8298

HM Courts & Tribunals Service

Residential Property TRIBUNAL SERVICE

LONDON RENT ASSESSMENT PANEL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION TO DISMISS AN APPLICATION UNDER SECTIONS 27A & 20C OF THE LANDLORD AND TENANT ACT 1985

Case Reference: **LON/00BE/LSC/2012/0271**

Property: Mybase, 130 Webber Street, and 118 Southwark Bridge Road, London SE1 0JN

Applicant: The Leaseholders of Mybase, 130 Webber Street (Leaseholders)

Represented by: Mr R. Southam; Director, Chainbow Limited, (Company Secretary of Mybase 1 RTM Company Limited)("Mybase")

Respondent: Estates & Management Limited (Landlord)

Represented by: Mr Justin Bates of Counsel

Also Present: Mrs L. King de Lagrutta, Solicitor

Tribunal: Mr L. W. G. Robson LLB(Hons)
Mr D. I. Jagger MRICS

Hearing Date: 10th October 2012

Date of Decision: 22nd October 2012

Decisions of the Tribunal

(1) This application is dismissed as an abuse of process pursuant to Regulation 11 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003.

(2) The Tribunal makes the other decisions as set out under the various headings in this Decision.

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the reasonableness and legal liability to pay demands for service charge in the service charge years 2008, 2009, 2010 and 2011, and subsequently, relating to a contract dated 1st April 2008 relating to the provision of A video door entry system, PAC, Sky and CCTV equipment installed by Interphone Limited (the Interphone Contract) under the terms of an agreed (specimen) lease dated 17th October 2010 relating to Apartment 13. Initial Directions were given by the Tribunal on 15th May 2012 after a Pre-Trial Review at which the Applicant's representative was present. The Respondent was not present but indicated by letter that it was aware of the application and the Review.

2. The Respondent's statement of case sent in accordance with the Directions included an application to dismiss the Application as frivolous, vexatious or otherwise an abuse of process under Regulation 11 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003. Consequently the hearing date fixed for 8th August 2012 was vacated and the parties were given notice of this hearing to decide whether the Tribunal had jurisdiction, as a preliminary issue.

3. The relevant legal provisions relating to this hearing are set out in Appendix 1 to this decision.

Background

4. The factual background to this application is slightly complex, and is summarised here for clarity.

5. The estate consists of a number of blocks of flats. Mybase is one of the blocks, completed only in 2008. The block consists of 102 residential units. The original developer and landlord, Buxton Homes South East Limited (Buxton) entered into the Interphone Contract on 1st April 2008. The

equipment subject to the contract was installed and operative before the first lease in the block was granted on 1st May 2008. The contract declared by clause 4 that the ownership of the installation remained the property of Interphone Limited, and by clause 1 confirmed that it was a contract for hire of the equipment and the sums payable were rental payments. The initial annual rent was £25,315 plus VAT. The rental could be varied at Interphone's option by the same percentage as the All Items Retail Price Index. Clause 7a specified that the contract would last for a period of 14 years commencing on the 31st December after the installation was complete, and thereafter from year to year. Clause 10 provided for free maintenance of the installation by Interphone. Clause 11 allowed Interphone to enter and remove the installation if the contract was ended for any reason. Clause 8 gave "the Subscriber" (in effect the landlord) the right to terminate the contract upon payment of all monies then due plus a substantial additional sum which was calculated by a formula, but would not exceed a sum equal to five years' rental. Clause 9 provided for a similar sum to be payable by the Subscriber if the contract was terminated as the result of an RTM company acquiring the right to manage.

6. On 2nd March 2009 the Respondent acquired the freehold reversion from Buxton, and it is worth noting that it remains the landlord. On 1st January 2011 the right to manage was acquired by Mybase (thus triggering clause 9 of the Interphone Contract). Apparently neither Buxton nor the Respondent paid the compensation due to Interphone. As a result, Interphone threatened to remove the installation. Mybase entered into negotiations with Interphone, coming to an agreement on slightly more favourable terms.

History of the Application

7. The Applicant made an application to the Tribunal (LON/00BC/LSC/2011/0339 under Section 27A for a determination of reasonableness of service charges demanded for the years 2008, 2009 and 2010. Several items were in issue, including a challenge to the Interphone Contract on the basis that;

a) it was a qualifying long term agreement in respect of which no (Section 20B) consultation had taken place, and thus the maximum chargeable was capped at £10,200.

b) all service charges above the capped amount were irrecoverable in the absence of an order for dispensation under Section 20ZA

c) costs arising for works done on the installation other than under the payment structure of the contract were irrecoverable under Section 27A

No challenge was made to the recoverability of the charge for that item per se, but only to the maximum recoverable. The Tribunal determined on 18th October 2011 that only £10,200 of the "Interphone contract price" was recoverable via the service charge in the absence of dispensation under Section 20ZA.

