UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2011] UKUT 178 (LC)
LT Case Number: LRX/133/2009

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – major works contract – costs incurred more than 18 months previously – whether notification given to tenant within that period – held it had been– appeal dismissed – Landlord and Tenant Act 1985 s 20B

IN THE MATTER OF AN APPEAL FROM A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

BETWEEN	**(1) MRS MARIE JEAN-PAUL** **(2) MS JENNY JEAN-PAUL**	**Appellant**
	and	
	THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF SOUTHWARK	**Acquiring Authority**

Re: 28 Stanwood Gardens
Sedgmoor Place
Camberwell
London SE5 7SQ

Before: The President

Sitting at 43-45 Bedford Square, London WC1B 3AS
on Wednesday 4 May 2011

Andrew Skelly instructed by direct access for the appellants
Simon Butler instructed by direct access for the respondent

The following cases are referred to in this decision:

Paddington Walk Management Ltd v Governors of the Peabody Trust [2010] L & TR6
London Borough of Islington v Abdel-Malek LRX/90/2006
Westminster City Council v Hammond, 19 December 1995
Holding & Management (Solitaire) Ltd v Sherwin [2010] UKUT 412 (LC)
Ember Homes Ltd v Lucas [2011] UKUT 42 (LC)
Gilje v Charlgrove Securities Ltd [2004] 1 All ER 91

DECISION

Introduction

1. This is an appeal by the tenants against a decision of a leasehold valuation tribunal on an application made by the tenants under section 27A of the Landlord and Tenant Act 1985 in relation to their liability for service charges arising from major works carried out by the landlord, Southwark London Borough Council, in 2004 and 2005. The LVT determined that demands for payment had not been made in accordance with the terms of the lease, so that for the time being there was no liability on the part of the tenants in respect of the amount demanded for the major works; but that if and when proper demands were served the amount of £39,049.33, as claimed by the council, would be payable. In reaching this decision the LVT rejected the tenants' argument that under section 20B of the Act none of the amount claimed was payable because the costs to which it related had been incurred more than 18 months earlier. It concluded that letters sent in 2005 and 2006 chasing payment for the major works satisfied section 20B(2). It is against this conclusion that the tenants now appeal, with permission granted by me.

2. In 2004 the council proposed to carry out major works to Block One, 1-20 Stanswood Gardens, and Block Two, Stanswood Gardens. The tenants' flat is in Block Two. The works included asbestos removal, roof works, the renewal of doors, windows and cladding panels and other works of renewal and repair. The council followed the consultation procedure prescribed under section 20 of the Act. On 27 July 2004 it gave notice under section 20 of the Act informing the tenants of the estimates received for the proposed contract. It said that, subject to the consultation exercise, it planned to proceed with the lowest tender, from Apollo London Ltd, at a sum of £1,279,344. The notice gave a description of the works to be carried out, and it identified as the cost chargeable to Block Two £612,960.62 and as the estimated contribution for the tenants' flat £44,657.40. The tenants did not make any observations on the notice.

3. The commencement date for the major works contract was 8 November 2004, and completion was on 27 August 2005. On 26 July 2005 Mrs Marie Jean-Paul completed a "Resident Satisfaction Questionnaire" provided by the contractor. She ticked the box opposite "1. Are you totally satisfied with the works?".

4. On 16 October 2004 the council had sent an invoice to the tenants for £44,657.40, giving as the account details "Estimate Charge: Refurbishment Stanswood Gardens." Mrs Jean-Paul wrote to the council on 13 December 2004 raising a number of queries about the demand. The council responded to the queries in a letter of 17 February 2005, and it concluded by saying that "this matter will be put on hold until your dispute has been resolved."

5. On 17 March 2005 the council wrote to Mrs Jean-Paul as follows:

> "I refer to our letter to you dated 17 February 2005, a copy of which is enclosed.
>
> I confirm that the following sums remain outstanding on your major works account:

- £44,657.40 in relation to Refurbishment Works conducted on Standswood Gardens and invoiced in October 2004; and
- £500.00 in relation to other miscellaneous major works conducted on your property.

Kindly contact the writer within 14 days of the date of this letter to arrange for the payment of the sum of £45,157.40."

6. It appears that the council wrote again on 19 August 2005, because on 18 October 2005 a letter identical to that of 17 March 2005, but with the date "19 August 2005" in the first paragraph, was sent to Mrs Jean-Paul; and on 17 February 2006 a further identical letter, except that the date inserted (erroneously) in the first paragraph was 17 February 2006, was sent to Mrs Jean-Paul.

