UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2011] UKUT 210 (LC)
Case Number: LRX/81/2010

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges- whether statutory summary of tenants' rights and obligations accompanied demands – whether service charge payable annually or quarterly – whether cost of installation of play equipment properly included in service charge – Landlord and Tenant Act 1985 s 21B

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE SOUTHERN RENT ASSESSMENT PANEL

BETWEEN **TINGDENE HOLIDAY PARKS LIMITED** **Appellant**

and

BRIAN COX **Respondents**
and
EILEEN PATRICIA COX
and
OTHERS

Re: Kingsdown Park
Upper Street
Deal
Kent CT14 8AX

Before: The President

Sitting at 43-45 Bedford Square, London WC1B 3AS
on 18 July 2011

© CROWN COPYRIGHT 2011

Adam Rosenthal instructed by Fosters, solicitors of Norwich, for the appellant
Andrew Lane instructed by direct access for the Respondents

The following cases are referred to in this decision:

Hiscox v Outhwaite (No1) [1991] 3 All ER 124

The following further cases were referred to in argument:

Revenue and Customs Commissioners v Benchdollar Ltd [2010] 1 All ER 174
Tenants of Langford Court v Doren Ltd (LRX/37/2000, 5 March 2001)
Schilling v Canary Riverside Development PTE Ltd (LRX/26/2005, 28 April 2006)
McDonald v Fernandez [2004] HLR 13

DECISION

Introduction

1. This is an appeal against the decision of a leasehold valuation tribunal for the Southern Rent Assessment Committee dated 19 March 2010 given under sections 27A and 20C of the Landlord and Tenant Act 1985 in relation to service charges payable by the lessees of 65 holiday chalets at Kingsdown Park, Upper Street, Kingsdown, Deal, Kent. The application to the LVT was made on 1 September 2009 by Mr Brian Cox and Mrs Eileen Patricia Cox, the leaseholders of chalet 52. It asked the LVT to determine their liability to pay the balance of service charges demanded from them for 2008 and the estimated service charge for 2009. Notice under section 146 of the Law of Property Act 1925 had been served on them on 8 July 2009 in respect of their failure to pay the service charges demanded for those years. On 20 August 2009 county court proceedings for the payment of unpaid service charges for 2009 were issued against the leaseholders of 5 chalets, Clifford John Austin-Haynes of chalet 75, Barrie Stevens and Pauline Mary Stevens of chalet 59, Dreda Christine Ilyas of chalet 53, James Clugston of chalet 41 and Janet Beatrice Lowers and Michael Leslie Lowers of chalet 51. These county court claims were transferred to the LVT from Canterbury County Court and on 11 December 2009 the LVT ordered that they should be consolidated with Mr and Mrs Cox's application. Subsequently the leaseholders of 59 other chalets were joined as applicants. The appellant, the respondent before the LVT, is Tingdene Holiday Parks Limited, which became the freehold owner of the Kingsdown Park on 20 December 2007, having purchased the park from the administrators of the previous owners, Archcare Limited.

2. A number of issues were raised in relation to these service charges which, by the time of the hearing, had been distilled to six issues that were listed in the LVT decision. Of the issues determined by the LVT, the following are the subject of this appeal:

(a) Whether demands complying with section 21B of the LTA 1985 were served on the respondents in relation to the 2008 and 2009 service charges and, if so, when.

(b) Whether the service charges are payable by the respondents annually or quarterly.

(c) Whether the LVT erred in its conclusion that the full sum of £11,116.36 is not payable by the lessees in relation to the refurbishment of the children's play areas within the park.

(d) Whether the LVT erred in its decision under section 20C in directing that no part of the appellant's costs of the proceedings should be added to the respondents' service charges.

3. I will deal with these in turn. Before I do so I should note that leases other than those granted in recent years contain in Part I of the Fourth Schedule the following provision relating to the payment of the service charge (referred to as "the Management Fee"):

> "8. The Lessee shall if requested by the Lessor pay to the Lessor on January 31 in each year or (if later) the date upon which such request is made such sum in advance and on

account of the Management Fee for such year as the Lessor or its agents shall specify at its discretion to be a fair and reasonable interim payment."

Although this provision provides for the payment of an annual sum, it has been the landlord's practice, over, it appears, a number of years, to serve quarterly rather than annual demands, and the newer leases provide for quarterly payments.

