UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2013] UKUT 0114 (LC)
LT Case Number: LRX/105/2012

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – calculation of lessee's fair proportion

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

BETWEEN **LONDON BOROUGH OF SOUTHWARK** **Appellant**

and

MR C BEVAN **Respondents**
MISS C CHAMPENOIS

Re: Flat 3, 108 Clifton Crescent
London
SE15 2RX

Before: His Honour Judge Nicholas Huskinson

Decision upon written representations

The following cases are referred to in this decision:

Daejan Investments Ltd v Benson [2009] UKUT 233
Daejan Investments Ltd v Benson [2011] EWCA Civ 38

DECISION

1. This is an appeal from the decision of the leasehold valuation tribunal ("the LVT") for the London Rent Assessment Panel dated 19 April 2012 under section 27A of the Landlord and Tenant Act 1985 as amended, whereby the LVT decided a point regarding the amount of service charges payable in respect of the relevant premises for the service charge year 2011-2012.

2. The appellant is the freehold owner of a block containing eight flats known as 1-8 Clifton Crescent, London SE15 2RX. The respondents hold flat 3 from the appellant upon the terms of a long lease dated 25 November 1991. The other seven flats are not held on long leases. The lease contains a covenant by the respondents to pay a service charge in accordance with the Third Schedule to the lease. The Third Schedule provides that the service charge payable is to be a “fair proportion” of the costs and expenses incurred in the year as set out in paragraph 7. Paragraphs 6 (2) provides:

> "The Council may adopt any reasonable method of ascertaining the said proportion and may adopt different methods in relation to different items of costs and expenses"

3. The question which arose for decision before the LVT was whether the "fair proportion" as adopted by the appellant for the calculation of the service charge payable by the respondents was a method that the appellant was entitled to adopt.

4. The method which the appellant adopted for the purpose of ascertaining the fair proportion was as follows. The appellant apportioned service charges according to the number of bedrooms in the flat in question. Thus as I understand it the calculation of service charge for flat 3 would be performed as follows. The total amount of the relevant expenditure (£x) would be divided by the total number of bedrooms in the entire block (to give £y per bedroom); then, in order to calculate the service charge payable for flat 3, £y would be multiplied by the number of bedrooms in flat 3 (namely two).

5. The appellant proceeded on the basis that there were 6 two-bed flats and 2 one-bed flats in the block. The respondents' flat, namely flat 3, is a two-bedroom flat. It was the respondents’ case before the LVT that the appellant had proceeded upon a factually incorrect basis, because flat 7, which the appellant had treated as one-bedroom flat, was in fact a two-bedroom flat.

6. The LVT proceeded on the basis that the appellant's chosen method of ascertaining the fair proportion was a reasonable method which it was entitled to adopt, provided that it introduced into the calculation the correct information regarding the number of bedrooms in each flat. Thus there was no suggestion that in some way the appellant was not entitled to adopt a method of calculating the fair proportion based upon the number of bedrooms in each flat.

7. The dispute before the LVT centred upon the question of whether flat 7 had one bedroom or two bedrooms. In paragraph 11 of its decision the LVT stated:

> "The Respondent has no plans of Flat 7. It provided a statement from Mr Davis Abulowodi, a Resident Officer with the Respondent, who also gave evidence to the Tribunal. In his statement Mr Abulowodi said that he had made repeated attempts to view the internal layout of Flat 7 only gaining access in December 2011. During his period of access he noted there was a living room, kitchen, bathroom and a single bedroom. He also noted a small additional storage cupboard but he stated that this would be too small to accommodate even a child's single bed. Mr Abulowodi took no photographs of the interior of Flat 7 nor did he take any measurements. He did not make a plan of the flat; indeed he said it was beyond his competence to do so."

The LVT was not satisfied with this evidence; it considered it should inspect the property; it was unable to gain access to flat 7; and (as stated in paragraph 12 of its decision) it "was unable from an exterior inspection to reach any conclusion about the footprint of Flat 7". The LVT issued further directions requiring the appellant to provide a floor plan of either flat 7 or flat 8 and to provide the former rateable values of the flats in the block. The appellant was unable to gain further access to flat 7 and it appears that the only further information which the appellant was able to provide to the LVT (information regarding rateable values having been archived) was that for the purpose of council tax flat 7 was listed as band B whereas flat 3 (i.e. the respondents' flat) was listed as band C. The respondents submitted to the LVT that the appellant should provide accurate facts on which to base its calculation of service charges, that the external appearance of the block suggested that flat 7 contains two bedrooms, and that without clear evidence to the contrary the appellant should proceed on that basis.

8. The LVT decided that the amount payable in respect of service charges should be based upon the assumption that flat 7 comprises two bedrooms rather than one bedroom. The reasons given by the LVT for this decision were as follows:

> "The Applicants have no means of gaining access to flat 7 and therefore cannot prove their case. However their assertion that from the outside the flat looks as if it contains two bedrooms does accord with what the Tribunal found at the inspection. The burden in a situation like this must be on the Respondent who is the owner of flat 7 to demonstrate that the formula it uses to calculate its service charge apportionment is fair and reasonable. In the opinion of the Tribunal Mr Abulowodi's evidence is not sufficient to discharge the burden. He has no property qualifications and could provide no evidence to support his statement."

9. The appellant appeals to the Upper Tribunal with leave given by the President. The respondents have decided not formally to respond to the appeal or to become parties to the appeal. However, whether or not the respondents are parties to the appeal, the appeal can only be allowed if the appellant can persuade the Upper Tribunal that the decision is wrong and can properly be interfered with having regard to the legal principles governing such appeals. The appeal is proceeding by way of review. As stated by the Senior President Carnwath LJ (as he then was) in *Daejan Investments Ltd v Benson* [2009] UKUT 233 at paragraph 61:

> "However, we remind ourselves that we are reviewing their decision, not substituting our own judgment. It is common ground that we can only interfere if the LVT has gone wrong in

principle, or left material factors out of account, or its balancing of the material factors led it to a result which was clearly wrong."

