UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2017] UKUT 302 (LC)
UTLC Case Number: LRX/160/2016

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charge – major works - service of s 20 Notice and section 20 procedure not put in issue by tenant in pleaded case but point taken by Ft-T at the hearing – refusal by Ft-T to admit s 20 Notice or to adjourn the hearing to allow landlord time to deal with the point – held decision to limit the sums recoverable to £250 was contrary to natural justice – appeal allowed.

IN THE MATTER OF AN APPEAL AGAINST THE DECISION OF THE FIRST TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY) MADE ON 5 SEPTEMBER 2016

BETWEEN:

SOUTHERN LAND SECUITIES LIMITED **Appellant**

and

MARK POOLE **Respondent**

Re: Flat 2 42 Bich Grove Acton London W3 9SS

Before: **His Honour John Behrens**

Sitting at: Royal Courts of Justice, Strand, London WC2A 2LL
on
18 July 2017

Ben Maltz (instructed directly by the Appellant.

Mr Poole appeared in person.

The following cases are referred to in this decision:

Birmingham City Council v Keddie [2012] UKUT 323 (LC),
Wales and West Housing Association Ltd v Paine [2012] UKUT 372 (LC)
Southern Land Securities Ltd v Carpenter [2013] UKUT 480 (LC)
Arrowdell Ltd v Coniston Court (North) Hove Ltd [2007] RVR 39

DECISION

Introduction

1. This is an appeal by Southern Land Securities Ltd ("SCS") against the decision of the Ft-T made on 5th September 2016. The Ft-T decided that SCS could only recover £250 per flat in respect of the cost external major works incurred between 2013 and 2015.

2. SCS had claimed £5,470 in respect of these items. Mr Poole had challenged the reasonableness of the items on the basis that SCS's selection process for appointing a contractor had been flawed. The Ft-T did not decide the case on that point. Indeed, it did not consider the merits of the case at all. The basis of the decision is contained in paragraphs 9 – 12 of the decision:

> 9 The sum of £5,470.64 claimed by the Applicant (page 159) was said to relate to major works carried out to the property between 2013-2015. The Respondent challenged the reasonableness of these charges on the basis that the Applicant's selection process for appointing a contractor had been flawed. Irrespective of that issue the Tribunal was concerned that the demand for this sum appeared to be unsupported by any evidence of proper service of a S20 notice, any tenders or schedules of works or detailed invoices to show that work had been carried out and paid for. Neither had the Applicant provided any service charge accounts in respect of any of the sums claimed by it.
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> 10 The Applicant said that it had brought a copy of the S20 notice with it to the hearing and made an application to admit the notice in evidence. Having considered the matter the Tribunal declined to allow the late submission of documents which the Respondent had not had the opportunity to see or consider. The Applicant is a professional landlord who has had the benefit of its own managing agents and solicitors in the preparation of its case. The late submission of documents in such circumstances is inexcusable.
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> 11 An application was then made by the Applicant to adjourn the hearing. After having retired to consider that application the Tribunal refused to grant the adjournment request holding that it would not be in the interests of justice to postpone the hearing nor would it be proportionate to do so.
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> 12 Returning to the consideration of the Applicant's claim for £5,470.64 for major works, the Tribunal concluded that as the Applicant had provided no evidence to show either that s20 had been complied with or of what works were carried out and paid for or that the works were within the landlord's repairing obligations under the terms of the lease the Tribunal was not in a position to declare either that the correct statutory procedures had been followed or that the sum claimed was reasonable and therefore the Applicant will be restricted to recovery of the maximum allowed without compliance with S20 of £250 per flat.

3. Permission to appeal was granted by the Deputy President on 13 January 2017. His reasons are summarised in paragraph 2 of the decision letter:

> "If, as is standard practice and as the applicant suggests in its ground of appeal, the FTT had given directions for the parties to identify the points in dispute in a Scott schedule or other statement of case, and if Mr Poole did not raise any issue about the service of notice under section 20, it is arguable, with a realistic prospect of success, that the FTT was wrong to determine the application against the applicant on a point of fact which had not been identified as being in issue. If the facts are as stated in the application for permission to appeal, the proceedings would appear to have been conducted contrary to the rules of natural justice and permission to appeal must be granted".