4. Issue (a) arises only in relation to Mr and Mrs Cox (on whom the section 146 notice was served on 8 July 2009) and to the transferred county court claims (which were issued on 20 August 2009) since it is accepted that demands complying with section 21B were in due course served on 20 November 2009.

5. Under section 21B(1):

> "(1) A demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges.
>
> (2) The Secretary of State may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations.
>
> (3) A tenant may withhold payment of a service charge which has been demanded from him if subsection (1) is not complied with in relation to the demand."

6. Pursuant to subsection (2) the Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007 have been made, and these set out the summary that under subsection (1) has to accompany the demand. Regulation 3 provides:

> "3. Where these Regulations apply the summary of rights and obligations which must accompany a demand for the payment of a service charge must be legible in a typewritten or printed form of at least 10 point, and must contain –
>
> (a) the title 'Service Charges – Summary of tenants' rights and obligations'; and
>
> (b) the following statement –"

There then follows the text of 12 paragraphs comprising the statement.

7. Relevant for present purposes are demands that were sent to lessees by the appellants on 4 April 2008, 1 July 2009 and 20 November 2009, since it is the appellant's contentions that each of these was accompanied by the summary required by section 21B. On 4 April 2008 the appellant wrote to Mr and Mrs Cox (and no doubt to other tenants) enclosing a statement of the estimated service charge for the year ending 31 December 2008 and requesting the payment of the first quarter's charge by 15 April 2008. No summary of tenants' rights and obligations was sent with the letter, but on 15 April 2008, after Mr Cox had pointed out this omission, the appellant sent to each of the lessees who had received a demand a summary that complied with

the Regulations. The demands, however, were not sent again with the summary. On 1 July 2009 a demand for payment of the third quarter's charge by 1 August 2009 was sent to lessees and it was sent together with a photocopy of the Queen's Printer's form of the Regulations themselves but without any further reference or explanation. The demands sent on 20 November 2009 were sent with the required summary, and there is no dispute that these complied with the requirements of section 21B.

8. The respondents contended before the LVT that the demands of 4 April 2008 and 1 July 2009 were not accompanied by the required summary and thus the lessees were entitled to withhold payment of the amounts demanded. Although the demands of 20 November 2009 had removed this inhibition to recovery, it was material, they said, for the LVT to determine that the amounts demanded were not payable until this date because of county court proceedings that had been commenced against five lessees on 20 August 2009 for non-payment of the amounts.

9. The LVT concluded on this point as follows:

> "41. The Tribunal accepts Mr Lane's arguments [for the lessees] that Section 21B of the 1985 Act as being absolutely clear in that a demand for payment of service charges must be accompanied by a summary of the rights and obligations of tenants. The respondent has de facto conceded that the 2008 demand was not accompanied by such a summary and a similar admission was made in part in respect of the 2009 demand although the time line is disputed. Mr Newborough [for the lessor] argues for July 2009 and Mr Lane for November 2009. The Tribunal, applying the civil standard is satisfied that the summary of rights and obligations was not in fact sent until November 2009. There is no credible evidence that this was done in July 2009. The Tribunal rejects any notion of 'substantial compliance' with the Act. To adopt such an approach would negate the clear purpose of the legislation and would itself be ultra vires.
>
> 42. In practical terms this means that any County Court actions begun against any of the Applicant's prior to November 2009 were premature and therefore an abuse of process. Further any legal costs in respect of these matters are not recoverable against the Applicant's if they took place before November 2009."

10. For the appellant Mr Adam Rosenthal submits that the LVT was wrong to conclude that there was a failure to comply with the requirement of section 21B in relation to both the demand of 4 April 2008 and the demand of 1 July 2009. As for the first he says that the combination of the letters dated 4 April 2008 and 15 April 2008 was sufficient to comply with section 21B in relation to the demand in the 4 April letter. He submits that the word "accompanied" does not imply a requirement that the two documents must be sent together. Since the legislation does not detail how one document (the demand) might "accompany" another, it is necessary, he says, to construe the legislation to ascertain what was intended. For example, he says, if the summary is not attached to the demand, it cannot be said, for that reason, that it does not "accompany" it. Similarly, he submits, if the documents are contained in separate envelopes, the requirement is nonetheless complied with. Here, although the letters were sent eleven days apart, the letter of 15 April clearly refers back to the letter of 4 April and

for that reason, Mr Rosenthal submits, it "accompanies" it for the purposes of section 21B. A contrary reading would be unduly restrictive and cannot, for that reason, reflect Parliament's intention.

