LRX/19/2007

LANDS TRIBUNAL ACT 1949

LANDLORD AND TENANT – service charge – Landlord and Tenant Act 1985 section 27A – LVT's decision lacking findings of fact or adequate reasons – Lands Tribunal deciding the dispute was not capable of just determination by Lands Tribunal on the papers on an appeal by way of review– in the light of that decision, parties consenting to remittal of case for rehearing of the relevant parts thereof by a differently constituted LVT

IN THE MATTER OF AN APPEAL FROM THE LEASEHOLD VALUATION TRIBUNAL FOR THE SOUTHERN RENT ASSESSMENT PANEL

BETWEEN **WITNESHAM VENTURES LIMITED** **Appellant**

and

(1) MRS FRANCES MARKWICK
(2) DEVONIAN COURT RESIDENTS ASSOCIATION **Respondents**

Re: Devonian Court,
Park Crescent Place,
Brighton,
East Sussex BN2 3HG

Before: His Honour Judge Huskinson

Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL
on 21 April 2008

Mr T W E Evans instructed by The Mitchell Plampin Partnership for the Appellant
Mr Stephen Kinch, solicitor, of Burt Brill & Cardens for the Second Respondent
The First Respondent was present as an observer but did not appear as a Respondent to the appeal and was not represented.

DECISION

1. The Appellant appeals to the Lands Tribunal, with permission, from the decision of the Leasehold Valuation Tribunal for the Southern Rent Assessment Panel ("the LVT") dated 8 December 2006 whereby the LVT determine the recoverability of certain disputed items of service charge for the financial years ending 31 March 1999 to 31 March 2005. The LVT's decision was made under section 27A of the Landlord and Tenant Act 1985.

2. The Appellant is the freehold owner of Devonian Court Park, Crescent Road, Brighton. The First Respondent, Mrs Markwick, was the original applicant to the LVT in respect of the amount recoverable by way of service charge and she took a substantial part in the preparation of the documentation which was laid before the LVT. However, so far as concerns the present appeal to the Lands Tribunal, Mrs Markwick indicated that she did not wish to participate as a Respondent. She was present at the hearing as an observer but she left the presentation of the appeal to the Second Respondent, which is the Residents Association and which represents the various lessees in the buildings. Mrs Markwick is one such lessee.

3. The chronology of the proceedings before the LVT can be summarised as follows:

(1) After certain preliminary directions, the matter first came before the LVT for hearing on 3 April 2006. I was told that on that day the LVT inspected the premises. The proceedings on that day appear more to have comprised the parties negotiating outside court. As a result there was resolution of various items, by reference to the then current state of the Scott Schedules which had been prepared for the purpose of setting out the parties' contentions regarding the points in dispute.

(2) The partial success of the negotiations on 3 April 2006 led to the issuing of further directions on 12 April 2006 which included directions for the preparation by the parties of revised Scott Schedules setting out the parties' contentions on the points remaining in dispute.

(3) On 13 June 2006 the hearing resumed before the LVT. I was told that there were discussions about and submissions upon the Scott Schedules, but that no evidence was called by either party. It seems to have been agreed by the parties that the LVT would take the Scott Schedules away and would determine the matters in dispute on the basis of the contents of the Scott Schedules. It may be noted that there were over 50 items in dispute on the Scott Schedules to a total value of, I was told, £214,540.

(4) By a decision dated 2 August 2006 the LVT gave what appears to have been treated as a preliminary determination upon the matters in dispute. The decision ran to 18 numbered paragraphs and had attached to it a schedule prepared by the LVT setting out its conclusions as to the service charge items and amounts payable. It was envisaged that this decision would lead to the parties reaching agreement as to the terms of an order which could be made by the LVT by consent. However the contemplated agreement did not emerge.

(5) In consequence the hearing was reconvened on 22 November 2006 for discussion and clarification and agreement regarding some points of the dispute.

(6) In the result a final decision of the LVT dated 8 December 2006 (the decision appealed against in these proceedings) was issued. This decision made certain alterations as to the items payable (as stated in the schedule to the decision) and it also added certain decisions regarding costs.

4. For the purpose of this decision it is not necessary to set out in any detail the items of service charge which were disputed as between the parties. It is sufficient to note that detailed Scott Schedules were prepared (one Scott Schedule for each of the disputed years) in which the Respondents, put forward their objections to the various items in dispute and where the Appellant put forward its answer to those objections and where, in many cases, the Respondents put forward their response to the Appellant's answer. What may be noted is that the dispute covered a substantial number of items and involved a substantial sum of money and that the objections included objections on the following grounds:

(1) Objections that the expenditure was unreasonably incurred or was excessive (see section 19(1)(a) of the 1985 Act).