4. At the request of Mr Poole, the appeal has been by way of an oral hearing on 18 July 2017. As noted above SCS was represented by Mr Maltz who produced a helpful skeleton argument in addition to the grounds of appeal. Mr Poole who had made written submissions on 12 December 2016 represented himself.

The Facts

5. Flat 2 is one of five residential flats within 42 Birch Grove, Acton. It is on the ground floor. Mr Poole is the tenant under a 99 year lease dated 24 September 1976. He acquired his interest in 1992; SCS acquired the freehold reversion to the building in 2008.

6. In 2013 SCS commenced a programme of external repairs and decorations. On 3 January 2014 the Managing Agents sent Mr Poole a demand in the sum of £5,470 in respect of the major works. The covering letter made express reference to the "Section 20 Notice of Estimates dated 21st May 2013".

7. On 10 January 2016 SCS instituted proceedings in the County Court for the recovery of £6,400.51 in respect of ground rent and service and other charges. In his handwritten defence Mr Poole referred to the section 20 consultation process without suggesting that he had not been served with any relevant notice. He alleged that SCS together with its Managing Agent had acted in collusion to fix the tendering of these major works with the intention of artificially inflating the cost of the work undertaken. He requested that the dispute be transferred to the Ft-T.

8. On 20 April 2016 DDJ Waschkuhn duly transferred the matter to the Ft-T.

9. At a hearing on 24 May 2016 attended by Mr Poole Professor Abbey gave directions. In para 4 of the order Professor Abbey identified six issues which included the cost and the reasonableness of the costs of the works. He also identified as an issue whether SCS had complied with the consultation requirement under section 20 of the Landlord and Tenant Act 1985.

10. He gave directions which provided a timetable for

1. disclosure of documents by SCS,

2. the provision of a Schedule by Mr Poole of items in dispute together with a statement setting out.

   > Any legal submissions in support of the challenge to the service charges claimed including argument if liability to pay is at issue.

3. Comments by SCS on Mr Poole's schedule and a statement by the landlord including legal submissions in support of the service charge claimed.

4. The preparation by SCS of a bundle of relevant documents with guidance as to the contents of the bundle. The guidance included the requirement for the consultation notices including section 20 notices.

11. The directions appear to have been substantially followed. There is nothing in Mr Poole's statement or his schedule which suggests that there was any issue about the service of the section 20 notice or of the consultation procedure. In the schedule Mr Poole referred to "a fixed and unfair tendering process resulting in grossly exaggerated charges". Notes 3 and 4 set out the case in more detail. In them he accepted that he had been sent copies of the tender documents but alleged that the instructions were vague and that two of the proposed tenderers were in financial difficulty. He also made allegations about the work carried out by the contractors.

12. SCS's case was supported by a statement from Mr Milward, a paralegal within the in house legal department of SCS. In paragraphs 5 and 6 of his statement Mr Milward expressly asserts that "Notices were served in accordance with section 20 …" and "We also cannot see any dispute with the section 20 procedure." He attached a schedule in response to Mr Poole's schedule in which he asserted that the Managing Agent followed the correct procedure and denied that the tendering process resulted in unfair charges.

13. Mr Poole replied with 2 emails in August 2016. He did not challenge the assertions in paras 5 and 6 of Mr Milward's statement. He did, however repeat his basic assertion that SCS and the Managing Agent had acted in collusion with their chartered surveyor in the tendering process. He referred to an article in The Guardian where SCS and the Managing Agent had been subject to criticism for using incompetent contractors.

14. The application came before the Ft-T on 5 September 2016. SCS was represented by Counsel. Mr Poole appeared as a litigant in person. Mr Milward had prepared the hearing bundle. In accordance with his belief that there was no challenge to the service of the section 20 Notices or the consultation procedure he did not include the notices in the bundle. The application was listed for a full day. In the event it only lasted 1 hr 40 minutes.