11. Further or alternatively, Mr Rosenthal relies on the letters dated 1 July 2009 sent to the lessees and the copy of the Regulations that was sent with them. He submits that the only respect in which the requirements were not strictly complied with was in relation to the heading: but the words of the heading were in the Regulations, and this, he says, was sufficient. He also relies on the defences served by the five county court defendants, each of which said:

> "The claimant did not issue a Summary of Rights and Obligations (Section 21B Landlord and Tenant Act 1985) with any demand for service charges until July 1st 2009."

Mr Rosenthal says that this was an admission that a summary complying with the Act was served on 1 July 2011 and that it was ignored by the LVT.

12. For the respondents Mr Andrew Lane submits that, since the lease (the older version) provides for the payment of an annual service charge, the section 21B requirement to serve a summary of rights and obligations relates to the original annual estimate of the service charge and not to the quarterly payments, which were in the nature of a facility provided for either by the lease or to be allowed by reason of estoppel. I do not accept this. Each quarterly demand was a demand for the payment of a service charge, and the fact that the amount demanded was for a quarter rather than for the whole year is nothing to the point. Each such demand had to be accompanied by the requisite summary. Mr Lane also submits that the letter sent on 15 April 2008 did not "accompany" the demand sent on 4 April 2008 and that the copy of the statutory instrument sent with the demand of 1 July 2009 was not the summary required by the Act. I accept both these contentions.

13. I do not see how a summary sent some 11 days after the demand to which it was intended to relate could be said to have accompanied the demand. It manifestly did not accompany it, and I can see no basis for an argument that there was compliance with section 21B. The amount demanded on 4 April 2008 was not payable until the later demand in November 2009, which was accompanied by the summary, cured the defect.

14. Nor do I think that the sending of a copy of the statutory instrument constituted a compliance with the statutory requirements. What was required to be sent was a document with a specific title – "Service Charges – Summary of tenants' rights and obligations" – and a specific text. The purpose is obvious: to ensure that the tenant, when he receives his demand, has clearly before him a statement of the rights and obligations that the Regulations set out; and the heading of the document is important in directing the tenant's attention to what it contains. The statutory instrument itself has its own title and contains the text of regulations 1 and 2 before the requirement for the heading and the statement is set out in regulation 3. It clearly does not itself constitute the document that it prescribes and it does not fulfil the purpose that underlies the requirement.

15. As far as Mr and Mrs Cox are concerned the result is that they were entitled to withhold payment of the service charges in respect of which the section 146 notice was served until they received the November 2009 demand, which was accompanied by the requisite summary. As for the county court defendants, while I accept Mr Rosenthal's submission that the statement in the defence of each of them that is set out in paragraph 11 above was an admission that the demand of 1 July 2009 did comply with the requirements of section 21B, I do not accept that the defendants were bound by that admission in the LVT proceedings. County court pleadings in a matter transferred to the LVT are undoubtedly material to the LVT's determination, and weight may appropriately be accorded to any admission that is made in them. But the pleadings themselves have no formal status in the LVT, and the LVT was not compelled to give effect to the admission. At the time the claims were issued, therefore, each of the defendants was entitled to withhold payment of the amounts claimed in the county court proceedings. The appeal thus fails on issue (a).

16. Issue (b), as stated, is whether the service charge is payable annually or quarterly. The case for the applicants before the LVT was that this was really a question of future payments (paragraph 12 of the decision). It is common ground between the parties that the LVT had jurisdiction to determine this matter under section 27A. The LVT recorded Mr Lane's submissions that the lease in terms assumed the payment on more than one occasion of interim payments prior to the final account; that the more modern leases confirmed the quarterly interim payments actually employed by landlord from 1995; and that, if the lease did not allow a right to quarterly payments, there was an estoppel by convention that prevented the landlord from denying that it did. The LVT expressed its conclusion on this issue as follows:

> "43. The Tribunal finds itself in agreement with Mr Lane that the older style leases may, by referring to interim payment(s) (in the plural) imply a right to quarterly payments. I any event the Tribunal is satisfied that an estoppel by convention has arisen where quarterly payments have been made and indeed encouraged to have been made. This has been the arrangement for a number of years and the Tribunal are satisfied that when the present Respondent took ownership of the Park, they were happy to continue with this. The Tribunal is fortified in its belief by the terms of the new type of lease which allows for quarterly payments in any event. The Tribunal finds as an evidential fact that an estoppel has arisen by custom and convention."

