UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2012] UKUT 154 (LC)
UTLC Case Number: LRX/20/2011

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – reasonableness of service charges – application of the provisions of section 18, 19 and 27A of the LTA 1985 – sufficiency of reasons – the LVT as expert – reasons on refusal to grant permission to appeal – disallowing costs

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

BETWEEN:

LONDON BOROUGH OF HAVERING **Appellant**

and

GEORGE INGLIS MACDONALD **Respondent**

Re: Flat 48 Parkview House
Sunrise House
Hornchurch
Essex RM12 4YW

Before: Her Honour Judge Walden-Smith

Sitting at: 43-45 Bedford Square, London WC1B 3AS
on
4 May 2012

James Fieldsend instructed by the Legal and Democratic Services Department of the London Borough of Havering on behalf of the Appellant
George Inglis MacDonald acted in person

The following cases are referred to in this decision:

Regent Management v Jones [2010] UKUT 369 (LC)
Yorkbrook Investments Ltd v Batten (1986) 19 HLR 25
Schilling v Canary Riverside Development PTD Limited LRX/26/2005
Lucie M v Worcestershire County Council and Evans [2002] EWHC 1292 (admin)
Flannery v Halifax Estate Agencies Ltd [2000] 1 WLR 377
English v Emery Reimbold & Strick Ltd [2002] 1 WLR 377
Clarise Properties Limited [2012] UKUT 4 (LC)
Chelsea Properties Ltd v Earl Cadogan LRA/69/2006
R v LB of Croydon ex p Graham (1993) 26 HLR 286
Oxfordshire CC v GB [2001] EWCA Civ 1358
Arrowdale Limited v Coniston Court (North) Hove Limited LRA/72/2005
Westbourne Limited v Spink and Joshua LRX/14/2007

DECISION

Introduction

1. This is an appeal by way of review from the decision of the Leasehold Valuation Tribunal ("LVT") for the London Rent Assessment Panel dated 4 January 2011. Permission was refused by the LVT on 4 February 2011. An application was made to the Upper Tribunal (Lands Chamber) for permission to appeal by way of re-hearing.

2. Permission to appeal was granted by the President on 8 April 2011 with the following observations:

> "There is a realistic prospect of success. I do not think, however, that the Lands Chamber should conduct a rehearing: if the LVT decision is shown to be erroneous, the proper course would be a remission.
>
> The appeal will be dealt with by way of review."

3. The appellant contends that the LVT erred in its decision making and that the appeal should therefore be allowed and the matter remitted to a differently constituted LVT. The respondents seeks to uphold the decision of the LVT.

The Background

4. The appellant is a local authority. The respondent is the long leaseholder of Flat 48 Parkview House, Sunrise Avenue, Hornchurch RM12 4YW ("Flat 48"). Flat 48 is one of 52 flats in Parkview House which is one of three blocks of flats on an estate comprising a total of 148 flats. The appellant is the freehold owner of the three blocks of flats including Flat 48.

5. By the lease dated 14 November 2005 the respondent was granted a term of 125 years of Flat 48 ("the lease"). The term of 125 years commenced on 18 June 1984 and the long lease was granted pursuant to the Right to Buy provisions of the Housing Act 1985, the respondent having previously been a secure tenant of the appellant residing in Flat 48. Clause 9 of the Eighth Schedule to the lease contains the service charge provisions.

The Issue before the LVT

6. The matter for determination by the LVT was the reasonableness of the service charge levied by the appellant to the respondent for the provision and maintenance of

communal television and radio signals to Flat 48. The costs charged to the respondent arise from a contract entered into between the appellant and Surtees Communications Limited on 6 May 1992 for the provision and maintenance of radio and television signals. Surtees Communications Limited changed their name to Surtees Holdings Limited on 16 April 1993.

