UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2012] UKUT 67 (LC)
Case Number: LRX/68/2011

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT- service charges – Landlord & Tenant Act 1985 – reasonableness of service charge – fair hearing – appearance of bias – appeal allowed

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

BETWEEN **COUNTRY TRADE LIMITED** **Appellant**

and

JOHN HANTON & OTHERS **Respondents**

Re: Block 3,
Esplanade Court,
3-4 North Drive,
Great Yarmouth,
Norfolk NR30 1AE

Determination on the basis of written representations

© CROWN COPYRIGHT 2012

The following cases are referred to in this decision:

Country Trade Ltd v Noakes [2011] UKUT 407 LC; UKUT LRX/118/ 2010)
Skilleter v Charles [1991] 24 HLR 421.
re Medicaments and Related Classes of Goods (No 2) [2001] 1 WLR 700
Porter v Magill [2002] 2 AC 357
R v Gough [1993] AC 646

DECISION

Introduction

1. This is an appeal by way of review by Country Trade Ltd (hereafter the appellant) against the decision of the LVT dated 29 March 2011. The respondents are seven occupants of five flats within Block 3, Esplanade Court. The respondents applied to the LVT under section 27A of the Landlord and Tenant Act 1985 for a determination of their liability to pay service charges for the years 2009 and 2010. The case came on for hearing on Thursday 3 March 2011.

2. The appellant manages 126 dwellings in 17 blocks owned by the various members of a group of companies incorporated in Guernsey. Members of the Curry family own the group. The group includes Landfast Ltd, the owner of the block in question, and Breydon Ltd.

3. At the beginning of the hearing the appellant renewed an earlier written request for an adjournment on the ground that the Lands Chamber was due to hear an appeal against a decision of the LVT on another application under section 27A in respect of properties on Crome Drive and other roads at Breydon Park, Great Yarmouth. (Hereafter referred to as 'the Breydon case'.) The appellant manages these properties on behalf of Breydon Ltd, the landlord. It was argued that very similar management issues had arisen in that case as were due to be argued in the present case. The LVT had decided against the appellant on the management issues and expressed itself with some emphasis. The chairman and one member of the LVT in that case were sitting as the LVT in the current case.

4. The LVT declined to adjourn, proceeded to hear the case and determined it adversely to the appellant.

5. The appellant appeals on a number of grounds relating to the failure to take account of relevant matters, taking into account irrelevant ones and behaving in ways that were procedurally unfair. But a central complaint is, in effect, that the appellant did not get a fair hearing because two of the members of the LVT had already formed an unfavourable view of the appellant, its method of management and the charges it sought to levy.

6. In my judgment the first and most important issue is whether, in all the circumstances, a fair-minded and informed observer would conclude that there was a real possibility that the LVT was biased against the appellant. If that issue is determined in favour of the appellant then the matter must be remitted back to be reheard before a differently constituted LVT. If not then it will be necessary to consider whether or not the LVT went wrong in law on any of the other points raised by the appellant.

7. With the agreement of the parties the appeal has been determined on their written representations.

The Facts

The Breydon Case

8. In the unusual circumstances of this case the account must start with a brief account of the Breydon case. It is unnecessary to say much about the basic facts of that case. The applicants were leaseholders on a new development called Breydon Park on the west of Great Yarmouth. Landfast Anglia Ltd had undertaken the development, the landlord was Breydon Ltd and Country Trade managed the development. The applicants challenged under section 27A the service charges required of them for the years 2008 and 2009.

9. A number of criticisms of the service charge were made, only one of which is relevant to the current case: namely the appellant's decision to buy in the management services of its two directors, Mr Curry and Mr Wright, from another company, Robbet Ltd, in which they were respectively sole director and company secretary. Mr Wright sought to explain in his witness statement and oral evidence that Mr Curry had been spending his time administering the appellant company but without making any charge and Robbet Ltd was used as a vehicle for providing those services at a cost split between those units managed by the appellant that took advantage of it. The nature of the management work undertaken and what the charge raised by Robbet to the appellant covered was investigated in detail.

