LRX/14/2007

LANDS TRIBUNAL ACT 1949

LANDLORD AND TENANT – service charges – breach of natural justice-validity of notice

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

BETWEEN **WESTBOURNE LIMITED** **Claimant**

and

(1) Mr KENNETH EDWARD SPINK
(2) Mr JOHN C JOSHUA **Respondents**

Re: Longfield House,
18-20 Uxbridge Road,
Ealing,
London W5 2SR

Before: His Honour Judge Reid QC

Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL
on 22 July 2008

Mr Alastair Redpath-Stevens of counsel instructed by Lee & Kan solicitors appeared for the Appellant.
The Respondents did not appear and were not represented.

DECISION

1. This is an appeal with the permission of the President from a decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel dated 24 July 2006. By its decision the LVT held, inter alia, that "the lack of compliance with the required Section 20 [of the Landlord and Tenant Act 1987] procedures made the costs of the major works [done by the Appellant at Longfield House] not recoverable." The "required procedures" in this case are to be found in Part 2 of Schedule 4 of the Service Charge (Consultation Requirements) (England) Regulations 2003. The consequence of this decision was that the Appellant landlord Westbourne Limited ("Westbourne") was limited to recovering £250 per flat in respect of those works. Against that decision Westbourne appeals. The appeal is not opposed.

2. The single ground of appeal is that the decision of the LVT was in breach of natural justice. In giving permission to appeal the President said: "To limit the amount recoverable to £250 on the basis that section 20 had not been complied with when, it appears, that had not formed the subject of the respondents' case and had not been put to the applicant by the tribunal constitutes on the face of it a breach of natural justice."

3. The background is that Longfield House is a 1930s building originally comprising 38 flats. In 2004 a developer constructed a further 16 flats on top of the original building pursuant to a lease of the airspace. In connection with that development the developer was prepared to make a substantial contribution to the refurbishment of the common parts of the original building (including replacing the lifts) and the landlord decided to commence a major programme of maintenance and repair to the original building which was in urgent need of work.

4. Following an inspection and report by surveyors in October 2004 on 5 November 2005 Westbourne served on the leaseholders a notice of intention to carry out internal and external works. On 6 December 2004 lump sum fixed price tenders were sought from five contractors and by 21 January 2005 estimates had been received from all five. These were analysed and on 2 March 2005 a statement of estimated costs was sent to the leaseholders. The cheapest tender came from MJW Builders. By a separate letter of the same date the leaseholders were informed that the developer of the 16 new flats was prepared to make an ex gratia contribution of £62,500 provided the works started on time and that the payment would be apportioned to the service charge ratio of each flat. By a further notice of the same date the tenants were given the opportunity to make observations on the estimates within the 30 day consultation period.

5. On 5 May 2005 the leaseholders were informed that because of objections from eight flats the internal works would not now be done, but that the developer was proposing to "deal with" the ground floor common parts at its own expense. Because of the change of plan the developer was now prepared only to pay a proportion of the proposed ex gratia payment but the new figure had not yet been finalised. That sum was eventually fixed at £25,468.75. Westbourne's surveyor then re-analysed the tenders on the basis that only the external works would be done. The tender from MJW Builders was still the cheapest tender.

6. On 3 June a letter was sent to all of the leaseholders informing them that "in accordance with the tender analysis already provided to you" the total cost of the works to the exterior would be £159,001.29 and after a contribution from the developer the cost to the residents would be £129,025.28. Unfortunately this letter was incorrect because the figures were taken not from the lowest estimate but from another estimate. This error was noticed and on 10 June 2005 a correcting letter was sent setting out the correct figures. It showed a total chargeable to the leaseholders of £109,650.42.

7. The contract for the works was signed and work commenced on 11 July 2005. Almost immediately problems arose. For present purposes it is sufficient to say that the result of the problems was a substantial variation in the nature of the works in particular in the system used to provide a protective coating to the block's external concrete surfaces. No written variation orders were issued. In May 2006 that the works done to that point were finally certified and confirmation was given of payment totalling £148,589.38 having been received by the builders. The Tribunal found that "It would appear that the external works have so far cost £148,589.38 but are very far from complete."

8. The former respondents to the appeal and others ("the leaseholders") applied to the LVT for a determination of the reasonableness of the service charge for the years ending 2004 and 2005. The landlord applied for determination of the service charge which would be payable by the leaseholders if the tendered costs were incurred in completing the major works. A small part of the major works costs was included in the 2004 accounts but the major part were sought to be charged in the year 2005. It is the major works costs of £133,734 said to be chargeable in 2005 which lie at the heart of this appeal. The LVT determined that in respect of those works Westbourne was limited to £250 per leaseholder in 2005 and could not charge any further sum in 2006. No issue was taken on the appeal as to the LVT's determination in relation to the 2004 service charge or the determination in relation to the service charge in 2005 excepting the major external works. The LVT also dealt with applications to vary the leases in certain minor respects. The decision in relation to those applications to vary are not subject to appeal.

