UPPER TRIBUNAL (LANDS CHAMBER)

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Case Number: LRX/38/2010

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – variation of lease – covenant proposed by lessor providing for payment by lessees of fee of managing agent – lease otherwise remaining the same – held existing provision not unsatisfactory – decision of LVT reversed – Landlord and Tenant Act 1987 ss 35(2)(e) & (f)

IN THE MATTER OF A NOTICE OF APPEAL AGAINST
A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL
FOR THE LONDON RENT ASSESSMENT PANEL

BETWEEN **Appellants**

(1) EDMUND CLEARY
(2) DAPHNE ELIZABETH ROBERTSON
(3) RAE JANETTE FEATHER

and

LAKESIDE DEVELOPMENTS LIMITED **Respondent**

Re: Flats 1, 3, 4 and 5,
44 Oakley Street
London SW3 5HA

Before: The President

Sitting at 43-45 Bedford Square, London WC1B 3AS
on 28 June 2011

Mr Edmund Cleary, appellant, in person
Mr Nils Christiansen for the appellant Miss D E Robertson
Justin Bates instructed by Dale & Dale, solicitors of Kingham, Oxfordshire, for the respondent

The following cases are referred to in this decision:
Mahmood v Sinclair Gardens Investments (Kensington) Ltd LRX/59/2007
Flats 1-8 Baden House CH1/OOAH/LVT/2006/0005 (LVT)
London Borough of Brent v Hamilton LRX/51/2005

The following further cases were referred to in argument:
Gianfresco v Haughton LRX/10/2007

DECISION

Introduction

1. This is an appeal against a decision of a Leasehold Valuation Tribunal under section 38 of the Landlord and Tenant Act 1987 varying the terms of the leases of four flats at 44 Oakley Street, London SW3 5HA by the addition of the following provision to the lessee's covenants:

> "(25) to pay on demand as part of the service charges hereunder any reasonable management fee of any Managing Agents, Surveyors or agents duly appointed by the lessor in connection with the performance of the lessor's covenants under this lease together with value added tax thereon at the appropriate rate."

2. The appellants are the lessees of three of those four flats. The respondent is the freehold owner of 44 Oakley Street, a terraced house on basement, ground and four upper storeys, divided into flats, one on each floor. The flats were the subject of individual leases granted at various dates in 1965 for a term of 99 years from 29 September 1964 at an annual rent of £90. Each lease provided for the payment by the tenant of an additional rent equal to one-sixth of the annual insurance premium for the building, and each lessee covenanted to pay one-sixth of the cost incurred by lessor in observing and performing its covenant to repair. The lessee of flat 1, the basement flat, covenanted to pay £15 per annum towards cleaning costs; and each of the other five lessees covenanted to pay 20% of the cleaning costs and 20% of the costs of lighting the common parts and providing an entry-phone.

3. Three of the leases have been varied. By a surrender and lease dated 31 August 2006 Flat 1 is now held for a term of 99 years from 29 September 2006 at a higher rent than before but on what for present purposes are the same covenants. The lease of Flat 2 was varied by deed on 31 August 1984 by the inclusion of two new covenants, one of which was a lessee's covenant as follows:

> "2(25) that the lessee will pay to the lessor a reasonable deemed management fee charged by the lessor in performing the covenants under Clause 3 hereof."

4. The lease of Flat 6 has been varied by deed on two occasions, first on 11 February 1969 in terms that are not material for present purposes, and then on 9 December 2002 by the insertion of two new provisions, one of which was a lessee's covenant in these terms:

> "2(25) to promptly pay as part of the service charge hereunder any reasonable management fees of any Managing Agent, Surveyor or agents duly appointed by the lessor in connection with the performance of the lessor's covenants under this lease together with value added tax herein at the appropriate rate."

5. On 5 November 2008 the present respondent, Lakeside Development Ltd, applied to the LVT under section 35 of the 1987 Act for the variation of the leases of Flats 1, 3, 4 and 5 by

the addition of two clauses. One of them is that set out in paragraph 1 above. The other was a lessee's covenant to pay legal charges incurred by the lessor in connection with the performance of its covenants under the lease. On 11 November 2008 the LVT sent a copy of the application to each of the lessees and gave notice of a pre-trial review to be held on 9 December 2008. At the pre-trial review, statements of case were ordered to be served. On 12 January 2009 Lakeside's statement of case was sent to leaseholders. On 26 January 2009 Mr Cleary filed a statement of case, and on 16 February 2009 Miss Robertson did so too. :Neither of the other lessees filed a statement of case. Lakeside prepared trial bundles, and these were sent to Mr Cleary and Miss Robertson 8 days before the hearing. The hearing took place on 26 February 2009. Mr Cleary appeared in person. Miss Robertson did not appear, owing to ill-health. She had previously applied for a postponement of the hearing, but a differently constituted tribunal had refused her application.