10. In a decision handed down on the 15 July 2010 the LVT summarised its conclusions on this point as follows:

> " 4.b. ... control of this development - from construction to property management and provision of human resources - is too incestuous and its management is not in accordance with the RICS Service Charge Residential Management Code, as approved by the Secretary of State ... First, Country Trade does not adopt a basic annual charge per unit, with additional tasks costed according to a menu of prices based on complexity and/or time spent. Secondly although Country Trade has 126 residential units under management on six sites spread over three counties it has only one service charge bank account overall, with no separate arrangement for placing payments towards the sinking fund for each service charge account on deposit. The tribunal disallows the existing secretarial/agent charges, substituting a normal annual unit charge. Reflecting the standard of management provided, and the fact that the lease entitles the management company to add as a further "management charge" 15% of actual service charge expenditure, the tribunal allows the basic sum of £125 per unit for management (to which it may add 15%))."

11. The LVT went on to comment (at paragraph 29) that it was evident that "neither Mr Curry nor Mr Wright know how their costs compare with professional managing agents or are interested in anything other than taking as much as possible in-house. Virtually everything to do with this development, from the developer, the contract administrator, management company, management services company, and even the pension fund which is the office landlord, is connected with Mr Curry."

12. In paragraph 30 the LVT said:

"The Tribunal does not accept that this incestuous relationship is legitimate where it acts against the interests of the service charge payer. In the Tribunal's determination a more cost-effective and reasonable approach to managing this development would be for Country Trade to sub-contract the management to a professional agent, charging on a normal unit cost basis."

13. An appeal was made to the Upper Tribunal on a number of grounds which were procedural in the sense that they involved allegations that the LVT had failed to understand the evidence put forward by Mr Wright and Mr Curry because they had taken into account matters they should not have done or failed to take into account matters they should, had failed to give adequate reasons for the conclusions they had reached and had failed in certain instances to give Country Trade a fair opportunity to deal with points that the LVT later relied upon. On the 13th of October 2010 the Upper Tribunal granted permission on the basis that Country Trade had an arguable case.

14. This matter came before the Upper Tribunal (Lands Chamber) on the 26th of September 2011. His Honour Judge Gerald recorded, in his decision dated 7 October 2011[2011] UKUT 407 (LC) UKUT LRX/118/2010) that the sole ground of appeal related to the LVT's findings concerning "secretarial/agents charges". He continued:

"2. After Ms Crampin Counsel for the Appellant had completed her submissions, Mr Ogunnow, who spoke on behalf of himself and also Mr Noakes and Ms Alps who were also present as well as the remainder of the twenty-six Respondents who were not, accepted that the Decision could not stand.

3. Both parties agreed that the matter should be remitted to a differently constituted LVT and then retried..."

15. Judge Gerald then said:

"5. There is one preliminary observation to make. The Decision is redolent with contentious language casting implied aspersions on the probity of the management arrangements reached between the Appellant and (Robbet) Ltd. Those arrangements, described variously as being a "device" or "incestuous" by the LVT, arose out of commonality of ownership and directorship of some of the legal entities involved about which the Appellant had been open and frank throughout.

6. Unless, which is not the case here, it is asserted that the management arrangements were a mere "sham" i.e. an arrangement which disguised the true relationship or agreement between the parties, there is nothing in principle objectionable to a management company such as the Appellant employing a company it owns or is involved in to provide services: see *Skilleter v Charles* [1991] 24 HLR 421.

7. Whilst such arrangements may well justify a rigorous scrutiny of the fees being charged and the services provided, sight must not be lost of the fact that (a) the question is whether or not the costs are reasonable within the provisions of section 19 of the Landlord and Tenant Act 1985 and (b) there is nothing objectionable to such arrangements - unless, as I have said, which was not the case here, it is alleged they were a mere sham or artifice. It is therefore preferable to avoid the use of such descriptions not least because it may give the

impression that the tribunal is not focused on what is or are the real issues - "reasonableness"."