(2) Objections that the relevant works were not done to a reasonable standard (see section 19(1)(b)).

(3) Objections that the consultation provisions in section 20 had not been complied with.

(4) Objections that the relevant costs were the result of the Appellant's (or their predecessor's) failure to maintain.

(5) Objections that the costs were not for works which fell within the relevant charging clause relating to service charges in the lease, but were instead costs incurred as a result of the Appellant building seven new flats at basement level in the premises.

(6) Objections based on the absence of supporting vouchers.

(7) Objections based on the contention that the expenditure was (or ought to have been) covered by insurance.

(8) Objections that the relevant works were only required in order to remedy earlier poor workmanship.

5. By its decision of 8 December 2006 the LVT stated as follows in paragraphs 15 and 16:

"15. Accordingly, we reviewed each item outstanding on the Scott schedule, and we attach for the information of the parties our schedule of those items of expenditure which we determine are recoverable as service charges and payable by the lessees, for the respective financial years in question, and we are satisfied that in all of the available evidence before us they are reasonable and have been reasonably incurred.

> 16. Specifically, in respect of the matter of fire precautions, about which there were extended arguments, it is accepted that as part of fire precautions, a fire alarm system was necessary and would have been for the benefit of all lessees. We noted the correspondence on behalf of the Residents' Association that those proposals were supported. The Tribunal determines that any additional costs are not recoverable due to the previous freeholders' neglect, failure to undertake essential works, and lack of evidence."

6. On one reading of paragraph 16 it might be thought that the closing sentence was also dealing with the matter of fire precautions, with which the earlier parts of paragraph 16 were concerned, such that the reference to "any additional costs" was a reference to any additional costs regarding fire precaution matters. If that was the proper reading then there would have been an omission to deal at all with other items in dispute. However in order to avoid that gap it is possible to read the last sentence of paragraph 16 as a determination that any additional costs (ie apart from those already dealt with in paragraph 15 and its attached schedule and in the earlier part of paragraph 16) are not recoverable for the reasons stated. This appears to have been the intention of the LVT, see its letter of 4 September 2006 to Mrs Markwick. I am prepared to read the decision in this manner, which avoids there being a complete absence of any reasons for the non-recoverability of the other (ie non-fire precaution related) costs which were disallowed.

7. However, even reading the decision in this way, the decision is, with respect, one that cannot stand for the following reasons.

8. First, it is plain that the various separate disputes between the parties (ie on the various separate disputed items of claimed service charge) raised numerous disputed questions of fact. There is no summary of the evidence presented to the LVT (and indeed it seems that nothing properly to be called evidence was so presented as opposed to there being presented conflicting assertions of fact as contained in the Scott Schedules). The LVT made no findings of fact. Also the LVT gave no reasons beyond those set out above. Thus the totality of the LVT's reasons for determining that the disallowed items were not recoverable by way of service charge was that these items

> "... are not recoverable due to the previous freeholders' neglect, failure to undertake essential works, and lack of evidence."

9. The LVT was required to give clear and sufficient reasons for its decision on the various aspects in dispute. The Appellant was entitled to know, in respect of a disputed item contained in the Scott Schedules which was disallowed, as to why the item in question had been disallowed and what the LVT's findings of fact were in relation to that item. With respect to the LVT, this was not done. It was unfortunate that the parties apparently agreed to the LVT deciding the matter by reference to the contents of the Scott Schedules and that the LVT acceded to this course. The nature of the present dispute was one which could not properly be decided without findings of fact being made. I do not seek to say that the LVT's reasons needed to be very lengthy or that every minute point of argument in dispute had to be ruled upon. But the Appellant was entitled to clear and sufficient reasons, which could be

comparatively briefly stated, as to why the Appellant had lost on any particular disputed item. Further, it is difficult to see how such a reason could be given without some finding of fact being made in relation to the item in question.

10. At the hearing before me Mr Kinch accepted (plainly correctly) that the LVT had indeed failed to give adequate reasons and that its decision upon the items challenged by the Appellant cannot stand.