6. Lakeside's case for the variations that it sought was based on paragraphs (e) and (f) of section 35(2). Section 35, so far as relevant for present purposes, provides:

> "35 Application by party to lease for variation of lease.
>
> (1) Any party to a long lease of a flat may make an application to a leasehold valuation tribunal for an order varying the lease in such manner as is specified in the application.
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> (2) The grounds on which any such application may be made are that the lease fails to make satisfactory provision with respect to one or more of the following matters, namely –
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> (a) - (d) …
>
> (e) the recovery by one party to the lease from another party to it of expenditure incurred or to be incurred by him, or on his behalf, for the benefit of that other party or of a number of persons who include the other party;
>
> (f) the computation of a service charge payable under the lease.
>
> (g) …
>
> (3) …
>
> (3A) For the purposes of subsection (2)(e) the factors for determining, in relation to a service charge payable under a lease, whether the lease makes satisfactory provision include whether it makes provision for an amount to be payable (by way of interest or otherwise) in respect of a failure to pay the service charge by the due date.
>
> (4) For the purpose of subsection (2)(f) a lease fails to make satisfactory provision with respect to the computation of a service charge payable under it if –
>
> (a) it provides for any such charge to be a proportion of expenditure incurred, or to be incurred, by or on behalf of the landlord or a superior landlord; and

(b) other tenants of the landlord are also liable under their leases to pay by way of service charges proportions of any such expenditure; and

(c) the aggregate of the amounts that would, in any particular case, be payable by reference to the proportions referred to in paragraph (a) and (b) would either exceed or be less than the whole of any such expenditure.

(5) – (8) …"

7. The tribunal gave its decision on 30 September 2009, some 7 months after the hearing. It expressed its conclusions on the management fees variation quite shortly:

> "23. The two variations sought in the present case concerned the recovery of service charge costs in relation to managing agents and legal fees. With regard to management fees, there were grounds for varying the lease. The landlord was a corporate body and the leases in respect of flat 2 and 6 already make provision for the recovery of service charges in respect of employing a management agent. The circumstances of the case therefore fell within section 35(2)(e) [recovery of expenditure incurred by one party for the benefit of the other party] and section 35(2)(f) [computation of service charges] because flats 2 and 6 were liable to pay the charges. Ample support for such a construction of sections 35(2)(e) and (f) could be found in the decision of *Mahmood and Another v Sinclair Gardens Investments (Kensington) Ltd LRX/59/2007* where a property was divided into two flats but only one was obliged to pay management fees. In that case His Honour Judge Huskinson varied the leases to as to ensure uniformity."

8. The LVT rejected Lakeside's application in respect of the proposed covenant on legal fees. It then went on to deal with compensation:

> "29. With regard to the issue of compensation no proper evidence was advanced by the respondents to show first that clause 2(25) would necessarily result in the diminution in value of the Respondents' leasehold interests or secondly, as to the extent of such diminution in value. Neither was any evidence advanced to show the extent of any further pecuniary loss on any alternative basis. In those circumstances the tribunal would not make any award of compensation. In the present case had there been any retrospective claim by the landlord as to the cost of managing agents, then the Tribunal in its discretion may have assessed compensation on the basis of such costs to the tenants of flats 1, 3, 4 and 5 to ensure that the tenants would not suffer prejudice as a result of the variation. However no such entitlement has been advanced by the applicant.

9. Three of the lessees, Mr Cleary of Flat 3, Miss Robertson of Flat 4 and Miss Fletcher of Flat 5, applied to the LVT for permission to appeal to this Tribunal. They advanced three grounds. The first was a point of procedure. They said that under the Leasehold Valuation Tribunal (Procedure) (England) Regulations 2003 notice of the proposed variations should have been given to the lessees by the landlord, but instead it was given by the LVT; and the LVT, had no jurisdiction to dispense with the requirement of service by the landlord. The second ground that was advanced was that the LVT had been wrong to conclude that the

circumstances of the case fell within paragraph (3) and (f) of section 25(2). They said that it fell within neither and that the LVT's approach to applying paragraph (e) was in any event erroneous in a number of respects. Thirdly they said that the LVT erred in law in dismissing the lessees' claim for compensation because of the absence of any, or any proper, evidence. In addition they contended that the LVT had failed to give adequate reasons for its decision to order the variation and to refuse compensation. The LVT granted permission to appeal. In doing so it said:

> "The Tribunal has considered the applicant's request for Leave to Appeal dated 26 October 2009 on behalf of the third, fourth and fifth respondents and determines that Leave be granted to Appeal to the Lands Tribunal. Although the legal arguments now raised by the respondents were not put to the Tribunal at the hearing they raise important issues of principal upon which the Lands Tribunal should give further guidance."