8. On the application of the Respondent, the Tribunal granted an application for dispensation under Section 20ZA of the consultation requirements relating to the Interphone Contract on 19th March 2012 (Case LON/00BE/LDC/2011/0110).

9. Mybase then applied for dispensation under Section 20ZA of the consultation requirements relating to the new contract with Interphone which had been negotiated to replace the subject contract, which was granted on 8th October 2012 (Case LON/00BE/LDC/2012/0095). The Applicants in this case were the Respondents to the Mybase application.

10. On 17th April 2012 the Applicants (substituted at the Pre-Trial Review for Mybase) made this application. The sums in issue were £15,145 for 2008, £35,225 for 2009, and £31,794 for 2010.

The hearing

11. Both parties made oral submissions following their written statements of Case.

12. The Respondents submitted;

a) that the issues raised in this case should have been raised in the original Section 27A application, relying upon the rule in Henderson v Henderson set out in its modern form by Lord Bingham in Johnson v Gore Wood & Co. [2002] 2 AC 1 Mr Bates submitted that this case fell well within the modern rule.

b) This application was inconsistent with the Applicants' position and pleading in the previous cases LON/00BE/LSC/2011/0339 and LON/00BE/LDC/ 2011/0110.

c) This application was effectively an attack on these earlier decisions. Mr Bates submitted that in LON/00BE/LSC/2011/0339 the Tribunal had decided specifically that no claim could be made against the Respondent relating to the period before 2nd March 2009, as the Respondent only became the landlord on that date. Also no claim could be made for a period after Mybase became the manager on 1st January 2011. The Respondent had no right to make a service charge demand for any period after 2010, and consequently the Tribunal had no jurisdiction in these proceedings to deal with any year after 2010.

d) Further, the passage of time since the original application had made it impossible for the Respondent to make its case satisfactorily. The Respondent had made strenuous attempts to obtain more information about the Interphone Contract from Buxton, but Buxton was in liquidation and had not provided that information.

e) The Lease terms contained nothing which would deem the landlord's actions relating to the Interphone Contract unreasonable.

e) In response to the decision LON/00BG/LSC/2007/0170 (Schilling v Canary Riverside) referred to by the Applicants, Mr Bates submitted that that decision was now an obsolete formulation of the legal position, and in any event in that case a number of invoices had been disclosed very late. In this application there had been no new evidence since 2010.

13. The Applicants submitted that:

a) Dismissal under Regulation 11 pursuant to Johnson v Gore Wood relying upon Res Judicata had been dealt with previously by the LVT in case LON/00BG/LSC/2007/0170, where Lady Wilson's Tribunal had concluded that "Res Judicata has little, if any, place in proceedings under Section 27A of the Act".

b) Further, that Tribunal did not consider hearing a different point relating to the same property from a previous panel as an abuse of process.

c) The Respondent could have raised this matter at the Pre-Trial Review, but did not attend.

d) To the Applicants, the large sums involved in this application did not appear frivolous, vexatious or an abuse.

e) In the original Section 27A application only the long term agreement aspect was explored. As a result of the Applicants' success, the Respondent had appealed the original decision and made a successful application under Section 20ZA. That decision made it clear that the question of reasonableness was not considered by the Tribunal. The prejudice to the RTM Company was solely considered by the Tribunal. After the success of its S20ZA application the Respondent withdrew its appeal and asked for its fees back. This suggested its main motive was to avoid paying out any money and fulfilling its obligations under clause 8b of the Interphone Agreement.

f) The Respondent's failure to fulfil its obligation under the Interphone Agreement had led to the Applicants facing thousands of pounds in unnecessary costs. Interphone had provided quotations for a maintenance only contract. The figures (at Exhibit 2) showed the disparity between the costs of renting and the cost of a comprehensive maintenance agreement. In any event the Lease did not oblige the lessees to pay for rental charges.

g) The Respondent and Interphone Limited were related companies (as shown in Exhibits 6 and 7). Mybase had been endeavouring to get them to meet their obligations. They appeared to be supporting each other in avoiding obligations. The witness statement of Julian Synett (on behalf of the Respondent) contained insufficient detail to be able to verify or challenge it. Nevertheless the cost of the Interphone contract gave very high returns.

h) The block is a high quality block and for the premiums paid, the leaseholders would expect to have equipment supplied and not pay for it through the

service charge. The Applicants sought fairness and balance for the leaseholders who (in their view) had suffered unreasonable charges while under the Respondent's control and wanted to ensure that "under the RTM control they have reasonableness".

i) The Tribunal was urged to look behind the companies. The matter had been fought all the way by the Respondent. The reason for this application was that the lessees had been threatened with the removal of the equipment. In this application all the years pleaded had been listed on the basis that the Applicants thought "they owned the equipment". The new facts which had come to light were that Interphone and the Respondent were connected, and that the maintenance of the system was being offered free.