16. Judge Gerald went on to point out that the decision of the LVT must be evidence-based but that it is entitled to adopt a robust commonsense approach based on the evidence as long as it then explains its reasons for doing so adequately. Judge Gerald then set out the principal objections to those aspects of the decision that related to "secretarial/agents charges" (Paragraph 18). These included failing to understand or take account of the evidence and reaching a finding on it without putting the point to Mr Wright to give him a fair opportunity to comment. Further criticisms (paragraph 19) were levelled at the 'unwarranted' reference to 'this incestuous relationship' not being 'legitimate' as it was either mistaken or unexplained. Critical reference was made to the suggestion that 'a more cost effective and reasonable approach to managing this development' would be for the appellant to subcontract to a professional agent charging on a normal unit cost basis.' This was based on the RICS Service Charge Residential Management Code, but the point was not put to Mr Wright. It was also said that in referring to the 15% management charge the LVT had failed to consider the provisions of the lease properly.

17. The matter was referred back to a differently constituted LVT with a number of directions.

The Esplanade Court case

18. I have already set out the basic facts of this case in the introduction above. The matter came before the LVT on 3 March 2011 and the decision was dated 29 March 2011. The chairman and one member of the tribunal had sat on the LVT in the Breydon case.

19. On the morning of the hearing the LVT first inspected the premises in question. What happened next is set out in paragraph 16 of the decision.

> "16. The hearing began at 11:00. In view of a pending appeal to the Upper Tribunal (Lands Chamber) in a related case heard by the tribunal in 2010 the Respondent renewed its earlier written request for an adjournment, on the ground that similar issues concerning management arose. The tribunal did not agree. Permission to appeal had been granted by the Upper Tribunal essentially on procedural and evidential points; not on matters of principle concerning the manner in which management of the estate was conducted. In addition, permission had been granted as long ago as 13 October 2010 but it was not until well after this case had been set down for hearing that an application was made to adjourn it.
>
> 17. Mindful of regulation 15(2) of the Leasehold Valuation Tribunal (Procedure) (England) Regulations 2003, viz
>
> > (2) where a postponement or adjournment has been requested the Tribunal shall not postpone or adjourn the hearing except where it considers it is reasonable to do so having regard to-
> >
> > (a) the grounds for the request;
> >
> > (b) the time at which the request is made; and

(c) the convenience of the other parties

and the fact that the Applicants' solicitor stated that he could proceed without even mentioning the earlier case, the Tribunal refused the application. In the Tribunal's view the similarity in lease terms and approach to management charges would not make the earlier case irrelevant, but in fact this case was argued on a different basis than did the unrepresented applicants in *Crome Drive*."

18. The principal points made by Mr Gibbons on behalf of the Applicants were:

(a) That the items challenged for 2009 and 2010, when taken together, are not reasonable and hence not recoverable.

(b) One principal ground is that they are not particularised in enough detail to enable the tenant to know that the sums are being charged in respect of their property and theirs alone, rather than being an apportionment of a wider sum which has not been broken down.

(c) What the Tribunal has seen are costs spread amongst all 126 properties subject to management by the respondent, by a rule of thumb; apportioning figures on a 65:35 split between leasehold and freehold.

(d) The only information sent to the leaseholders is a short statement referring to "goods/services" (see for example of the statement dated March 2009 at page 337).

(e) Referring to correspondence ... concerning Block 1, every obstacle is placed in their way to obtaining a detailed explanation, with the respondent refusing on grounds of cost and lack of staff to do any photocopying, and requiring attendance at its offices in Halstead in Essex.

(f) The web of interconnected companies controlled by Mr Curry and individuals arouses suspicion that there is a duplication of effort and a generation of profit by these separate entities, none of which appears to be designed for the benefit of the leaseholders. It creates a veil which makes it difficult to see how the managing agents' various charges are raised

(g) Once Robbet Ltd got involved between 2008 and 2009 the overall charge jumped by 76% from £4,144 in 2008 to £7,316 in 2009.

(h) It was not possible to extract documents to see how the audit fee was charged.

(i) By comparison both Block 1 and Block 3 under RTM company management were able to charge much less.

(j) The profit element is included within the 15% charge, but the perception was that the company was making a profit and adding a further profit on top.

