C3/03/0852

Neutral Citation Number: [2003] EWCA Civ 1049
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
THE LANDS TRIBUNAL
(N J ROSE FRICS)

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 10 July 2003

B E F O R E:

LORD JUSTICE KEENE

LORD JUSTICE CARNWATH

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MEMBERS OF THE ORCHARD COURT RESIDENTS ASSOCIATION

Claimants/Respondents

-v-

ST ANTHONY'S HOMES LIMITED

Defendants/Applicants

- - - - - - -

(Computer-Aided Transcript of the Palantype Notes of
Smith Bernal Wordwave Limited
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

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MR CHRISTOPHER HEATHER (instructed by Messrs Macfarlanes, London, EC4A 1BD) appeared on behalf of the Applicants
The Respondent did not appear and was not represented.

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J U D G M E N T
(As approved by the Court)

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1. LORD JUSTICE KEENE: This is a renewed application for permission to appeal against a decision of the Lands Tribunal dated 19 March 2003, permission having been refused on the papers by Carnwath LJ.

2. The applicant, St Anthony's Homes Limited, sought leave to appeal to the Lands Tribunal from a decision of the Leasehold Valuation Tribunal ("the Tribunal") under Part 2 of the Landlord and Tenant Act 1987. The Lands Tribunal refused leave. It is against that refusal which the applicant now seeks permission to appeal to this court.

3. By an order dated 9 January 2001 the Tribunal had appointed Mr Barry Martin FRICS, as the manager of Orchard Court under section 24 of the 1987 Act. Orchard Court comprises three blocks of flats of which the applicant company is the landlord. The order reflected the considerable disrepair and lack of management activity before that date. Subsequently the landlord applied to discharge the order appointing Mr Martin. That application was not pursued at the eventual hearing.

4. In the meantime the members of the residents association applied to the Tribunal under section 24(9) of the Act, to vary the order by extending the term of Mr Martin's appointment. That was opposed by the landlord, but on 31 October 2002 the Tribunal decided to grant the residents association application and to make an order extending Mr Martin's appointment for two years from the expiry date of the previous order. It set out its reasons in some detail at paragraph 20 of its decision. It is unnecessary to repeat those. It concluded that it would be "just and equitable" to extend the appointment.

5. The Lands Tribunal, Mr N J Rose FRICS, refused leave to appeal to him. It had been said in the grounds of appeal that the Tribunal below should have considered all the matters set out in section 24(2) of the Act, where the court, before making an order, has to be satisfied of various things; such as that the landlord or other person owing an obligation to the tenant:

> "....either is in breach of any obligation owed by him to the tenant under his tenancy and relating to the management of the premises in question or any part of them (or, in the case of an obligation dependent on notice) would be in breach of any such obligation but for the fact that it has not been reasonably practical for the tenant to give him the appropriate notice, and.
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> ....
>
> (iii) that it is just and convenient to make the order in all the circumstances of the case."

That is simply one of the bases as alternatives upon which the Tribunal may make an order under section 24. It will suffice as an example for present purposes.

6. In refusing leave to appeal, the Lands Tribunal said:

> "The applicant suggests that, in arriving at its decision, the tribunal should have considered all the matters in section 24(2) of the Landlord and Tenant Act 1987 ("the Act"). In fact, the application was made under section 24(9) of the Act, which contains no such requirement. The applicant is justified in pointing out that the tribunal considered whether it was just and equitable that Mr Martin's appointment should be extended, whereas the true test is whether it is just and convenient in all the circumstances of the case to vary the order. It is, however, implicit in the tribunal's conclusion that the variation was equitable that it was also convenient. There is no reason why the tribunal could not have found on the material before it that it was also convenient."

The reasons given by the Lands Tribunal continued beyond that point, but it is unnecessary to quote from them at further length.

7. Since that refusal, and since the application was lodged for permission to appeal to this court, The Civil Appeals office has suggested that there may be no right of appeal to this court because the decision of the

Lands Tribunal was only to refuse leave to appeal and that is not a "decision" within the meaning of section 3(4) of the Lands Tribunal Act 1949. It is the proviso to that subsection which gives the right to appeal against a decision of the Lands Tribunal. That issue could in my view give rise to some interesting arguments. But there is no point in dealing with that aspect unless there is a real prospect of success on the substantive grounds of appeal being advanced as to why the Tribunal was wrong in its decision.