7. The agreement dated 6 May 1992 was subject to two subsequent variations in writing: one on 28 September 1997 and one on 10 January 2001. The purpose of these variations was purportedly to upgrade the services provided. In the first variation of September 1997, Surtees Holdings Limited added the reception of additional satellite signals; added Channel 5 reception; and assumed the maintenance of the communal antenna systems in the Borough. That variation provided for an increase in the sums payable under the agreement. The second variation of January 2001 provided for the phased upgrade of the communal antenna systems to accept digital television signals. That second variation also allowed for an increase in the sums payable under the agreement and for an extension of the original term.

8. The cost of the provision of television and radio signals is charged to the respondent as part of the service charge payable under the terms of the lease (clause 9 of the Eighth Schedule to the lease). The service charge year runs from 1 April to 31 March (clause 13 of the Fourth Schedule). Section 20 of the Landlord and Tenant Act 1985 and the Service Charges (Consultation Requirements)(England) Regulations 2003 do not apply as the sum payable by each tenant falls below the annual threshold of £100 so that the agreement of 1992, subject to the variations of 1997 and 2001, are not subject to the statutory consultation requirements.

9. The cost charged to the respondent for the period 1 April 2008 to 31 March 2009 was £66.56 and for the period 1 April 2009 to 31 March 2010 was £70.20.

10. The respondent challenged the reasonableness of the cost of the provision of the radio and television signals to Flat 48 by an application made on 10 October 2010 pursuant to the provisions of section 27A of the Landlord and Tenant Act 1985. The respondent is plainly extremely cross about the charges levied by Surtees Holdings Limited and, as he sees it, the failures of the appellant to negotiate a contract which provided good value for money. The respondent, in his submissions before me, indicated that he had been challenging these figures for some 6 years or more.

11. The respondent did not challenge the appellant's entitlement to recover the cost through the service charge provisions, but he did contend that it was not reasonable for him to pay for the cost of a satellite signal as it was his case that he neither sought nor received such a signal and, indeed, to receive such a signal would, he contends, have been illegal as he had no agreement with a provider of satellite television services.

The Procedural History

12. The application to the LVT had been made by the respondent on 10 October 2010. On 25 October 2010, a procedural chairman (Mrs TI Rabin JP) had given directions including, at paragraph 6 of the order, a direction with respect to reimbursement of fees and to an application for an order under section 20C of the Landlord and Tenant Act 1985.

13. The respondent's statement of case was set out in a document referred as being a "background" document and a "conclusion" document, together with a series of annotated attachments. The appellant's statement of case was set out in a Statement of Reply which referred to a report by the appellant's former director of finance, Rita Greenwood, with respect to the costs of the provision and maintenance of signals and the costs and charges made by other local authorities with respect to communal signals.

14. The hearing took place on 21 December 2010 and the decision was promulgated on 4 January 2011. The respondent appeared in person and the appellant was represented by counsel with both the Housing Management Organisation's Director of Finance and Resources and the Stock Options Manager in attendance.

The Decision of the LVT

15. The decision of the LVT was promulgated on 4 January 2011. The conclusions of the LVT were that it was satisfied that the cost of providing and maintaining the signals was recoverable under the terms of the lease (paragraph 6 of the decision) but that the costs charged to the respondent were unreasonable (paragraph 18) and that "the top of the range reasonable charges" for the years 2008/2009 and 2009/2010 was £26 per annum (paragraph 21). The LVT further found that it was "just and equitable" to make an order under section 20C of the Landlord and Tenant Act 1985 and for the reimbursement of the respondent's fees to the LVT pursuant to the provisions of regulation 9 of the Leasehold Valuation Tribunal (Fees)(England) Regulations 2003 (paragraph 21).