19. Asked by the Tribunal chairman for an appropriate yardstick against which it should measure the reasonableness of the management charges, Mr Gibbons referred to paragraph 2.3 of the *Service Charge Residential Management Code* ... published by the Royal Institution of Chartered Surveyors..."

20. The decision then records that Mr Hopkins and Mr Wright sought to explain the relationship between the companies and to justify the fees that were charged. In paragraph 26 and 27, in the course of the discussion about various management charges, it is recorded that the respondent was allowed to introduce evidence of the management fees charged by Peverel for a property in Coggeshall, Essex and the "community charge" charged by the Block 1 RTM in 2010. The decision then continued in the following way.

> "28. At this point one of the Tribunal members commented that, from the service charge information disclosed, the Coggeshall property was quite clearly designed for the active elderly, with a resident manager and further income being generated by the letting of one or more guest rooms to overnight visitors, and other undisclosed sources. He produced a further comparable, which he described as very similar in age and style to the subject premises, viz 1 - 14 Mark Jennings Lane. There the management fee charged by Peverel/Solitaire for 2009 was £1684.48, or £129.57 per unit.
>
> 29. Discussion ensued on all the comparables produced, it being put to Mr Wright that the charges for a retirement community were likely to be higher than for an ordinary flat.
>
> 30. Questioned by the Tribunal he was also asked why Country Trade did not quote a basic fee and then charge for exceptional items rather than apportioning costs across 126 separate properties. He had no answer."

21. The Tribunal then put to Mr Wright that the demands failed to comply with section 47 of the Landlord and Tenant Act 1987 and so nothing was payable. The decision records that "this seemed to come as an unwelcome surprise." In paragraph 42 the Tribunal made a finding of fact in respect of the failure to comply with section 47.

22. The Tribunal began its discussion and findings by considering clauses 6.2 and 7.13 of the lease. It then said (in paragraph 33):

> "However, as Mr Wright says... there is no provision in the lease that enables the tenant to become a member of the respondent management company. ... Mr Wright also confirmed that Landfast has no intention of selling the freehold. Both with management of the premises and acquisition of the freehold reversion the lease therefore raises a hope which neither the landlord nor the management company intend to fulfil. Rather, the respondent management company prefers, regardless of the small number of properties for which it is responsible, to pass the entire set-up costs of its operation on to those obliged by their leases (and in some cases by estate rentcharges annexed to their freeholds) to pay for the reasonable costs of management; this despite a lack of thought whether this is a cost-effective way of managing the various properties or not."

23. The Tribunal then remarked that the portfolio of properties under the management of Country Trade were modern and required little in the way of management. The Tribunal continued:

> "35. The Tribunal is troubled by the respondent's approach to management. In so far as the costs of administration of the management company are concerned the respondent seems to believe that these may be divided amongst its whole estate, rather than by reference to those identified in each lease. For certain costs this may be legitimate, but where responsibility for the activities of the respondent is largely

delegated to an agent, Robbet Ltd, it is not acceptable to ignore the wording of the Third Schedule and on the basis of a brief one-line invoice for services - seek to spread the agent's cost of managing all of the respondent's properties regardless of time actually spent on this one."

24. The Tribunal then turned to consider the comparables saying that each party sought to produce comparable evidence. The Tribunal said that, doing the best it could with the figures' it came to the sum of £140 per unit in each of the years for management costs. This subsumed costs of staff and equipment, office costs, consumables, professional fees and professional indemnity insurance. The Tribunal added "as agreed between the parties, the authorised 15% uplift on actual expenditure is sufficient to cover the profit element." The Tribunal then remarked that:

> "41. For the future, the Tribunal notes with concern the split responsibility for management, with the two RTM company's managing their respective blocks themselves but with the respondent clinging on to management of the external, and parts (garden and car park). Despite this, the respondent's budget figures for 2011 indicate minimal actual expenditure on services but very significant audit, secretarial and agency fees-on top of which a further 15% is added. Justification of such estimated costs is perhaps a matter for another day."