17. The provision on which the LVT apparently relied for its conclusion that the older style leases "may…imply a right to quarterly payments" is paragraph 9 of Part I of the Fourth Schedule, which provides:

> "9. As soon as practicable after the signature of the Certificate, the Lessor shall furnish the Lessee with an account of the Management Fee payable by the Lessee for the financial year in question due credit being given therein for all interim payments made by the Lessee in respect of that financial year…"

18. Paragraph 9 was preceded by paragraph 8, which I have set out above, obliging the Lessee, if requested by the Lessor, to pay on January 31 in each year or (if later) the date of the request a sum on account of the Management Fee for such year. There is thus express

provision for an annual payment. In the light of this I do not understand how it can be said that paragraph 9 entitles the lessee to make quarterly payments instead. It says nothing about quarterly, monthly or any other periodic payments. The reference to credit being given "for all interim payments" is presumably there for the purpose of covering the circumstance in which a lessee, though asked to make a single payment, in fact makes more than one. It is wholly insufficient for the implication which Mr Lane invited the LVT to read into the provision and which they did read into it.

19. The other way in which the LVT justified its decision on quarterly payments was estoppel. The question only arose in relation to future payments, and, as Mr Lane acknowledged, the principle of estoppel by convention does not apply to future dealings. That is clearly established by a number of authorities, the point being succinctly put in the judgment of Lord Donaldson of Lymington MR in *Hiscox v Outhwaite (No1)* [1991] 3 All ER 124:

> "…once a common assumption is revealed to be erroneous, the estoppel will not apply to future dealings."

Thus the LVT's reliance on estoppel as the basis for a conclusion that the tenants would be entitled in future to make payments on a quarterly basis was simply misconceived. The appeal therefore succeeds on issue (b).

20. Issue (c) concerns an amount in the 2009 service charge accounts relating to expenditure on the play area. The respondents argued before the LVT that they were not liable to contribute to this amount, £11,116.46, because planning permission for the works to the children's play area had been refused and in the absence of planning permission the expenditure was not reasonably incurred. The LVT (at paragraph 54) accepted this contention and said that, in any event, even if in due course planning permission were to be obtained on appeal, the lease "only permits for maintenance, repair and decoration and not improvement". It went on:

> "55. In the Tribunal's opinion the play area as observed is of a wholly different character to the limited amount of play equipment that was previously there. Indeed the previous level and amount of equipment could hardly be described as a play area at all and the new equipment seems to have transformed this area of the park. Therefore even if planning permission were to be granted, the Tribunal are of the opinion that any costs can only be charged in respect of repairing or refurbishing what was already there and not the provision of new sets of play equipment."

21. The appellant's case is that in disallowing the sum of £11,116.46 the LVT failed to take into account evidence given on the second day of the hearing by Paul Spriggins, a director of the appellant company, that £3,374.66 of the total sum did not relate to work for which planning permission was required and related to the replacement and repair of parts of the play area which were out of repair. In refusing permission to appeal on this ground the LVT said:

> "…the Tribunal notes its observation in Paragraph 55 of the Decision that the play area is of a wholly different character from what was there before and therefore the sum of

£3374.46 is not recoverable because it cannot relate to an existing play area and is inextricably linked to the failed attempt to obtain planning permission."

22. Mr Rosenthal also seeks to rely on the fact that on 23 June 2011 the local planning authority granted planning permission for the installation of new play equipment in the play area. The officer's report noted that the application proposed to change the siting of the new equipment. Mr Rosenthal seeks to amend the grounds of appeal to enable this matter to be taken into consideration.

23. Paragraph 1 of Part II of the Fourth Schedule to the lease identifies as services for which the lessor may charge through the management fee "Maintenance repair decoration (if appropriate) cleansing and when necessary renewal of the structure exterior and interior of the Amenity Areas"; and "Amenity Areas" is defined in clause 3(a)(1)(a) to include the "parts of the Holiday Site the use or enjoyment of which is common to some or all of the residents of the Estate and all equipment aerials and apparatus fixed thereon". The finding of the LVT was that the play area, following the installation of the new equipment, was of a wholly different character to what was there before. In the light of this finding it was in my judgment entitled to conclude that none of the expenditure was for the maintenance, repair and renewal of the existing play area but that all of the expenditure was in the nature of an improvement. The question of the planning permission is immaterial to this conclusion. The appeal fails on issue (c).