8. The principal argument advanced by Mr Heather on behalf of the applicant on the substantive merits is that the Tribunal below mis-interpreted section 24 of the Act. It is said that, when making any order under section 24, whether a first order or an order varying or discharging an existing order, the Tribunal must consider the circumstances set out in section 24(2), and can only vary or discharge an order if at least one of the circumstances set out in section 24(2) exists. It is submitted that one of the thresholds which are required when making an order initially has to be passed if such an order is subsequently to be varied or discharged. Mr Heather submits that this is because of the mandatory language of section 24(2) which says that a Tribunal may only make an order in the specified circumstances. He argues that, if a Tribunal varies an existing order, it is making an order in those circumstances as well. He also says that support for that conclusion can be derived from the absence of any guidance or criteria in section 24(9) itself as to how the discretion of the Tribunal is to be exercised.

9. It was argued before the Tribunal that the order ought not to be varied at all because it had not been demonstrated that the landlord was in breach of any of its obligations under the leases. Mr Heather says that the section 24(2) test must certainly be met if the variation in mind is one of extending the term of a manager as was proposed here. He says that that is virtually akin to making an order for the first time, and that it is a draconian step to appoint a manager of someone's property in the first place. He does accept that there is no time limit of which he is aware on the term for which a manager may be appointed.

10. It is necessary to consider the terms of section 24(9), which is the subsection dealing with applications to vary or discharge an order. Section 24(9) provides as follows:

> "[A leasehold valuation tribunal] may, on the application of any person interested, vary or discharge (whether conditionally or unconditionally) an order made under this section."

Section 24(9A):

> "[The tribunal] shall not vary or discharge an order under subsection (9) on [the application of any relevant person] unless it is
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> satisfied-
>
> (a) that the variation or discharge of the order will not result in a recurrence of the circumstances which led to the order being made, and
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> (b) that it is just and convenient in all the circumstances of the case to vary and discharge the order."

A "relevant person" is, in effect, a landlord for present purposes. Subsection (9A), therefore, does not apply when an application to vary or discharge is made by a tenant or tenants.

11. It is to be noted that the legislature has not thought it fit to embody in section 24(9) the various criteria set out in section 24(2). There is a clear contrast between the requirements when an order is made and when an order is varied. It seems to me that the section is drawing a distinction between making an order and varying an order. Although it might perhaps be said that in some circumstances the court is always making an order when it varies an existing order, that cannot be the correct interpretation in the context of this statutory provision.

12. There are no explicit criteria in section 24(9) in contrast to section 24(2). Moreover, if an application is made by a relevant person (such as a landlord) to vary or discharge an existing order, the legislature has expressly required the Tribunal to be satisfied of certain matters (see section 24(9A)). The inclusion of those express requirements in (9A) and the omission of anything of that sort in subsection (9) itself has to be seen as deliberate and confirms the contrast between section 24(2) and section 24(9).

13. Section 24(2) and section 24(9) deal with quite different situations. Section 24(2) is concerned with making an order where one does not exist, whereas section 24(9) is dealing with an order which is already in existence because the Tribunal has already been satisfied that the tests in section 24(2) have been met.

14. I quite accept that, in exercising its discretion under section 24(9), a Tribunal must have regard to relevant considerations; that is trite law. But when one looks at paragraphs 20 and 21 of the Tribunal's decision, it is quite clear that this Tribunal did have such regard. However, section 24(2) did not require it to be satisfied that at least one of those thresholds had been passed. Nor can I see any reason why this particular type of variation, the extension of a manager's term, should have to meet the criteria in section 24(2). Mr Heather has conceded that there is no limit on the length of time for which a manager may be appointed in the first place. In those circumstances, why should one require the section 24(2) tests to be met all over again simply because a variation is sought which will extend his term of appointment?

15. Reference is also made on behalf of the applicant to the fact that the Tribunal used the phrase "just and equitable" rather than the statutory words "just and convenient". It is, however, in my mind, quite clear from the Tribunal's decision that it regarded the variation as convenient as well as being just and equitable. I can see no real prospect of a successful appeal in this particular case, either against the Tribunal's decision or the Lands Tribunal's decision. If there is no real prospect of a successful appeal, it becomes unnecessary to decide the jurisdictional point.

16. In those circumstances I would dismiss this application.

17. LORD JUSTICE CARNWATH: I agree. I would perhaps mention that we have had a very helpful skeleton argument from Mr Heather dealing with the jurisdictional point. He discusses the relationship of the leading case under the old law, **Bland v Chief Supplementary Benefit Officer** [1983] 1 WLR 262, with the changes made by the Administration of Justice Act 1999 s54. I agree, however, that it is not necessary to deal with that in the context of this case.

18. I would also add that it would be rare for what would in effect be a second appeal to this court to be appropriate. Parliament clearly intended these matters should be left to the good sense of the Leasehold Valuation Tribunal, under the expert supervision of the Lands Tribunal.

Order: Permission to appeal refused.