10. Mr Cleary and Mr Christiansen, who appeared for Miss Robertson, pursued all three grounds of appeal before me. I will consider them in turn, starting with the point on procedure.

11. Regulations 4(1) and 5(1) of the LVT Procedure Regulations 2003 provide as follows:

> "4(1) The applicant shall give notice of an application under Part 4 of the 1987 ACT (variation of leases) to the respondent and to any person who the applicant knows, or has reason to believe, is likely to be affected by any variation specified in the notice."
>
> "5(1) On receipt of an application, other than an application made under Part 4 of the 1987 Act, the tribunal shall send a copy of the application and each of the documents accompanying it to each person named in it as a respondent."

12. Before the LVT Mr Cleary contended, as he does now, that there had been a failure to comply with regulation 4 and the tribunal had no power to dispense with its requirements. At paragraph 3 of its decision the LVT said that it was "satisfied in relation to all the material before it that the respondents have received notice of the application from the Tribunal and in particular that all of the respondents have received a copy of the directions made by the Tribunal on 9 December 2008 and therefore the hearing could proceed." In the section of its decision headed "Determination" the LVT said:

> "25. So far as the requisite provision of notice is concerned, under this particular head the Tribunal did not consider that any prejudice had been caused to the respondents."

13. Paragraph 25 related to the proposed management fees covenant. The tribunal went on, with respect to the other proposed covenant:

> "26. With regard to the proposed clause 2(26) this was a more controversial variation and the respondents ought to have been given independent notice of this variation so that they could seek advice well before any application to the Tribunal. Here there was real prejudice to the respondents. The tribunal would have refused the application on this ground alone but for the fact that the application fails in any event…"

14. Mr Cleary argued that it was internally inconsistent for the tribunal to decide that the application for the legal charges covenant should be refused on this ground and to conclude despite this that the failure to give independent notice did not prejudice the respondents in relation to the management fees covenant. The tribunal, he said, had no power to dispense with service. Under regulation 3(7) and paragraph 6(1) of schedule 6 to the regulation where an application for the variation of a lease is made it must include the "names and addresses of any person served with a notice in accordance with regulation 4." That clearly assumed that notice under regulation 4 will have been given before the application is made. The application contained the names of all those who were required to be given notice under regulation 4(1) i.e. the respondents and persons who the applicant knew, or had reason to believe, likely to be affected by any variation specified in the application. No notice had, however, been given at the time of the application.

15. The application thus failed to comply with regulation 3(7), since the names given were not those of persons who had been given notice until regulation 4. Under regulation 3(8), however,

> 3(8) Any of the requirements in the preceding paragraphs may be dispensed with or relaxed if the tribunal is satisfied that –
>
> (a) the particulars and documents included with an application are sufficient to enable the application to be determined; and
>
> (b) no prejudice will, or is likely to, be caused to any party to the application.

16. It is clearly the case in my judgment that the particulars and documents (here, the draft variations) included with the application were sufficient to enable the application to be determined; and no prejudice would be caused to any party by the fact that the applicant did not itself send a copy of the application to each of the lessees. A copy of the application was sent each of the lessees by the LVT. Each of the respondents thus received the notice that paragraph 4 provided for, except that he or she received it from the LVT rather than from the applicant (an immaterial difference) and by letter sent on 11 November 2008 rather than one received by the date of the application, 5 November 2008 (which in the context of the sequence of events was also immaterial). The breach of regulation 4 did not invalidate the application, and since in all the circumstances none of the respondents had been prejudiced by it, it presented no impediment to the determination of the application by the LVT. And the LVT was entitled to dispense with the requirement in regulation 3(7) and paragraph 6(1) under regulation 3(8). The first ground of appeal therefore fails.

17. The second issue is whether the LVT erred in law in determining that the lessee should be varied by the insertion of the management fees covenant and whether its reasoning on this was inadequate. The LVT accepted the case for the landlord that the variation fell within both paragraph (e) and paragraph (f) of section 35(2) and that it was appropriate that it should be made.

18. The variation does not in my view fall within paragraph (f) ("the computation of a service charge payable under the lease"), however, and Mr Bates agreed that this was so. For

(f) to apply the requirements of section 35(4) must be met. The first requirement, (a), is that the lease provides for a service charge to be a proportion of expenditure incurred, or to be incurred, by or on behalf of the landlord. None of the leases the subject of the application, however, provides for a proportion of the management fees to be payable as a service charge.