15. There is no detailed evidence of what happened at the hearing. However in his statement in opposition to the appeal Mr Poole said:

> [The Ft-T] simply asked [SCS's] representatives to provide evidence which supported their claims that the section 20 process had been followed correctly. Within the first hour of the

> proceedings commencing [SCS's] representatives were granted 2 ten minute recesses to produce copies of tenders, invoices etc but failed to do so.
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> [SCS's] representatives eventually produced a section 20 letter and attempted to hand it to me during the hearing but [the Ft-T] dismissed this on the grounds that it gave me no time to consider or question the document.

16. In the result the Ft-T made an order limiting the sum payable by Mr Poole in respect of the major works to £250. It also made an order under s 20C of the Landlord and Tenant Act 1985. The grounds of its decision are contained in paras 9 -12 which I have set out above. It is plain from the decision that no consideration was given to the merits of Mr Poole's criticisms of the amounts claimed.

17. The Ft-T also made a number of decisions about a number of small matters. There is no appeal against any of these findings and I say no more about them.

Submissions

18. Mr Maltz submitted that the Ft-T was wrong in law or as a matter of procedure to raise, of its own initiative, the issue of compliance with the requirement to serve a section 20 notice relating to the qualifying major works. Even if the Ft-T was entitled to consider the issue of compliance with the section 20 consultation requirements, it was wrong in law or as a matter of procedure to refuse permission to SCS to adduce into evidence the section 20 notices it had brought to the hearing and/or to adjourn the hearing to allow for disclosure of such relevant documentation.

19. He referred me to 3 authorities – *Birmingham City Council v Keddie* [2012] UKUT 323(LC), *Wales and West Housing Association Ltd v Paine* [2012] UKUT 372(LC) and *Southern Land Securities Ltd v Carpenter* [2013] UKUT 480(LC).

20. *Keddie* was decision of Judge Gerald. To my mind the relevant principles appear from paras 15, 16, 19 and 20 of his decision:

> 15. Applications are commenced by landlord or tenant issuing a *pro forma* application form prescribed by the Residential Property Tribunal Service which requires that details of the questions relating to service charge expenditure requiring resolution by the LVT be set out. If they are not sufficiently set out, as is often the case, the LVT will at the pre-trial review order that the applicant serve a statement of case giving full particulars of precisely what is in issue and why. The respondent will be ordered to serve a statement of case setting out its case to which the applicant will usually be given an opportunity to respond if he so wishes by serving a statement of case in reply.
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> 16. Those documents, whether they be described as pleadings or statements of case or whatever, set out the nature and scope of the issues in dispute. They operate to limit the issues in respect of which the parties must adduce evidence in support of their respective cases. They also operate to define the issues in respect of which they seek resolution by the LVT. They therefore

serve five functions. First, to identify the issues. Secondly, to enable the parties to know what issues they must address their evidence to. Thirdly, to vest the LVT with jurisdiction, and focus the LVT's attention on what needs to be resolved. Fourthly, setting the parameters of, and providing the tools within which, the LVT may case manage the application. Fifthly, by confining the issues requiring resolution to what is actually (as distinct from what might theoretically be) in dispute between the parties they will be assured economical and expeditious disposal of their dispute whilst also promoting efficient and economical use of judicial resources at first instance and appellate levels.

19. That said, there may of course be rare cases in which it is appropriate or necessary for the LVT to raise issues not expressly raised by the parties but which fall within the broad scope of the application in order to properly determine the issues expressly in dispute. But even then, the issues must fall within the scope of the application, not something which arises outside of it. This no doubt is what His Honour Judge Mole QC had in mind when he said in *Regent Management Limited v Jones* [2012] UKUT 369 (LC), LRX/14/2009 that:

> "29. 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."

20. In those rare cases where an LVT does feel compelled of its own volition to raise an issue not raised by the application or the parties, it must as a matter of natural justice first give both parties an opportunity of making submission and if appropriate adducing further evidence in respect of the new issue before reaching its decision. Failure to do so is not only unfair, but may give the unfortunate impression that the LVT has descended into the fray and adopted a partisan position which may well serve to undermine the confidence of the parties in the impartiality of the LVT.