16. The reasoning of the LVT is set out in paragraphs 14 to 21 of the decision. The LVT found that the evidence contained in the Rita Greenwood Report was hearsay but was accurate and they therefore found the contents therein as facts. The LVT further found that the evidence before them was limited and that there was no evidence as to the competitiveness of the 1992 agreement and that the large difference in the costs of satellite and television signals was unexplained. It was further found that a contract of significant length was reasonable in order for Surtees Holding Limited to recoup its capital outlay, but that the original term of the agreement (of 15 years) was unreasonably long; that the variations to the agreements were unexplained and inexplicable; that the costs charged to the respondent were unreasonable; and, as set out above, that, while there was a range of reasonable charges, the top of the range of reasonable charges was £26 per annum. The appellants say that this final finding was a "quantum leap" from the other findings particularly where it had recognised that the information underlying the

costs charged to other local authorities, as contained in the Rita Greenwood Report, were unavailable.

Refusal of Permission to Appeal

17. Permission to appeal from the LVT was sought from the LVT and refused on 4 February 2011 and, in the body of its reasons for refusing permission, the LVT recorded that:

> "On the limited evidence before us, we determined that the maximum reasonable charge was £26 per annum for 2008/09 and 2009/10. This figure was arrived at on the basis of the (limited) evidence before us and our own general knowledge and experience".

18. As is set out above, the President gave permission to appeal by way of review and, if appropriate, remission to the LVT on 8 April 2011.

The Issues

19. The appellant contends that the decision of the LVT should not be upheld and the matter remitted to a different constituted LVT on the following grounds:

(i) the LVT failed to give any, or any sufficient, reasons for their decision;

(ii) the failure to give any, or any sufficient, reasons for their decision cannot be cured on the refusal to give permission to appeal and, even if it could, the LVT failed to do so in this instance;

(iii) the findings on reasonableness were not open to the LVT on the evidence before the LVT;

(iv) the LVT came to a conclusion that no reasonable Tribunal could have come to on the evidence before it.

20. The respondent seeks to uphold the decision of the LVT on the basis of the matters set out in both the decision of the LVT and in the refusal to allow permission to appeal. He set out in oral submissions before me that he had spent more than 6 years challenging the figures charged for the provision of television signals; that he never sought nor received satellite television signals and, indeed, that it would have been illegal for him to have done so; that he has raised a number of Freedom of Information Act requests in order to obtain further information about the legitimacy of the agreements between the appellant and Surtees Holdings Limited; and that he agreed with the comments of Mr Humphreys FRICS (a member of the LVT) that the terms of the contract with Surtees Holdings Limited were "inexplicable". He expressed concern that the LVT may well have failed to properly set out the grounds for their conclusions but accused the appellants of being "very professional timewasters".

21. This appeal raises some general points about the decision making process of the LVT and how the LVT should express its decisions.

Service Charges and the Leasehold Valuation Tribunal

22. Sections 18 and 19 of the Landlord and Tenant Act 1985 (as amended by the Landlord and Tenant Act 1987 and the Commonhold and Leasehold Reform Act 2002) set out the statutory framework for service charges.

23. Section 18(1) provides that "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable directly or indirectly for services, repairs, maintenance, improvements or insurance or the landlord's costs of management; the whole or part of which varied or may vary according to the relevant costs. Section 18(2) provides that the relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord or a superior landlord in connection with the matters for which the service charge is payable.

24. Section 19(1) of the Landlord and Tenant Act 1985 (as amended) provides that relevant costs shall be taken into account in determining the amount of a service charge payable for a period only to the extent that they are reasonably incurred and where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard and the amount payable shall be limited accordingly.

Reasonableness

25. It is Mr MacDonald's contention that the costs incurred are not reasonable and the amount payable with respect to the provision of television and radio signals should be limited.

26. It is by virtue of the provisions of section 27A of the Landlord and Tenant Act 1987 (inserted by the Commonhold and Leasehold Reform Act 2002) that an application may be made to the LVT for a determination whether a service charge is payable and, if it is, as to the amount which is payable.