25. The Tribunal summarised its decision (at paragraph 3) in these words:

> "…the tribunal determines that the amounts charged for postage & telephone, audit, secretarial costs, and agent's fees were unreasonably incurred and that a professional managing agent would charge in the order of £140 per unit per annum, on top of which the lease also provides for a 15 % surcharge. For 2009 this is the actual charge allowed; for 2010 it is a reasonable estimate, made at a time when the date of transfer to the RTM company was still uncertain. When the actual costs for 2010 fall to be calculated this will need to be apportioned when assessing the amount to be transferred by the respondent to the RTM company."

26. The appellant applied to the LVT for leave to appeal to the Upper Tribunal. The appellant's grounds, broadly summarised, were that the LVT was wrong not to allow the applications of both parties for the adjournment of the hearing. Both parties applied independently in writing on the 22 February 2011, a week before the hearing. In the event the issues raised in the Breydon case were similar if not the same as those that were crucial in the current case. Secondly, the Tribunal could not be considered to be impartial as two of the three members of the LVT that decided the Breydon case were sitting on the current case. The way the LVT has handled the case amounts to a breach of natural justice. Thirdly no evidence was adduced by the leaseholders in support of their case that the charges were unreasonable. The only significant evidence was that produced by a member of the LVT. Had the appellant been aware in advance of that comparable it would have been able to deal with it properly. There were a number of additional complaints that the LVT had taken into account irrelevant matters and failed to take into account relevant points.

27. The LVT refused permission. It said that permission to appeal in the Breydon case had been granted on procedural and evidential points, not on matters of principle concerning the manner in which the management of the estate was conducted. It repeated the point that had been made

about the applications not being made until after the case had been set down for hearing. As to the accusation of bias the LVT said -

> "No challenge was made at the hearing or earlier to the impartiality of the Tribunal, despite the fact that the Directions were issued in the chairman's name. Judges and tribunals often have to deal with many cases involving the same parties, and in particular large corporate or local authority landlords, but that does not justify a charge of partiality or bias. Applying the "fair-minded and informed observer" test as explained by the Court of Appeal in *re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700, the Tribunal is satisfied that this ground has no merit."

28. The LVT noted that there was no requirement to plead precisely what matters were in dispute at the date of the application and since the principal challenge by the leaseholders was that the challenged items were not explained in enough detail for them to be understood, it lay ill in the mouth of the appellant to complain of not knowing of the case it had to meet.

29. As to the service charge statement produced by a member the LVT responded that each of the parties produced sample service charge statements to support their cases "whereupon a Tribunal member produced details of a third of which he was aware, so that the parties could consider and make submissions about all three comparators."

30. The application for permission to appeal was renewed to the Upper Tribunal. On 10 October 2011 the President granted leave remarking that there was a strong argument that since permission to appeal against the Breydon decision had been given on the basis that there was a realistic prospect of success on the ground that it was procedurally unfair, and since the chairman and a one member of the panel were the same, the LVT should on its own initiative have adjourned the proceedings and directed that the case be heard by a different panel. The allowing of the appeal in the Breydon case made it inevitable that permission should be granted since the same errors were arguably to be found in the current decision.

Submissions

31. The appellant's representations, drafted by Mr Wright, repeat the allegation that there were procedural defects, particularly the failure to allow the applications for an adjournment, the failure to disqualify themselves of the two members of the LVT which had already formed an unfavourable view of the appellant, its method of management and its charges, and the production by the Tribunal itself of a comparable, without advance notice. It was said that in fact the leaseholders had put a substantial degree of reliance on points raised in the Breydon case. The statement of case also advanced several instances where it was alleged that the LVT had taken account of irrelevant considerations or failed to take account of relevant ones and made a complaint that Mr Wright was not given a fair opportunity to deal with detailed points of which he had been given no prior notice. The appellant argued that it had been deprived of the right to a fair hearing before an impartial Tribunal.

32. Mr Gibbons, of Norton Peskett Solicitors, who had appeared at the hearing before the LVT, submitted written representations on behalf of the leaseholders of Esplanade Court.

33. Mr Gibbons said that he had made it clear at the beginning of the hearing that he was happy to conduct the case without relying on the decision in the Breydon case, so there was no prejudice to the appellants. He acknowledged that "whilst the decision (his underlining) in the Breydon case was not being relied upon the general arguments and issues raised in that case were live in relation to the present case and the appellants were well aware that that was the case." He maintained that the leaseholders were perfectly entitled to argue their case in a similar manner to the Breydon case.