19. The application for the variation could thus only succeed on ground (e), therefore; and for this it would be necessary for the landlord to show that the lease failed to make satisfactory provision for the recovery by it of expenditure incurred by it on management.

20. The case for the landlord, as recorded at paragraph 7 of the LVT's decision was that the leases of flats 1, 3, 4 and 5 failed to make satisfactory provision for the recovery of such expenditure "in that they fail to make any provision for the payment of management fees despite the fact that flats 2 and 6 are liable to pay those fees and despite the fact that the applicant, as a corporate body, does in fact employ a managing agent." The lessor's statement of case in the LVT said: "The current arrangement means that the costs are apportioned between the landlord and two of the leaseholders, yet all the leaseholders receive the benefits." It said that a manager was in fact employed at a cost of £200 per unit, and a long list of his tasks was set out. The decision also recorded that Mr Bates, appearing for the landlord, relied for support on two decisions, one of an LVT, *Flats 1-8 Baden House CH1/OOAH/LVT/2006/0005*, and one of the Lands Tribunal, *Mahmood v Sinclair Gardens Investments (Kensington) Ltd LRX/59/2007*. At paragraph 11 the LVT recorded Mr Bates as saying that the variation would facilitate any further attempt on the tenants' part to exercise the Right to Manage or collective enfranchisement since in either case it would be necessary for the RTM company or nominee purchaser to recover all its costs if it was to avoid insolvency; and that the failure to include such a clause would inevitably mean that a landlord would pursue recovery of each costs in the county court rather than the LVT.

21. Mr Cleary's case, as before the LVT, was that there was nothing before the LVT to show that the new covenant would be of benefit to the lessees. It mattered not to the lessees whether the functions of management were performed by the lessor itself or by a managing agent. The fact that the lessor was a corporate body was irrelevant. The cost of delegating management functions to an agent should fall on the lessor. Neither of the cases relied on by the lessor in support of its case justified the LVT in reaching the decision that it did, and a substantial part of the functions listed in the lessor's statement of case were for its benefit and not for the benefit of the tenants. Miss Robertson's case was that she had purchased her flat in full knowledge that the lease did not include provision for management charges. She had paid a premium for the lease with this in mind. Mr Christiansen said that the application was simply an attempt to transfer value from the lessees to the lessor. Each lessee bought his or her lease knowing what the lease provided for. To change this position created a transfer of value between the parties.

22. Mr Bates submitted that the lack of limiting words in section 35(2)(e) showed that it was not a limited power. It was for the LVT to determine as it saw fit whether a variation should be made on this ground having regard to all material circumstances. The relevant circumstances in the present case were (i) that the leases of flats 1, 3, 4 and 5 make no

provision for the recovery of the costs of management; (ii) that flats 2 and 6 are liable to contribute towards those costs; and (ii) that the landlord does in fact employ a manager, at a cost of £200 a year per unit, who carries out a wide range of tasks. It was open to the LVT having regard to these circumstances to conclude that the variation should be made.

23. Mr Bates said that it was not an irrelevant consideration that the landlord was a body corporate. The fact was that a body corporate can only discharge management functions through agents or employees, and he referred by way of example to *London Borough of Brent v Hamilton* LRX/51/2005.

24. Paragraph 23 of the LVT's decision, which contains its reasons for directing the variation, was in terms confined to determining that it had power under both paragraph (e) and paragraph (f) to make the variation. It was, as I have said, in error in relation to paragraph (f), which did not apply on the facts of the case. As regards (e), the LVT gave no explanation as to why the two facts that it referred to – that the landlord was a corporate body and that the leases of two of the flats contained a covenant for the payment of the lessee's expenditure on management fees – meant that the other leases failed to make satisfactory provision for such expenditure. Nor did it address the question whether as a matter of discretion it was appropriate to make the variation sought. Neither of the two facts that it mentioned, however, was conceivably sufficient, in my judgment, to justify the making of the variation.

25. Mr Bates urged that the LVT's conclusions should be read as accepting the case for the lessor, so that these should be treated as reasons for the decision.