27. As is consistent with other decisions as to what is meant by "reasonableness", in determining the reasonableness of a service charge the LVT has to take into account all relevant circumstances as they exist at the date of the hearing in a broad, commonsense way giving weight as the LVT thinks right to the various factors in the situation in order to determine whether a charge is reasonable. The test is "whether the service charge that was made was a reasonable one; not whether there were other possible ways of charging that might have been thought better or more reasonable. There may be several different ways of dealing with a particular problem… All of them may be perfectly reasonable. Each may have its own advantages and disadvantages. Some people may favour one set

of advantages and disadvantages, others another. The LVT may have its own view. If the choice had been left to the LVT it might not have chosen what the management company chose but that does not necessarily make what the management company chose unreasonable" per His Honour Judge Mole QC in *Regent Management v Jones* [2010] UKUT 369 (LC).

28. Once a tenant establishes a prima facie case by identifying the item of expenditure complained of and the general nature (but not the evidence) of the case it will be for the landlord to establish the reasonableness of the charge. There is no presumption for or against the reasonableness of the standard or of the costs as regards service charges and the decision will be made on all the evidence made available: see *Yorkbrook Investments Ltd v Batten* (1986) 19 HLR 25 (as applied in *Schilling v Canary Riverside Development PTD Limited* LRX/26/2005 and *Regent Management Limited* (supra).

Written Reasons and the Permission to Appeal Decision

29. The LVT is a statutory body and the procedure of the LVT is governed by the Leasehold Valuation Tribunals (Procedure)(England) Regulations 2003 (made pursuant to the provisions of section 174 and Schedule 12 to the Commonhold and Leasehold Reform Act 2002).

30. The effect of Regulation 18 of the 2003 Regulations is that reasons for a decision of the LVT (whether given orally at the end of the hearing or in writing) must be provided in writing.

31. The jurisprudence behind why written reasons must be given by a Tribunal, including a Leasehold Valuation Tribunal, were set out succinctly by Lawrence Collins J (as he then was) in *Lucie M v Worcestershire County Council and Evans* [2002] EWHC 1292 (admin) paragraphs 10 and 11. In that case, Lawrence Collins J was dealing with a decision of the Special Educational Needs Tribunal. However, he expressly found that the principles are not unique to that Tribunal and set out the following principles:

(1) proper and adequate reasons must be given, so that they are intelligible and deal with the substantial points that have been raised, and the reasons should deal, in short form, with the substantial issues raised in order that the parties can understand why the decision has been reached;

(2) as a result of that first principle, the absence of reasons to explain why a case was rejected may make the decision appear irrational;

(3) where reasons are inadequate, it is not normally appropriate that the reasons should be amplified on the appeal to the High Court;

(4) a decision must be sufficiently specific and clear as to leave no room for doubt as to what has been decided;

(5) the lay members of a Tribunal specifically appointed for their [educational] expertise may use that expertise in deciding issues before the Tribunal, but they may not use it to raise and decide other issues which the parties may not have had an opportunity to consider as the Tribunal must obey the rules of natural justice and members should not give evidence to themselves which the parties have had no opportunity to challenge

32. In *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377, the Court of Appeal set out the following general rationale for the giving of reasons. First, it is a function of due process and justice. Fairness requires the parties (especially the losing party) to know the reason for the result as without such reasons, it cannot be determined whether the court has misdirected itself. The second reason is that it concentrates the mind and makes sure that the decision is soundly based on the evidence. As was put by Lord Phillips MR (as he then was) in *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 377*:*

> "We would put the matter at its simplest by saying that justice will not be done if it is not apparent to the parties why one has won and the other has lost."

33. There is no power for the LVT to review its decision on an application for permission to appeal, but it can correct a clerical mistake (regulation 18(7)). In *Clarise Properties Limited* [2012] UKUT 4 (LC) the President, sitting with Mr Rose FRICS, concluded that the LVT only has power to alter a decision by virtue of regulation 18(7) of the 2003 Regulations, which is very limited in scope: "It is in essence a slip rule, and the limitations of such a rule were stated in Bristol-Myers by Aldous LJ, with whom Laws LJ and Blackburne J agreed, where at paragraph 25 he concluded that the authorities established that: "the slip rule cannot enable a Court to have second or additional thoughts. Once the order is drawn up any mistake must be corrected by the appellate Court. However it is possible under the slip rule to amend an order to give effect to the intention of the Court." Further, in *Chelsea Properties Ltd v Earl Cadogan* LRA/69/2006, HHJudge Huskinson sitting with Mr Rose FRICS expressed the view that a correction certificate under regulation 18(7) was valid so long as it did not "purport to alter the ultimate decision of the LVT …".