34. As for the complaint about a lack of natural justice, Mr Gibbons pointed out that the LVT is a Tribunal with a relatively small number of members and it is to be expected that it may deal with more than one application in respect of any landlord that has many tenanted properties within its jurisdiction. The mere fact that members of the Tribunal have previously sat on a case involving identical parties does not involve bias. Reference was made to *Porter v Magill* [2002] 2 AC 357.

35. Mr Gibbons then took issue with a number of the instances where the appellants allege that there was no evidence or irrelevant evidence on particular matters.

36. There is plainly a dispute between the parties as to what was actually said or not said at the hearing.

The Law

37. The law relating to bias has undergone some development in recent years. The test for bias had been set out in the case of *R v Gough* [1993] AC 646 at 670 by Lord Goff in these words:

> " Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the Tribunal, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him.."

38. That test was re-examined in a number of cases in the light of the jurisprudence of the Scottish court and the Court of Human Rights at Strasbourg. In *Re Medicaments and Related Classes of Goods (no.2)* [2001] 1 WLR 700, Lord Phillips MR, in the Court of Appeal, reviewed the authorities and said (at 726):

> "83 We would summarise the principles to be derived from this line of cases as follows. (1) if a judge is shown to have been influenced by actual bias, his decision must be set aside. (2) where actual bias has not been established the personal impartiality of the judge is to be presumed. (3) the court then has to decide whether, on an objective appraisal, the material facts give rise to a legitimate fear that the judge might not have been impartial. If they do the decision of the judge must be set aside. (4) the material facts are not limited to those which were apparent to the applicant. They are those which are ascertained upon investigation by the court. (5) an important consideration in making an objective appraisal of the facts is the desirability that the public should remain confident in the administration of justice."

39. Lord Phillips observed that such an approach was close to that in *R v Gough* [1993] AC 646 and considered the differences with the Strasbourg court. He continued

> "85. When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in *R v Gough* is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased."

40. In *Porter v Magill* [2002] 2 AC 357, Lord Hope, with whom the other Law Lords agreed, approved that test subject to the deletion of the words 'a real danger', which served no useful purpose. He said;

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

Consideration and Conclusion

41. The fair-minded and informed observer of this case would be aware that the leasehold valuation tribunal would draw both its members and its cases from its region. It has a specialised jurisdiction. That may mean that suitably qualified and public-spirited members are a limited resource. It may not always be easy to get busy professional members together to sit as a Tribunal. It will probably not be easy to assemble a differently constituted panel. When a date can be found it ought not to be set aside lightly and the Tribunal will be properly reluctant to grant an adjournment.

42. It is also likely that a local landlord or local management company with several properties may often find itself appearing, probably with the same representation or witnesses, before the same Tribunal members. The permutations of different Tribunal members and different witnesses are finite. It is very possible that a Tribunal may start to form a general provisional view about the way the management committee or landlord in question conducts its business or the general reliability of a particular witness. This is commonplace; legal representatives and witnesses are usually aware of the value of their good reputation and jealous of it. And by the same token, Tribunal members (including Judges) know that they not only have to be open-minded and prepared to set any preconceptions aside, they have to behave in a way that shows that they are doing so. The fact that there are a limited number of local Tribunal members and a limited number of likely litigants, makes it more important, if anything, that the tribunal is scrupulous about being and appearing fair and sensitive to the impression given by what it says and does.

43. As a matter of general principle therefore no fair-minded and informed observer would consider that the simple fact that the same litigant appeared quite often before the same Tribunal and that the Tribunal quite often found against him was an indication that there was a real possibility that the Tribunal was biased. The same would be true even if the litigant sometimes succeeded in winning on appeal. The Tribunal in this case was entirely correct when it observed that 'Judges and Tribunals often have to deal with many cases involving the same parties, and in

particular large corporate or local authority landlords, but that does not justify a charge of partiality.' It is not just what is done that is important; it is how it is done.