21. There are passages to much the same effect in para 19 of *Paine* which made express reference to an earlier decision of the Lands Tribunal in *Arrowdell Ltd v Consiton Court (North) Hove Ltd* [2007] RVR 39 and para 24 of *Carpenter*. Thus the principles are well established in this Tribunal.

22. Mr Poole made no legal submissions as to the propriety of what happened at the hearing before the Ft-T. He repeated his submissions that there were 2 adjournments during the hearing and that the attempt to put in the section 20 notice was late in the hearing. He pointed out that SCS was a professional landlord with professional advisers. The main part of his submissions was devoted to the merits of his complaints against the Managing Agent and the surveyor and the press criticisms they had received. He repeated his complaint that the tender process was flawed because two of the prospective tenderers were practically insolvent. He repeated his allegation that the work was not worth the £27,000 that had been paid. He doubted whether any work at all had been done to the roof. He complained that SCS had been casual in their approach to this litigation pointing out that there was no attendance before Professor Abbey and that they had withdrawn from mediation at the last moment. None of these matters were considered by the Ft-T. As I have noted there was no consideration of the merits at all.

Discussion

23. In my view there was a clear breach of natural justice by the Ft-T. Whilst it is true that Professor Abbey identified compliance with section 20 as a potential issue it was clear from Mr Poole's defence in the County Court proceedings, his statements of case and the notes to the schedule he prepared that he was not challenging the service of the notices or the procedure adopted by SCS. This was also made clear in paras 5 and 6 of Mr Milward's witness statement which was not challenged.

24. It is thus clear that the issue of compliance with section 20 was very much an issue raised by the Ft-T. Indeed the word "irrespective" in para 9 of its judgment suggests that this was acknowledged by the Ft-T. In the light of Professor Abbey's directions it was, in my view, probably open to the Ft-T to raise it as an issue. However once raised it was, in my view, as a matter of natural justice obliged to give both parties an opportunity of making submission and if appropriate adducing further evidence in respect of the new issue before reaching its decision. In my view the refusal by the Ft-T to adjourn the hearing and to admit the s 20 notice and any other material relating to the procedure amounted to a breach of natural justice.

25. The fact that SCS was a professional landlord with professional advisors does not affect this. In the result the appeal will be allowed and the matter remitted to a differently constituted tribunal to be reheard. If, at that hearing, Mr Poole or indeed the Ft-T wish to be satisfied as to the compliance with the section 20 procedure that should be made clear in good time before the hearing so that the relevant documents and indeed evidence of service can be put in the bundle.

26. There remains the question of s 20C both in this Tribunal and before the Ft-T. I have not heard full argument on s 20C and thus the views I now express are provisional and are subject to further written submissions from either party. If the parties wish to make further submissions the following timetable will apply:

1. Written submissions from SCS are to be made within 14 days of the date of this decision. A copy of the submissions is to be served on Mr Poole.

2. Submissions from Mr Poole are to be made within 28 days of the decision. A copy is to be served on SCS.

3. Submissions in reply (if any) are to be made by SCS within 35 days of the decision.

27. Subject to any submissions my provisional views are as follows:

1. Although the matter was dealt relatively shortly in argument it was by no means clear that there was any express power in the lease for the costs of these proceedings to be included within the service charge. My provisional view is that it is not included. If so, there is no need for an order under section 20(C) and it should be refused.

2. If (contrary to my provisional view) there is such a power I would provisionally agree with Mr Maltz that the question of whether the costs of the Ft-T below should be subject to a s

20(C) order should be adjourned to the freshly constituted Ft-T. However, I take a different provisional view about the costs in this Tribunal. In my view the hearing before this Tribunal was caused by a mistake by the Ft-T which was not promoted by Mr Poole. In those circumstances the just order is that each side pay their own costs before this Tribunal. That is achieved by making an order under s 20(C). I would provisionally make an order under s 20(C) in respect of this Tribunal.

HH J Behrens

19 July 2017