34. However, there is a clear rationale for the LVT to be able to amplify its reasons where reasons are said to be inadequate so long as those reason where properly within the mind of the LVT at the time the decision was made and formed the basis (or at least part of the basis) for the decision being reached.

35. In *English v Emery* (supra) Lord Phillips held that where an application for permission to appeal on the ground of lack of reasons is made to the trial judge, then the judge should consider whether his judgment is defective for lack of reasons:

> "…if he concludes that it is , he should set out to remedy the defect by the provision of additional reasons refusing permission to appeal on the basis that he has adopted that course. If he concludes that he has given adequate reasons, he will no doubt refuse permission to appeal. If an application for permission to

> appeal on the ground of lack of reason is made to the appellate court and it appears to the appellate court that eh application is founded, it should consider adjourning the application and remitting the case to the trial judge with an invitation to provide additional reasons for his decision or, where appropriate, his reasons for a specific finding or findings…"

36. This decision is clear authority that a Judge should properly provide additional reasons for a decision, where those detailed reasons are not given in his judgment. Similarly, an LVT should properly provide additional reasons for a decision where those detailed reasons are not given in the decision letter as there is no purpose in cases being appealed to the Upper Tribunal (Lands Chamber) simply for the Lands Chamber to remit for those lack of reasons. In service charge cases, the LVT may have a very large number of items to deal with and the LVT will not necessarily give detailed reasons on each item. If the losing party appeals on the basis that inadequate reasons are given, it should be open to the LVT, if appropriate, to expand on those reasons. This has the double advantage of potentially avoiding the need for an appeal and, if not, giving the Lands Chamber the opportunity of considering the reasons and whether the LVT has erred in its decision-making.

37. In *R v LB of Croydon ex p Graham* (1993) 26 HLR 286, a case dealing with the local housing authority's decision on whether someone was intentionally homeless, Steyn LJ (as he then was) set out that:

> "In my judgment the idea that material gaps in the reasons can always be supplemented ex post facto by affidavit or otherwise ought not to be encouraged. That in effect is what we have been asked to do on behalf of the council. No doubt questions of the sufficiency of reasons usually involve a judgment as to matters of degree. Nevertheless it seems to me that if the reasons are insufficient to enable the court to consider the lawfulness of the decision the obligation of furnishing reasons has been breached and in that event the decision itself will be unlawful."

and, following the reasoning of Steyn LJ that the very absence of reasons may have rendered the decision itself unlawful, Sedley LJ giving the decision of the Court of Appeal in *Oxfordshire CC v GB* [2001] EWCA Civ 1358 said: "… we do not consider it generally appropriate that a statutory tribunal which is required to give reasoned decisions should responds to an appeal by purporting to amplify its reasons."

38. In this matter, the LVT was not reviewing its own decision (which is plainly not permissible) it was providing what it said were the reasons for its decision. That is permitted in accordance with the principles set out in *English v Emery* and does not prevent a potential appellant seeking to contend that the very existence of the gaps in reasoning makes the decision unlawful or that the reasons given on the refusal of permission cannot have been the reasons for the decision, on a proper reading of that decision.