14. In answer to questions, Mr Southam made it clear that he was not alleging either the Respondent or Interphone had misled the Applicants. He was not suggesting that Buxton was a connected company, but it was no longer trading. In the previous cases the Applicants had considered that the leaseholders were not prejudiced by the Interphone Contract but now found that they were prejudiced. As the contract had been entered into before the RTM had been exercised, it was frustrated. He agreed that one of the purposes of the application was to retrieve the monies paid under the Interphone Contract in 2009 and 2010. Two applications were being made on the same contract but this application was contingent on the outcome of the first case.

15. Mr Bates submitted that Parliament had left the parties with a difficulty over a contract entered into prior to grant of the leases. The RTM Company had never been asked to pay Interphone under this contract. Whether Interphone could sue the Respondent was not relevant. No one could be asked to pay money to a non-party to the agreement. This application was speculative.

Decision

16. The Tribunal considered the evidence and submissions. In an application relating to Regulation 11 of the 2003 Regulations the Tribunal should not attempt to decide upon the substantive parts of the case put forward by the Applicants, but merely whether the requirements of Regulation 11 had been fulfilled. Regulation 11(a) requires the Tribunal to consider whether an application appears frivolous, vexatious or otherwise an abuse of process of the Tribunal. The Tribunal has seen no evidence in this case that the Applicants' application is frivolous or vexatious, in the sense of being irresponsible. The application relates to a serious matter with significant financial implications for both parties. However the question of the Tribunal's jurisdiction to deal with matters which have previously been before the Tribunal is properly asked, and needs an answer.

17. The Tribunal went on to consider the issues by reference to the cases referred to by the parties, the most significant being listed below;

Yorkbrook Investments v Batten [1986 18 HLR 25

Iperion Investments v Broadwalk House Residents Ltd [1995] 27 HLR 196
Investors Compensation Scheme v West Bromwich Building Society [1997] 1 WLR 896
Johnson v Gore Wood & Co [2002] 2 AC 1
Forcelux v Sweetman [2001] 2 EGLR 173
Henley v Bloom [2010] 1 WLR 1770
Regent Management Ltd v Thomas Jones [2010] UKUT 369 (LC)
Southall Court (Residents) Ltd v Tiwari [2011] UKUT 218 (LC)
Schilling v Canary Riverside Estate Management Ltd and Anor LON/00BG/LSC/2007/0170

18. The Tribunal firstly considered that the Applicants' formulation of the LVT decision in the Schilling Case did not go far enough. The Respondent also seemed to concentrate more on the issue of Res Judicata than other related issues. The full summary of the decision in the headnote of that case states;

"The concept of res judicata has little, if any, place in determinations under Section 27A of the Landlord & Tenant Act 1985 although re-litigation of disputes may be an abuse of process or beyond the Tribunal's jurisdiction".

The Tribunal considered that such a statement is not an unreasonable reflection of the current law, particularly if the second limb of the statement is given its proper weight.

19. Considering Johnson v Gore Wood & Co, referred to by the Respondent, Lord Bingham's comments (at pp. 23 B-D and 31 a-f) are germane to the modern ambit of Henderson v Henderson and are set out below:

p.23

"... To litigate these matters in separate actions on different occasions as GW contends, to duplicate the cost and use of court time involved, to prolong the time before the matter is finally resolved, to subject GW to avoidable harassment and to mount a collateral attack on the outcome of the earlier action, settled by GW on the basis that liability was not admitted.

This form of abuse of process has in recent years been taken to be that described by Sir James Wigram V-C in Henderson v Henderson 3 Hare 100, 114-115:

"In trying this question, I believe I state the rule of court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward the whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

Again at p31 he stated:

"... Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties, and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before an abuse may be found, to identify an additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question of whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily relevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice." ...

20. The Tribunal then considered the positions of Buxton and Interphone. They appeared to have entered into a contract which benefited them both. The evidence suggested that the sums payable to Interphone were likely to substantially exceed the cost of installing a new system, particularly in the early years of the contract. Although the parties positions on this point were implicit rather than explicit, the Tribunal notes that the benefit for the developer was that it saved a considerable amount of money (apparently in excess of £100,000) by not having to pay for installation of the system, and probably also it was aware that the future leaseholders would be asked to pay the cost which, as implied by Mr Southam, was in reality related to a capital cost which leaseholders would not normally expect to pay. Nevertheless this, in the Tribunal's experience is not a particularly unusual arrangement for this type of