10. The appellant indicated it was happy for the appeal to be decided upon written representations. As already stated, the respondents are not parties to the appeal. Accordingly this appeal is being dealt with upon written representations.

11. The points advanced by the appellant are contained in its grounds of appeal and statement of case (both drafted by Mr Justin Bates of counsel) and can be summarised as follows:

(1) that it was inappropriate for the LVT to decide this case upon the basis of where the burden of proof lay; that reference to the burden of proof is a last, not a first, resort (per Sedley LJ in *Daejan Investments Ltd v Benson* [2011] EWCA Civ 38); and that looking at the evidence as a whole as it was before the LVT the only conclusion the LVT could properly have reached was that flat 7 was a one bedroom flat; and

(2) that no legally sustainable reason was given by the LVT for dismissing the evidence of Mr Abulowodi (as supported rather than contradicted by the council tax information) that flat 7 contained only one bedroom.

12. I conclude that this appeal must be allowed. My reasons for so concluding are substantially those advanced by the appellant and can be stated as follows.

13. The lease provides that the appellant may adopt any reasonable method of ascertaining the fair proportion. It is not suggested that the appellant failed to adopt a reasonable method of ascertaining the fair proportion by adopting a method based upon the number of bedrooms in each flat in the block. Accordingly the only question is whether the application of this method was an unreasonable method if flat 7 was treated as a one-bedroom flat but was a reasonable method if flat 7 was treated as a two-bedroom flat.

14. The evidence before the LVT clearly (if not solely) pointed towards flat 7 having only one bedroom. First there was evidence called before the LVT from Mr Abulowodi who had personally seen the inside of the flat and who said that there was a single bedroom. The fact that he made reference to a small additional storage cupboard too small to accommodate even a child's single bed does not alter his evidence that he had seen the flat and that there was a single bedroom. Secondly there was evidence from the council tax records that flat 7 was in a lower council tax band than flat 3 (a two-bedroom flat), which lends support to the evidence that flat 7 was only a one-bedroom flat. The only point arguably weighing against these pieces of evidence was contained in the passage in paragraph 18 of the LVT's decision when it referred to the respondents' assertion that from the outside flat 7 looks as if it contains two bedrooms and that this "does accord with what the Tribunal found at the inspection". However in paragraph 12 of its decision the LVT had stated that it had been unable to gain access to flat 7 and was unable from an exterior inspection to reach any conclusion about the footprint of flat 7. Accordingly an exterior inspection did not enable the LVT to reach any conclusion about the footprint of flat 7, whereas evidence from the witness who had personally seen inside the flat was to the effect that the flat was a one bedroom flat.

15. The LVT concluded that Mr Abulowodi's evidence was not sufficient to discharge the burden of proving that the flat was only a one bedroomed flat. The LVT so concluded because Mr Abulowodi "had no property qualifications and could provide no evidence to support his statement". However no property qualifications would be required for giving factual evidence as to whether there was one bedroom (plus a small storage cupboard) or two bedrooms within a flat. There was no suggestion that his evidence was untruthful. His evidence as to what he personally saw on inspecting the flat was capable of proving that the flat was a one bedroom flat without any support for his statement. However there was some support for his statement from the council tax records.

16. Accordingly I conclude that the only legally sustainable conclusion open to the LVT upon the evidence before it was that, on the balance of probabilities, flat 7 was a one-bedroom flat rather than a two-bedroom flat, such that the fair proportion for the purpose of the service charge calculations could properly be made upon that basis. With respect to the LVT, I conclude that its conclusion to the contrary was clearly wrong such that the Upper Tribunal can and must interfere with the LVT's decision within the *Daejan* principles set out in paragraph 9 above. If the LVT is to be taken as finding that there was a burden upon the appellant to prove to some higher standard than the balance of probabilities that flat 7 was a one-bedroom flat, then I disagree that there was any such burden to do so.

17. The appellant's appeal is allowed. The "fair proportion" for the service charge year 2011-2012 can properly be calculated upon the basis that flat 7 is only a one bedroom flat.

18. By their letter dated 2 January 2013 the respondents indicated they did not wish to be party to the appeal and observed that they did not accept responsibility for any further costs in this case. It seems to me that I should treat this as an application by them under section 20C of the Landlord and Tenant Act 1985 as amended. I am provisionally of the view that I should make such an order. I express the matter in this way because I realise that the appellant has not been put on notice that a section 20C application is to be considered and the appellant has therefore not had the opportunity of arguing that no such order should be made. The appellant may make submissions in writing to the Tribunal (with copies to the respondents) within 28 days of the date of this decision if it wishes to argue that an order under section 20C should not be made. If such submissions are made, then I will give separate consideration to the section 20C matter and issue a separate written decision upon it. In the absence of such submissions being made by the appellant within 28 days, the following order will take effect namely:

> All of the costs incurred by the appellant in connection with these proceedings before the Upper Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the respondents.

My reasons for reaching the provisional view (subject to any submissions to the contrary which the appellant may make) that this order should be made are as follows. The appellant could have avoided the difficulties which have arisen in this case if it had retained a clear and indisputable record of the accommodation available in each flat in the block. It was no fault of the respondents that the appellant did not do so, nor was it any fault of the respondents that this matter has had to come on appeal to the Upper Tribunal. In all the circumstances of the case it appears just and equitable to make this order.

4 March 2013

His Honour Nicholas Judge Huskinson