24. Issue (d) relates to the order made by the LVT under section 20C that no part of the relevant costs incurred by the appellant company should be added to the service charge. Both counsel recognise that the decision under section 20C needs to be retaken if the appeal succeeds in whole or in part. Before determining this issue, therefore (and also any application that may be made under section 20C in respect of the appellant's costs in these appeal proceedings), I think it appropriate to give the parties the opportunity if they wish to make submissions upon it. Such further submission must be filed and exchanged within 14 days. I will then deal with the issue in an addendum to this decision, which will then become final.

Dated 8 August 2011

George Bartlett QC, President

Addendum

25. The respondents have applied under 20C for an order in relation to the costs of the appeal to this Tribunal; and I have received submission from both parties in relation both to this and to the decision of the LVT under section 20C.

26. Mr Lane submits that it would be unjust and inappropriate to allow the appellant to seek to recover any of its legal costs of either proceedings. It had acted oppressively, or at least unreasonably, in serving a section 146 notice on Mr and Mrs Cox and issuing court proceedings against five households despite the fact that no valid demand had been made. It was the appellant's failure to grasp the section 21B process until November 2009 that led to the service charges being legally irrecoverable. It was the appellant's inability to go through the proper planning process and understand the lease provisions that led to irrecoverability of over £11,000 in respect of the play area. And it was the appellant's inability to follow the certification process, an issue determined by the LVT in favour of the respondents and not appealed against, that had led to the delayed determination of the reasonableness of the 2008 and later accounts. While Mr Lane accepts that this is not a costs issue to be determined, as in the civil courts, in accordance with the loser pays principle and that it is not enough for the respondents to show that the proceedings have largely been determined in their favour, he says that it has been the unwillingness of the appellant to co-operate with the tenants and comply with the statutory processes that has made the proceedings necessary.

27. For the appellant Mr Rosenthal said that the LVT had been wrong to base its decision under section 20C purely on the degree of success of the lessees. The only issue of particular significance to the parties was whether the charges were payable quarterly or annually, on which the lessees' arguments were hopeless. It should have been left to the county court proceedings to determine whether demands before November 2009 complied with section 21B. The LVT had ultimately declined to deal with the reasonableness of the service charges for 2008, which was the real issue between the parties. The lessees had produced a huge volume of paperwork for the LVT hearing, and one of the two days of the hearing was taken up with the 2008 service charges, on which the LVT declined to rule. As to the costs of the appeal, Mr Rosenthal said that the appellant had succeeded on one of the three issues, and that was the most significant issue to the parties. The others were discrete, short points. It would be unjust to deprive the landlord of its ability to claim its costs as service charges purely because of its failure on the two smaller issues.

28. I agree with Mr Lane that the appellant's failure to grasp the section 21B process until November 2009 has coloured both sets of proceedings (including in the LVT hearing the time spent abortively on the 2008 service charges), and for this reason, quite apart from considerations of the degree of success on particular issues, it would be inappropriate to allow the landlord to recover all its costs by way of the service charge. I recognise, however, the relative importance to both parties of the question whether charges are payable quarterly or annually, an issue that has been resolved in the landlord's favour. Taking these matters into consideration along with the extent to which each of the parties was successful on particular

issues, I consider that the landlord's right to recover the costs should be limited to 25% of the costs in the LVT and 50% of the costs in this Tribunal.

29. Accordingly the issues are determined as follows::

(a) Demands complying with section 21B of the LTA 1985 were not served on Mr and Mrs Cox and the other defendants in the transferred county court claims until 20 November 2009.

(b) Except in the case of those leases that make express provision for quarterly payments, service charges are payable by the respondents annually.

(c) The LVT did not err in its conclusion that the full sum of £11,116.36 was not payable by the lessees in relation to the refurbishment of the children's play areas within the park.

(d) Under section 20C I order that only 25% of the relevant costs incurred by the appellant company in the LVT proceedings and only 50% of such costs in this Tribunal may be added to the service.

The appeal is therefore allowed to the extent set out in (b) and (d) above and is dismissed in relation to (a) and (c).

Dated 12 October 2011

George Bartlett QC, President