11. As regards the items on which the LVT found in favour of the Appellant, it was accepted that the Respondents had not sought and did not seek to appeal. Accordingly it is not the totality of the LVT's decision which cannot stand but merely that part of it which disallowed, without giving adequate reasons, the items in the Scott Schedules which were claimed by the Appellant and which are referred to in paragraph 3(5) of the Appellant's grounds of appeal (extending from item 3 to item 78(i) making a total of £155,337.86 which was disallowed by the LVT).

12. Mr Kinch having recognised that the aforesaid parts of the LVT's decision could not stand, the question arose as to how these disputed items could properly be decided. Mr Evans recognised that it was a surprising course for the parties to have taken for them to agree, as they apparently did, that the items in dispute should be decided by the LVT on the basis of the contents of the Scott Schedules and without hearing evidence. However he submitted that, bearing in mind that this agreement was made between the parties, the Lands Tribunal should itself go on to decide all these items in dispute on the basis of the documents alone. He argued that insofar as any disputed item turned upon any finding of facts, then as there existed no evidence as such but merely conflicting assertions the Lands Tribunal should consider each item separately and should decide the item against the party on whom the burden of proof lay (because that party would have failed to discharge the burden of proof for want of any evidence).

13. Mr Kinch argued that the matter could only be justly determined on the basis of findings of fact. He argued that the matter should be remitted for a fresh hearing before the LVT, but sitting differently constituted.

14. I reject Mr Evans' submission that the Lands Tribunal should decide this case on the basis of the contents of the Scott Schedules and by application of the burden of proof. In my judgment the disputes between the parties can only justly be determined by the making of findings of fact. Mr Evans' suggested course would not comply with the overriding objective to deal with cases justly. His approach would also, in effect, invite the Lands Tribunal to repeat the error of approach made by the LVT. Quite apart from the foregoing, I can see substantial scope for disagreement, in the light of the detailed contentions made in the Scott Schedules, as to where the burden of proof lies in respect of many of the items in dispute – eg as to whether it is for the Appellant to show that certain works were done to a reasonable standard and/or that the expenditure on them was reasonably incurred or whether it is for the Respondents to disprove one or both of these matters.

15. Mr Evans stated that if I were against him on his main point (namely that I should myself decide the disputed items on the documents) then the Appellant would agree to the disputed items being remitted for a fresh decision by a different constituted LVT. This is what Mr Kinch also contended was the appropriate course. Accordingly, in the light of my rejection of Mr Evans' main point, the situation is that both parties expressly agree to the LVT's decision being quashed so far as concerns the disallowance of the matters complained of by the Appellant in paragraph 3(5) of its grounds of appeal (totalling £155,337.86) and to the question of the recoverability of these items being remitted to be the subject of a fresh hearing before a differently constituted LVT. I agree that the foregoing is the appropriate course and accordingly the appeal is to that extent allowed.

16. The question of costs was raised. Understandably neither party made any application for an order for costs against the other – no such order would have been appropriate having regard to the limitations on the power of the Lands Tribunal in awarding costs. As regards the question of section 20C of the 1985 Act Mr Kinch on behalf of the Second Respondent realistically did not seek to argue that I should order that the costs before the Lands Tribunal should not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable. It should however be recorded that Mr Kinch did not accept that the proper construction of the lease entitled the Appellant to seek to charge any such costs through the service charge provision (and the Respondents' position on this point was accordingly reserved – it was not argued before me). Accordingly I make no order under section 20C as regards the costs of the proceedings before the Lands Tribunal. As regards the costs of the proceedings before the LVT (ie the costs already incurred in the proceedings so far) it was agreed between the parties that the newly constituted LVT should have the ability to reconsider the entire question of section 20C in relation to all the cost before the LVT. Accordingly in the light of that agreement, and in consequence of the fact that the Appellant has been successful in this appeal, I also quash the existing section 20C order made by the LVT. The question of what if any section 20C order should be made will be for the newly constituted LVT and will extend to all the costs before the LVT, including those already incurred.

17. In the result, the Appellant's appeal is allowed and the LVT's decision is quashed as regards its disallowance of the items referred to in paragraph 3(5) of the Appellant's grounds of appeal (being items totalling £155,337.86) and the question of whether and to what extent these items are recoverable by way of service charge is, by consent, remitted for a fresh hearing before a differently constituted LVT. The LVT's decision under section 20C is also quashed and the question of what if any order to make under section 20C is also, by consent, remitted to the newly constituted LVT.

Dated 24 April 2008

His Honour Judge Huskinson