount" of the balancing charges the whole of the actual expenditure for the year, since that is what the

Maintenance Adjustment is expressed to relate to. The reality, however, is that the balancing charges simply reflect the costs incurred after the amounts of the advance payments received by the landlord for the year in question have been used up, and in my judgment it is those costs, therefore, that are material for the purposes of section 20B(1); so that the tenant would not liable to pay a balancing charge in respect of any of such costs as were incurred more than 18 months before the demand. Any amount that was payable and was paid as an advance payment would be unaffected. To apply the subsection in this way accords with the approach of the court in *Gilje*.

23. In that case Etherton J dismissed an appeal against a decision of a Chancery master who had rejected the claim of tenants that they were not liable to pay service charges in two particular years by reason of the provisions of section 20B. Payments on account for the two years had been demanded and paid, and there was no balancing charge. The judge said ([2004] 1 All ER 91 at 95):

> "20. I accept the primary submission of Ms Amanda Eilledge, counsel for the defendants, that s.20B of the Act has no application where (a) payments on account are made to the lessor in respect of service charges, and (b) the actual expenditure of the lessor does not exceed the payments on account, and (c) no request by the lessor for any further payment by the tenant needs to be or is in fact made."

24. The judge explained why he rejected the contentions of the tenants to the contrary:

> "25...if [counsel for the tenants'] interpretation is correct, I would have expected the draftsman of the landlord and Tenant Act 1987 (which inserted s20B into the Act) to have added what [counsel] claims is the substance of this section to s.19(1) of the Act which deals with the challenge to service charges after expenditure has been incurred. In this connection, it is to be borne in mind that the legislation expressly contemplates the payment of service charges on account, and provides an express mechanism in s19(2) for challenging such payment on account if and insofar as the demand for such payment is unreasonable. Against that background, the failure to insert the 18 month limitation as an extra qualification under s.19(1) is extremely poor drafting if it was intended that the limitation is to apply to all costs falling within s.19(1) even where payments on account, subject to the provisions of s19(2), exceed the final expenditure of the lessor.
>
> 26. Further, I agree with Ms Eilledge that the provisions of s.20B fit extremely uncomfortably with the application of that section to payments on account. Such payments must necessarily, by virtue of s19(2) of the Act, be related to particular contemplated costs of which the tenant is notified in advance. While [counsel for the tenants] is, strictly speaking, correct that the lessor is not restricted to expenditure of the interim payments only on those anticipated items of expenditure, the fact that the draftsman appears to make no allowance in s20B(2) for the siruation (expressly anticipated in s19(2)) where the expenditure has been notified in adavance and payments on account ahve been made, indicates that he did not have such a situation in mind as falling within the ambit of s,20B(1).

> 27. Finally, I agree with Ms Eilledge that, so far as discernible, the policy behind s.20B of the Act is that the tenant should not be faced with a bill for expenditure, of which he or she was not sufficiently warned to set aside provision. It is not directed at preventing the lessor from recovering any expenditure on matters, and to the extent, of which there was adequate prior notice. This does not leave the tenant without a remedy for the failure of the lessor to prepare a final account. In the event of a wrongful delay by the lessor, the tenant can apply to the court for the taking of an account and, if the lessor's delay is culpable, the lessor will have to pay the costs."

25. *Gilje* has been followed in this Tribunal in *Islington London Borough Council; v Abdel-Malek* [2008] L & TR 2 (AJ Trott FRICS) and in *Brennan v St Paul's Court Ltd* [2010] UKUT 403 (LC) (Judge Mole QC, 11 November 2010), and was cited as authority by Judge Hazel Marshall QC, sitting at Central London County Court, in *Paddington Walk Management Ltd v Peabody Trust* [2010] L & TR 89, where at 95 she said:

> "14. With regard to service charge demands validly made under a lease for *estimated* amounts on account, i.e. before the costs have been incurred, the section has no application if the landlord operates under that procedure, so long as his actual expenditure does not exceed the payment demanded on account so that no further payments are demanded by the tenants (see *Gilje v Charlegrove Securities Ltd* ...). However, the section will apply where there is a demand for the balance of actual costs incurred because they exceed any sums previously demanded and paid on account."

26. In refusing permission to appeal the LVT said that it disagreed with the judgment in *Gilje*. Although a decision of the High Court is not binding on an LVT (because there is no hierarchical relationship between them), in view of the relative standing of the court and the tribunal I find it hard to conceive of circumstances in which an LVT could possibly be justified in rejecting the authority of a High Court decision. There was, in my view, no possible justification for the LVT to do so in the present case.

27. Applying section 20B in the way that I have concluded to be correct (see paragraph 22 above) would produce the following results. The amount by which "the expenditure estimated as likely to be incurred in the Maintenance Year by the Company for the purposes mentioned in the Fifth Schedule" fell short of the actual expenditure in the Maintenance Year 2006/7 was £2,686.79. The schedule of expenditure shows that those costs were incurred on and after 20 March 2007, the date on which the amounts received as advance payments were used up. The demand for the balancing charges was issued on 11 September 2008. Since none of the costs to which the demand related were incurred before 11 March 2007 it follows that no part of the balancing charge would be rendered irrecoverable by section 20B(1). For 2007/8 the costs to which the balancing charge related amounted to £7,206.50. The schedule of expenditure shows that those costs were incurred on and after 19 December 2007, the date on which the amounts received as advance payments were used up. The demand for the balancing charges was issued on 2 December 2008, so that only costs before 2 June 2007 would be irrecoverable. None of the balancing charge costs were incurred before that date, however, so that none would be rendered irrecoverable under section 20B.

28. That is the effect of applying section 20B to the actual expenditure of the company for the two years in question. The same result would, of course, be reached if the costs held by the LVT under section 19(1) to have been reasonably incurred were to be used instead of the actual expenditure since the costs allowed were less and thus the point in time at which the advance payments were used up was later. I rather think that it would be correct for this purpose to take the costs allowed rather than the actual expenditure, but, as it makes no difference to the result, there is no need to consider this further.

29. The appeal must be allowed. The LVT was wrong to make deductions because of section 20B. The amount payable by Miss Sherwin for 2006/7 was, therefore, £817.75, and the amount payable by her for 2007/8 was £1,198.38.

10 December 2010

George Bartlett QC, President