7. Between 22 December 2004 and 24 August 2005 the council made eight payments under the contract, totalling £1,067,814.39. Further payments were made in March 2006 and March 2007. The council's evidence to the LVT was that the final account was agreed with the contractor in June 2007, although it appears that the final account was not issued until September 2008. On 1 October 2008 the council wrote to the tenants with the final account for their flat. It adjusted downward their contribution to £39,049.43.

8. The tenants hold their flat under a right-to-buy lease for 125 years from 11 June 1990. The Third Schedule to the lease contains the following provisions as to the payment of the service charge:

"1. (1) In this Schedule 'year' means a year beginning on 1st April and ending on 31st March

(2) Time shall not be of the essence for service of any notice under this Schedule

2. (1) Before the commencement of each year (except the year in which this lease is granted) the Council shall make a reasonable estimate of the amount which will be payable by the Lessee by way of Service Charge (as hereinafter defined) in that year and shall notify the Lessee of that estimate

(2) The Lessee shall pay to the Council in advance on account of Service Charge the amount of such estimate by equal payments on 1st April 1st July 1st October and 1st January in each year (hereinafter referred to as 'the payment days') …

4. (1) As soon as practicable after the end of each year the Council shall ascertain the Service Charge payable for that year and shall notify the Lessee of the amount thereof.

(2) Such notice shall contain or be accompanied by a summary of the costs incurred by the Council of the kinds referred to in paragraph 7 of this Schedule and state the balance (if any) due under paragraph 5 of this Schedule."

9. The LVT held that no liability to pay service charges arose on the basis of any of the invoice and requests for payment that I have referred to above. It said that there was a failure to comply with paragraph 4(1) in that the council had not ascertained the amounts payable for each individual service charge year. It also held that the demand of 16 October 2004 was not made in accordance with paragraph 2 because it did not refer to any one service charge year and therefore it did not create a liability to pay the amount demanded. The council does not seek to contest these conclusions.

10. It should be noted also that Part II of the Third Schedule to the lease makes provision for a "Capital Expenditure Service Charge", but the council did not purport to be following the procedure there laid down in making its demands for the payment in respect of the major works.

11. Section 20B of the Act 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 subjection (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."

12. Among the arguments advanced by the tenants before the LVT was that, by reason of section 20B, none of the amount demanded from them was payable, because the costs were incurred more than 18 months previously (and no valid demand had yet been made) and no notification under subsection (2) had been given. The LVT rejected this contention. It said:

> "30. The tenants also initially attempted to rely on section 20B of the 1985 Act. This provides that a landlord must either demand payment within 18 months of incurring expenditure or serve a notice that costs had been incurred which he would subsequently be required to contribute to. The penalty for failure to do so is that the monies become irrecoverable from the tenant. The landlord sent repeated letters in 2005 and 2006 chasing payment for the major works. These letters in our judgment manifestly satisfy section 20B, so there is nothing in this point.
>
> 31. Accordingly, were it not for the para 2 and 4 point, we would have disallowed nothing in respect of the major works."

13. The tenants sought permission to appeal on the LVT's determination on the section 20B point, and in refusing permission the LVT said:

> "(2) Section 20B set out no formal requirements for a notice by a landlord. In the current case the landlord repeatedly asked for monies in respect of the major works after those works commenced. The fact that the landlord asked for more than was ultimately due does not render the demands invalid for the purposes of section 20B. (Whether a demand for less than was due would also be valid is not a matter which arises for determination.)"

14. For the appellants Mr Andrew Skelly submitted that the LVT was in error in concluding that the otherwise unidentified "repeated letters in 2005 and 2006 chasing payment for the major works" constituted notification for the purposes of section 20B(2). He referred to *Paddington Walk Management Ltd v Governors of the Peabody Trust* [2010] L & TR 6 (a decision of HH Judge Hazel Marshall QC in Central London County Court) and *London Borough of Islington v Abdel-Malek* LRX/90/2006 (a decision of A J Trott FRICS in the Lands Tribunal) and also to a note of a judgment of HH Judge Martin at Central London County Court in *Westminster City Council v Hammond*, 19 December 1995. He submitted that the requirement was to specify the costs which had been incurred and that none of the letters did this. The amount referred to in the letters, £44,657.40, was the estimated contribution and not the costs which had been incurred. Although payments had been made at the time of the letters of 17 March 2005, 18 October 2005 and 17 February 2006, the amount stated in the letter was not related to these.

15. For the council Mr Simon Butler referred to my decisions in *Holding & Management (Solitaire) Ltd v Sherwin* [2010] UKUT 412 (LC) and *Ember Homes Ltd v Lucas* [2011] UKUT 42 (LC) and to Etherton J's statement of the policy behind section 20B in *Gilje v Charlgrove Securities Ltd* [2004] 1 All ER 91 at para 27:

> "… the policy behind section 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."