26. What the LVT had to be satisfied about was that that each of the four leases failed to make satisfactory provision with respect to the recovery by the lessor of expenditure incurred by it for the benefit of the lessee. The case for the lessor was that at present the cost to the lessor of employing a manager are borne by the lessor, with contributions from two of the lessees. It is this which is said to be unsatisfactory and the new provision is designed to change. It is important to note that it was not part of the lessor's case that the lessor was entitled by implication to include the management fees as part of the tenant's one-sixth share of the insurance and repair costs or the 20% share of the cleaning and lighting costs. Had that been the case, there would have been an argument, in my view, that, by leaving it to implication, about which there could be disagreement, the lease was unsatisfactory and an explicit provision was appropriate. But it was not part of the lessor's case that the management fees reflected what the lessor was entitled to charge in any event. The list of tasks produced went far beyond those associated with the performance of the covenants in respect of which the lessor was entitled to charge.

27. The case for the lessor, as I have said, was that at present the cost to the lessor of employing a manager are borne by the lessor, with contributions from two of the lessees. There is, however, nothing unsatisfactory about that in itself. It is the result of the contractual arrangements freely entered into between lessor and lessees. In the case of two flats the lessor and the lessees have agreed, in provisions expressed slightly differently, that the lessee should be obliged to pay a contribution towards the cost of management. But it is notable that in the

most recent lease modification, that contained in the surrender and lease of flat 1, no such provision was included despite the fact that the lease provisions were substantially altered in other respects. If the absence of a management fee provision was unsatisfactory Lakeside could have ensured that it was included. The surrender and lease was entered into on 31 August 2006, two years only before the application was made to vary its terms and the terms of the other three leases. There is, in my judgment, nothing arguably "unsatisfactory" in the fact that two lessees pay a contribution to the lessor's costs of management and four do not. It simply reflects different contractual provisions that do not appear to cause any difficulty in interpretation or application.

28. The effect of the variation would be to require each of the four tenants to pay £200 a year, whereas nothing is now payable under the lease. The lessor's obligations under the lease would remain the same. Contractually the lessees would be paying £200 without any entitlement in return. Not surprisingly they are not in favour of being obliged to do so. Mr Bates suggested that if the lessees made the contribution sought there would be a greater incentive to the lessor to ensure that a qualified and appropriate manager was appointed. But there was no evidence that this would happen, and as a theoretical possibility it is obviously not sufficient to show that the leases currently do not make satisfactory provision.

29. I should add that there is nothing in the Lands Tribunal case of *Mahmood v Sinclair Gardens Investments (Kensington) Ltd*, referred to by the LVT and relied on by the lessor, to suggest that the variation sought in the present case could or should be made. The facts in that case were that the lease contained a repairing covenant on the part of the lessor but it was made "subject to the lessee paying his proper proportion of the costs thereof". However, there was no provision in the lease whereby the lessee was made liable to pay this proper proportion of the costs – so that it was manifestly unsatisfactory in this respect, and the Tribunal (HH Judge Huskinson) directed a variation to be made to correct this defect. In contrast there is not in the leases that are the subject of the present application anything to suggest that the management costs to which the proposed variation relates were intended to fall on the tenants, and there is no reason why they should do so.

30. I note also that in the LVT *Bath* case the tribunal varied leases so as to provide for the payment by the lessees of an annual sum for the costs and expenses of management. It concluded that it was in the interests of the lessees for management of the building to ensure that the tasks associated with its insurance and maintenance should be carried out properly and that this should be done in order to maintain the value of the lessees' investments as well as the amenities of the property. The level of income generated was such that it presented a risk of future neglect. That was a fully reasoned decision based on the evidence that the LVT had before it. I can see that there may be circumstances where the financial position of the lessor may make the absence of a lessee's covenant to pay for the cost of management unsatisfactory. This could be the case, for instance, where there was an RTM company with no other source of income. But evidence would be needed to show that there was a particular need in the circumstances of the case. In the present case, in my judgment, there was no evidence on which the LVT could conclude that the absence of such a provision was unsatisfactory.

31. The LVT determined that no compensation should be paid under section 38(1) of the Act (under which it had power, if it thought fit, to make an order for the provision of compensation in respect of any loss or disadvantage that any lessee was likely to suffer as a result of the variation). It said (see above) that "no proper evidence" had been advanced by the lessees to show that the new clause "would necessarily result" in the diminution in value of their leases or as to the extent of such diminution in value. It is not, of course, the case that a loss or disadvantage is only to be measured in terms of the diminution in value of a party's interest in the property, and it is on the face of it hard to see how a requirement that the lessees should have to pay £200 a year for something for which they at present pay nothing would not be a loss or disadvantage requiring the payment of compensation. However, as I am satisfied that the LVT was wrong to direct the variation, this matter does not arise for determination.

32. The appeal is allowed, and the lessor's application for the variation of the leases is dismissed.

Dated 7 July 2011

George Bartlett QC, President