The Expertise of the LVT

39. In *Arrowdale Limited v Coniston Court (North) Hove Limited* LRA/72/2005, the President sitting with Mr Rose FRICS set out that, as an expert tribunal, an LVT should use its knowledge and experience to test and, if necessary to reject, evidence that is before it. As was said by His Honour Judge Mole QC in *Regent Management v Jones* (supra):

> "The LVT is perfectly entitled, as an expert tribunal, to raise matters of its own volition. Indeed it is an honourable part of its function, given that part of the purpose of the legislation is to protect tenants from unreasonable charges and the tenants, who may not be experts, may have no more than a vague and unfocussed feeling that they have been charged too much. But it must do so fairly, so that if it is a new point which the tribunal raise, which the respondent has not mentioned, the applicant must have a fair opportunity to deal with it."

40. In *Arrowdale*, the President set out three "inescapable requirements":

> "Firstly, as a tribunal deciding issues between the parties, it must reach its decision on the basis of evidence that is before it. Secondly, it must not reach a conclusion on the basis of evidence that has not been exposed to the parties for comment. Thirdly, it must give reasons for its decision. In the present case the tribunal rejected the evidence of both the experts on relativity, and it was entitled to do this provided its reasons for doing so were explained. But in basing its decision on "its own knowledge and experience, particularly in relation to relativities which have been agreed between parties or their valuers in other similar cases" it was in error because those agreements on relativity had not been identified nor had the parties had the opportunity to comment on them."

41. Further, an LVT must not reach a conclusion on the basis of a point or argument which has never been raised by the parties or put to the parties by the Tribunal (per His Honour Judge Reid QC in *Westbourne Limited v Spink and Joshua* LRX/14/2007).

Conclusion

42. The primary criticism of the LVT made by the appellant is that the decision letter dated 4 January 2011 failed to set out any, or any adequate, reasons as to how the conclusion was reached that the service charges levied by the appellant for 2008/9 and 2009/10 were unreasonable. The decision letter sets out that the evidence before the LVT "was limited"; that a contract of a significant length was appropriate in the circumstances of this matter but then, without any reason or justification given, finds that 15 years was unreasonable; that the increases in prices brought about by the two variations to the agreement with Surtees Holding Limited were "inexplicable" despite an explanation being provided within the body of the variations to the original agreement; that it was acknowledged that it would not be fair to follow the Barking & Dagenham charges as set out in the "Rita Greenwood Report" as the basis of those charges was not known; but then comes to a conclusion, without any reasoning being expressed, that

there was a range of reasonable charges and that the top of that range was £26 per annum, or 50 pence per week.

43. For the reasons I have already set out, it is necessary for the LVT to give written reasons for its decision. This is both because the regulations governing the LVT require written reasons to be given, but is also to satisfy the needs of natural justice. A party (particularly the losing party) is entitled to know why the decision was made and the reasons given must be clear and specific.

44. Following the reasoning of Lord Phillips in *English v Emery* it is appropriate for the LVT to be able to remedy any defect apparently caused by lack of reasons being given, by giving those reasons in the permission to appeal decision.

45. The LVT were, therefore, entitled to expand upon their reasons but their expansion of reasoning set out in refusal to grant permission to appeal, namely that the LVT was relying on the limited evidence before them and "our own general knowledge and experience" did not cure the defect. The amplified reasons must be matters which have been fully aired in front of the parties in order that they have been able to comment upon the same.

46. The LVT is an expert body and its expertise is an extremely important part of the decision-making process. However, the knowledge and expertise relied upon by the LVT must be raised before the parties, again in order that the parties have the opportunity to comment upon the same.

47. The appeal is therefore allowed.

48. There is no record that an application for an under pursuant to the provisions of section 20C of the Landlord and Tenant Act 1985 and on the application to the LVT, the respondent said that it was "not applicable". In any event, the order relating to section 20C and the remission of fees are both matters which fall away by reason of the appeal being allowed.

49. The final issue is that, as the appeal was by way of review rather than re-hearing, this matter must be remitted for rehearing. In all the circumstances, it seems to me highly sensible that the case is remitted to a differently constituted LVT. The respondent is able to argue all the points he wishes to argue with respect to the reasonableness of the service charge before that LVT.

Dated 17 May 2012

Her Honour Judge Karen Walden-Smith