44. The Chairman and one member of both the Breydon LVT and the Esplanade Court LVT were the same. They had been asked, in effect, to recuse themselves but had refused. The reason for not doing so (and for then refusing permission to appeal to the Upper Tribunal) case was that the Breydon appeal was "essentially on procedural and evidential points; not on matters of principle concerning the manner in which management of the estate was conducted." Certainly the appeal to the Upper Tribunal challenged procedural errors of law but they arose out of the LVT's decisions concerning the way the estate was managed. In fact the issues were very similar and sometimes virtually the same. This is made clear by a comparison of the Breydon decision and the issues in the Esplanade Court decision advanced on behalf of the leaseholder by Mr Gibbons, as summarised by the LVT in paragraph 18 of the decision (see above). It is difficult to see that the basis on which the cases were argued was very different. Mr Gibbons fairly acknowledged as much in his written submissions when he said: "the general arguments and issues raised in that case were live in relation to the present case". In those circumstances it was of no significance that Mr Gibbons did not have to mention the previous case by name (which the LVT gave as part of its reason for refusing the adjournment: see decision paragraph 17; refusal of permission paragraph (1). He did not have to; everyone present knew exactly what Mr Gibbons and the Tribunal were getting at. The informed observer would have realised as well.

45. The Tribunal in the Breydon case expressed itself in language that was unnecessarily colourful or, as HHJ Gerald put it, 'contentious.' By way of example, in this context to refer to a 'close' relationship would be neutral; to call it an 'incestuous' relationship suggests a level of moral disapproval. But, as Judge Gerald pointed out there is nothing objectionable in legal principle to such a relationship. So such language is not appropriate. It is especially troubling where it is applied to the basic structures of the landlord and the management company. It implies that the fault is systemic. And a fault that is systemic is a fault that persists from case to case until the system is changed. In the absence of change the parties have no reason to suppose that the same Tribunal members may take a different view.

46. In the event the LVT did not take a different view about those management structures and came to broadly the same decisions about secretarial costs and management fees as it had in the earlier case. Similar complaints were made about the procedures in the two Tribunals: in the appeal against the first LVT Judge Gerald found that Mr Wright was not given a fair opportunity to deal with a point raised by the LVT (*Country Trade v Noakes*, paragraph 19(b)). In the Esplanade Court LVT the appellant says that Mr Wright was not given a fair chance to deal with a comparable produced without notice by a member of the Tribunal. This comparable plainly carried some weight with the LVT.

47. I should express my view on this point. On the basis of the written representations before me I find that Mr Wright was not given a fair hearing so far as the production of this comparable was concerned. Of course the LVT is entitled to rely on its own knowledge and expertise and is not confined to the evidence the parties choose to put – or are able to put – before it. But where there is a specific and potentially determinative piece of evidence, such as the Tribunal's comparable, the parties must be given a fair chance to deal with it. This need be no more than a short adjournment or even delaying a decision by a few days to allow parties to inspect and consider the comparable and then submit further representations on it in writing. That did not happen. The

appellant did not receive a 'fair crack of the whip' (to borrow a phrase from an early case) and the LVT erred in law.

48. The fair-minded observer would therefore have noted that the Breydon LVT had expressed its decision against the management company in a way found on appeal to be contentious and found to have involved procedural errors of law. Two members of that panel refused to recuse themselves from sitting on another panel dealing with the same management company, knowing that the earlier decision was under appeal and what the grounds of appeal were. The panel gave reasons for not recusing itself which appear, on examination, to be mistaken and possibly somewhat disingenuous. Thus constituted, the LVT then found against the management company once more on very much the same issues as before. The LVT also made at least one similar procedural error of law, putting forward its own comparable and not giving the management company a fair chance to deal with it.

49. In that light it seems to me that the question whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased, must be answered in the affirmative. The particular circumstances in that case made it clear that the Tribunal ought to have adjourned the case of its own motion and ordered that it be heard by a different panel.

50. The appeal succeeds and the matter must be remitted to the LVT to be reheard by a differently constituted Tribunal.

Dated: 3 May 2012

His Honour Judge Mole QC