Mr Butler drew particular attention to the last sentence.

16. Mr Butler said that the cases established two principles: firstly that, if requests are made for advance payments under the lease which are prospective costs, section 20B does not apply so as to limit the tenant's liability in respect of advance requests; and secondly that, where the actual payment does not exceed the advance payments, the lessor does not need to make a request for any further payment. He submitted that the letters sufficiently warned the tenants to set aside provision for the major works well in advance of the final demand for payment after costs had been incurred. The tenants would have been under no misapprehension that costs for major works would be incurred and payment would need to be made. Completion was on 27 August 2005. At that date the council's liability to pay the totality of the costs of the works had been incurred. The letters requesting payment had to be read in context, and those sent after the completion date were requests for payment for costs that had been incurred. Mr

Butler suggested in an alternative argument that the costs were only incurred for the purposes of section 20B when the final account was rendered by the contractor. This was immediately before the demand of 1 October 2008, and therefore well within the 18 months time limit.

17. The question for decision is whether, if the council were to serve a demand that complied with the provisions of the lease for the amount, £39,049.33, that the LVT has determined to be payable, section 20B would operate so as to prevent its recovery. Mr Butler's primary argument was that by the time the letters of 18 October 2005 and 17 February 2006 were sent the council had incurred the totality of the costs, since completion was on 27 August 2005, and the council's liability to pay the total contract amount arose on that date. In my judgment, however, costs are only "incurred" by the landlord within the meaning of section 20B when payment is made. There is clearly a distinction between incurring liability (ie an obligation to pay) and incurring costs, and it is the latter formulation that is used in the provision. However, it is the case that some payments under the contract had been made at the time that each letter, from 17 February 2005 onwards, was sent and the greater part of the payments had been made at the time of the letters sent after completion of the works (£1,067,814.39 out of the sum of £1,268,340 that was finally agreed). How much of this is attributable to works for the cost of which the tenants were potentially liable is not clear. It could be the totality of the amount demanded of them; it could be something less. The final two payments were made by the council in March 2006 and March 2007, but no demand or other notification was sent to the tenants between the letter of 17 February 2006 and the demand of 1 October 2008. If any part of these final payments related to works for the cost of which the tenants were potentially liable, none of this would be recoverable because the demand of 1 October 2008 was more than 18 months after the costs were incurred.

18. For the purpose of determining whether the letters requesting payment or any of them constituted notification under section 20B(2) it is in my judgment right, as Mr Butler contended, that these should be read in context. At the time the invoice for "Estimate Charge", 16 October 2004, the works had not commenced. At the time the first letter was sent on 17 March 2005 the works had been under way for four months and four payments had been made by the council to the contractors. By the time of the letter of 18 October 2005 the works had been completed and four further payments had been made; and Mrs Jean-Paul had expressed her total satisfaction with the works. Under section 20B(2) the tenant must have been notified "that those costs had been incurred". Each of the letters referred to the amount of "£44,657.40 in relation to Refurbishment Works conducted on Standswood Gardens and invoiced in October 2004". The words "Refurbishment Works conducted on Standswood Gardens" clearly meant the works being carried out or having been carried out at the date of the letter. For these the council had incurred costs through making payments to the contractors. The amount of £44,657.40 was an overstatement of those costs, since it was the amount that had been invoiced in October 2004 in advance of the works commencing, but an overstatement of the costs incurred would not in my judgment prevent a demand being a notification for the purposes of section 20B. Given the purpose of the provision as articulated by Etherton J in *Gilje*, the demand would have fulfilled its function.

19. My conclusion, therefore, is that the LVT was correct to conclude that the letters constituted notifications for the purposes of section 20B(2). There is no doubt that this

conclusion accords with the merits, and Mr Skelly accepted that, leaving aside the operation of section 20B, the tenants' case was unmeritorious. They were fully consulted in advance about the proposed contract and its cost, were informed what their liability would be and received a demand for the estimated contribution in advance of the commencement of the works. The works were carried out, the tenants expressed their total satisfaction with them, and the council continued to press for payment. The LVT determined on the tenants' application that the final amount demanded, which was less than the estimated amount, was reasonable. They have paid nothing and seek to avoid paying anything. I am satisfied that section 20B does not enable them to ride free.

20. The only matter that would require determination is whether the letters of 18 October 2005 and 17 February 2006 constituted notification for the purposes of the total amount of £39,049.33 for which the tenants are potentially liable under the lease or for some smaller amount. The answer to this (see paragraph 17 above) is that if any part of the final two payments, in March 2006 and March 2007, related to works for the cost of which the tenants were potentially liable, such amount would not be recoverable and would fall to be deducted from the £39,049.33.

Dated 9 May 2011

George Bartlett QC, President