equipment. It is not entirely risk free for the provider, especially as components can become obsolete and unobtainable during the currency of the contract. This seems an unfortunate case where the parties before us are innocently affected by the actions of two third parties. The Tribunal rejected Mr Southam's view that the connection between Interphone and the Respondent landlord was material. There was no cogent evidence to suggest any concerted action between these two which had brought the Interphone Contract into being. While questions could be asked about the contract, neither party to it was a party to this application. Buxton had apparently demanded service charges in respect of it in the period 1st May 2008 – 2nd March 2009, but was now apparently beyond the reach of either of the parties in this application. Interphone's remedy was also primarily against Buxton, and possibly against the Respondent. The Respondent suggested at paragraph 16 of its Statement that it was stated in the contract that it had to bear any penalty for early termination, but that cannot be right, unless the terms of clause 5 of the contract have been complied with, which was not made clear. Whether or not this occurred, Interphone has no right to demand service charges under the Lease.

21. Applying Lord Bingham's formulation in Johnson v Gore Wood & Co to the present application, the Tribunal noted that the Interphone Contract had been disclosed in connection with the RTM application (on or about 1st January 2011) and the RTM company (essentially representing the interests of the Applicants) had chosen to disclaim the contract. The full terms of the contract were, or at least should have been, within the knowledge of the Applicants' representatives at that time. Certainly Mr Southam did not suggest that the Applicants were ignorant of those terms in the previous 27A application. Mr Southam urged upon us a material change in circumstances, i.e. the discovery of the connection between Interphone and the Respondent, however he was careful to clarify that he did not claim that his clients had been misled over that matter. He also submitted that the issue of the validity of the contract was separate from the claims put forward in the earlier proceedings, suggesting in effect that this application was a natural consequence of the previous proceedings. The Tribunal disagreed. It decided that the terms of the contract were clear by early 2011, and the connection between Interphone and the Respondent, without more, was insufficient to make a finding of collusion or bad faith, sufficient to escape the rule in Henderson v Henderson. In the Tribunal's view, the factual nexus of this application tended to suggest that a head of claim had been omitted from the earlier Section 27A proceedings, and rather than being a consequence of the earlier proceedings, this application appeared to be intended to cure that omission.

22. Dealing briefly with the second and third limbs of Mr Bates' argument, i.e the alleged inconsistency of the Applicants' position, and an attack on the previous decisions, the Tribunal decided that while some inconsistency was often likely in a case brought on a different aspect of the same subject matter, such inconsistency was not always fatal. However the Tribunal also decided that in effect this application would have the effect of undoing the previous decisions if it was successful. All things considered, the Tribunal decided that

this application fell within the ambit of Johnson v Gore Wood & Co . The application was thus an abuse.

23. The above decision appears to deal fully with this application, but if the Tribunal is wrong on that point, it considered the actual terms of the Application. It agreed with Mr Bates that since the Respondent had no further right to demand service charges after 31st December 2010, the Tribunal has no jurisdiction under Section 27A to rule on that part of the application. Further, while sums had been demanded (and apparently paid) under the Lease relating to the period 1st May 2008 – 2nd March 2009, this issue had been raised in the previous Section 27A application. The Tribunal in LON/00BE/LSC/2011/0339 had dismissed this point in paragraph 1 of its decision, noting that Buxton was not a party to the case, and thus made no determination relating to that period. Without a successful appeal on that point, or at least a specific pleading on that issue, this Tribunal decided that it would be inappropriate to go behind that part of the previous decision. Thus the case before this Tribunal can relate only to service charges relating to the Interphone Contract demanded from 2nd March 2009 – 31st March 2010.

(Signed) Mr L. W. G. Robson LLB (Hons)
Chairman

Dated: 22nd October 2012

Schedule

Leasehold Valuation Tribunals (Procedure)(England) Regulations 2003

....

11.—(1) Subject to paragraph (2), where—

(a)it appears to a tribunal that an application is frivolous or vexatious or otherwise an abuse of process of the tribunal; or

(b)the respondent to an application makes a request to the tribunal to dismiss an application as frivolous or vexatious or otherwise an abuse of the process of the tribunal,

the tribunal may dismiss the application, in whole or in part.

(2) Before dismissing an application under paragraph (1) the tribunal shall give notice to the applicant in accordance with paragraph (3).

(3) Any notice under paragraph (2) shall state—

(a)that the tribunal is minded to dismiss the application;

(b)the grounds on which it is minded to dismiss the application;

(c)the date (being not less than 21 days after the date that the notice was sent) before which the applicant may request to appear before and be heard by the tribunal on the question whether the application should be dismissed.

(4) An application may not be dismissed unless—

(a)the applicant makes no request to the tribunal before the date mentioned in paragraph (3)(c); or

(b)where the applicant makes such a request, the tribunal has heard the applicant and the respondent, or such of them as attend the hearing, on the question of the dismissal of the application.

...

.....