9. The grounds on which the LVT made its determination in relation to the major works were set out at paragraph 75 of its decision. They were as follows:

> "(a) The Notice of Intention dated 5 November 2004 complied with the requirements of the Act.
>
> (b) A Statement of Estimates was served on 2 March 2005. However no invitation to make written observations within the statutory 30 day period was offered not was any indication given as to which tender had been accepted.
>
> (c) On May 5 2005 the leaseholders were informed that only the external works were to be carried out but no cost was indicated or contractor named.
>
> (d) On 3 June 2005 the leaseholders were erroneously informed that the cost of the external works only would be £159,001.29 and that with a contribution from the developers the total cost to them would be £129,025.28. Again, no contractor was named.

> (e) On June 10 the clerical error was acknowledged and a revised contribution was sought. Again no total cost was notified or contractor named."

10. In the light of these conclusions the Tribunal did not go on to consider the reasonableness of the costs. Westbourne's complaint about this decision is that (a) it was never given the opportunity to address the issues raised in paragraph 75 of the decision and hence the decision was in breach of natural justice and (b) in any event the decision was wrong.

11. As to the law, Westbourne relied on the passage of the Lands Tribunal decision at para 32 of *Arrowdell Ltd and Coniston Court (North) Hove Ltd* [2007] RVR 39:

> "It is entirely appropriate 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. But there are 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."

12. To that statement of the law I would add that 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.

13. In this case the lessees did not suggest that there was any "section 20 point". So far as the Notice of Intention of 5 November 2004 was concerned Mr Spink and Miss Jones, who represented the leaseholders at the LVT directions hearing, were recorded as conceding that there was no suggestion "that [Westbourne] had failed to comply with the statutory consultation procedure in respect of the work as originally specified." It is true that there was no express concession at that hearing that no "section 20 point" arose in relation to later events but it was not suggested there was any such point. The leaseholders statements of case did not raise any point as to the service or adequacy of any notice. In consequence Westbourne's evidence did not deal with the point in any detail. When Mr Byers, the managing agent for Westbourne, gave evidence at the substantive hearing no issue was raised with him on behalf of the leaseholders or by the LVT as to the service or adequacy of notices. It appears that no point as to the service or adequacy of notices was raised with counsel then representing Westbourne either by those representing the Leaseholders at the hearing (Mr Spink and Mr Joshua).

14. In my judgment in these circumstances Westbourne can properly complain that it was not given a fair hearing. It was never presented with the suggestion that there was any "section 20 point" and never had the opportunity of trying to rebut it.

15. The question then is what should be done about the decision. There is clearly no point in overturning it if, having been given the chance before the Lands Tribunal to explain its answer to the point, Westbourne is unable to show that it had an answer.

16. Westbourne submitted that it did indeed have a convincing answer to the point. Taking the five subparagraphs of paragraph 75 of the decision individually it made these submissions.

(a) It was common ground that the Notice of Intention dated 5 November 2004 complied with the requirements of the Act and paras 1 and 2 of Part 2 of Schedule 4 of the Service Charge (Consultation Requirements) (England) Regulations 2003.

(b) (i) Although no invitation to make written observations was offered with the statement of estimates served on 2 March 2005 it was offered by the separate notice of the same date which did invite consultation within the statutory period. No copy of this notice was before the LVT because it was not material to the issues as ventilated before that tribunal. Had the LVT raised the point (which was not a point raised by the leaseholders) a copy of the notice would have been produced. Because of the LVT's failure to comply with the requirements of natural justice Westbourne was deprived of the chance of disposing of this point. There is no requirement that the notice inviting observations under regulation 4(10) should be in the same document as the statement of estimates given under regulation 4(5)(b).

(ii) The suggestion that Westbourne should at that stage have indicated "which tender had been accepted" was simply wrong. There is no "chosen contractor" at this consultation stage and to identify one contractor as the "chosen contractor" would show a breach of the consultation process since it would demonstrate that the landlord was not going to have regard to anything said as to which estimate should be selected.

(c) At 5 May 2005 when the leaseholders were informed that only the external works were to be carries out there was no obligation on Westbourne to indicate the cost or name the contractor. The duty imposed by regulation 6 of Part 2 of Schedule 4 on a landlord to give notice in writing within 21 days of entering into a contract to carry out qualifying works does not apply "where [as here] the person with whom the contract is made … submitted the lowest estimate": see regulation 6(2).

(d) and (e) These were irrelevant to the statutory consultation process and were in any event not in issue between the parties.

17. In my judgment there is substance in these submissions. It cannot be said that were the matter remitted to another LVT the result would inevitably be the same after a hearing at which Westbourne was given a proper chance to answer the points on which the LVT relied. Because the LVT focused only on the "section 20 point" it did not consider or determine the issue between the parties, namely the reasonableness of the costs of the major works and the amount in respect of those works that should properly be included in the 2005 service charge and the estimated 2006 service charge.

18. In these circumstances I take the view that the proper course is to allow the appeal, set aside the determination of the LVT that for the year 2005 Westbourne is entitled to recover only £250 per applicant in respect of the major external works and that it is not entitled to recover anything in respect of those works in respect of 2006, and to remit to a differently constituted LVT the question of what amount Westbourne is entitled to recover by way of service charge for the external major works in the years 2005 and 2006.

19. It will remain open on the re-hearing for the leaseholders to take a "section 20 point" if they should be so advised.

20. The remission is limited to the determination in respect of the major works. The LVT's determinations in relation to the other sums chargeable in respect of the years 2004 and 2005 were not the subject of appeal and those determinations stand.

Dated 25 July 2008

His Honour Judge Reid QC