**UPPER TRIBUNAL (LANDS CHAMBER)**


**UT Neutral citation number: [2009] UKUT 129 (LC)**
**LT Case Number: LRX/70/2008**

**TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007**

***LANDLORD AND TENANT – LVT procedure – refusal to grant adjournment - not in breach of natural justice***
***LEASEHOLD ENFRANCHISEMENT – terms of transfer - application for permission – section 24 Leasehold Reform Act 1993 – service charge outstanding – whether LVT entitled to consider reasonableness of charge – permission refused***

**IN THE MATTER of an Application under**
**Section 24 of the Leasehold Reform, Housing and Urban Development Act 1993**

**BETWEEN** **WESTLEIGH PROPERTIES LIMITED** **Claimant**

**and**

**AMANDA CHRISTIE** **Respondents**
**FRANCIS BOWELL**
**SHARON CROWLEY**
**KEITH PRACY**
**FRANCES PRACY**

**Re: Flats at 45 Finchley Road, Westcliff on Sea, Essex, SSO 8AD**

**Before: His Honour Judge Mole QC**

**Appeal by written representations**

No cases are referred to in this decision.

## DECISION

### Introduction

1. This is an appeal against a decision of the Leasehold Valuation Tribunal for the Eastern Rent Assessment Panel dated 21st of May 2008 on an application made to it under section 24 of the Leasehold Reform Housing and Urban Development Act 1993. It has been determined, with the agreement of the parties, on the witness statements and written representations.

2. A number of points were raised in the applicant's notice of application for permission to appeal. Those points included (ground e.) that the allegedly limited time that had been allowed for preparation was made much worse for the applicant when the LVT refused to grant an adjournment to the applicant's representative, Ms Scott, on the day of the hearing 10th March 2008.

### Evidence and Submissions

3. The LVT refused permission to appeal on the 8th April 2008.

4. On the 18th of August 2008 the President of the Lands Tribunal granted permission to appeal and made the following observations:

> "There is in my view a very strong argument that in refusing to adjourn the hearing despite knowledge of the landlord's representative's travel difficulties the LVT acted in breach of natural justice. If the appeal was successful on this ground, which seems to me likely, the proper course would be for the matter to be reheard by a differently constituted LVT. This issue will therefore be dealt with at the outset, and the appellant's statement of case and the reply of any respondent will be confined to this ground. The other grounds on which application is made would, however, fall for consideration if the appellant were to be unsuccessful, but it is unnecessary to consider them until the issue on the refusal to adjourn has been determined."

5. The Tribunal ordered that the appeal should be dealt with under the written representations procedure. Witness statements were lodged from Louise Bolt, the respondents' solicitor, Lorraine Scott, a legal assistant with the applicant's solicitors and Amardeep Bansil, a representative of the applicant's managing agents. In the letter of the second of April 2009 conveying the order the parties were told that, in the light of the witness statements that had been filed, the President was no longer of the view that he expressed in granting permission to appeal that the argument that the LVT acted in breach of natural justice was very strong.

6. The Lands Tribunal has had regard to all the written submissions of the parties and to the witness statements.

7. The LVT decision recorded the facts on the issue of the adjournment as follows:

> "10. On Monday 10 March 2008 the Tribunal had the opportunity to inspect the Property, its common parts and the gardens and grounds. The lessees of flats A.B. and C. were present. The Respondent (landlord/reversioner) had been invited to the inspection. At about 10:00 the respondent's solicitor, Ms Scott notified the Tribunal case officer that she was delayed on her journey due (to) traffic and adverse weather conditions. Ms Scott also notified the office that the Respondent's witness, Mr Amardeep Bansil, who was travelling separately, would also be late. No application to delay the start of the hearing or to adjourn the hearing was made to the Tribunal. Mr Bansil is an employee of BLR Property Management, the managing agents now employed by the Respondent for the Property.
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> 11. The hearing started at11:05. Miss Bolt was present along with the lessees of flats A.B. and C. Miss Bolt opened and presented the case on behalf of the Applicants. Mr Bansil arrived at 1215. He informed the Tribunal that Ms Scott hoped to arrive shortly. At 12:35 the Tribunal adjourned the hearing until 13:45 both for lunch and to give further time for Ms Scott to arrive.
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> 12. The hearing resumed at 13:45. Mr Bansil informed (the) Tribunal that Ms Scott anticipated arriving within 20 minutes. Meanwhile Mr Bansil said he was authorised to go through the service charge budget for 2007/8 and to explain what expenditure of the Respondent had incurred to date in the current service charge year. In the event the only expenditure was two quarters management fees of £202.81 each [70-72]. This expenditure was not challenged by Miss Bolt.
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> Ms Scott arrived at 14:00 and was briefed on the progress made up to that time."

6. The LVT amplified its reasons on this issue in its decision on the application for permission to appeal. It said:

> "8. The Tribunal is satisfied that the Respondent knew well what the issues were and had ample opportunity to prepare and put forward its case. Indeed it served a detailed witness statement in support of its case and the witness was at the hearing. No complaint about lack of time or any application for more time was made at the beginning of the hearing or part way through it when the Respondent's representative arrived.
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> 9. The Tribunal acknowledges that on the morning of the hearing travel was subject to adverse weather conditions. This had been expected and warnings had been given on the radio and TV and in newspapers over the preceding few days. Having regard to public resources and the efficient dispatch of the Tribunal's business the Tribunal expects parties and their representatives to plan ahead and (make) appropriate arrangements to travel to hearings and to be on time. Evidently the Respondent's representative, Ms Scott, chose to drive by car from Oxfordshire to east Essex on a Monday morning employing a route that included a substantial section of the M25 well known to be busy and at a time when she would have been aware of the adverse weather conditions likely to be experienced. In the event Ms Scott failed to allow herself sufficient time for her journey or to use a more reliable means of transport.

> 10. The Tribunal was informed that Ms Scott had called the office on her mobile to explain that she would again be late for a hearing. No application for a delay in start time or an adjournment was made. When Ms Scott did arrive at the hearing there was no application for an adjournment. At the hearing the major issue was the legal costs incurred by the respondent, which it now wanted to pass through the service charge account. Ms Scott had every opportunity to and did at some length address us on this issue and Mr Bansil gave evidence on it. The Tribunal is satisfied that no procedural irregularities occurred which affected the Respondent adversely."

7. Ms Scott says, in her witness statement that on the morning of the 10th of March she awoke (in Henley-on-Thames) to reports of a severe storm with high winds, fallen trees and possible flooding. Mr Bansil spoke to her. He was also concerned about the weather conditions. She waited until the LVT offices were open at 9:00 and then telephoned to ask that the matter be adjourned. The case officer phoned her back to say that the panel Chairperson had indicated that there would be no adjournment and she was advised to attend the hearing as soon as possible. Ms Scott set out, stopping at intervals when the winds made her fear for the stability of her car. She says that the journey took her about four hours. She spoke to Mr Bansil in the course of the journey and he told her that the panel would adjourn until after lunch. She advised him to refuse to give evidence until she arrived. When she did arrive she did not repeat the request for the adjournment as, she says, she was left in no doubt that the LVT intended to deal with the matter that day. When she arrived she noted that the solicitor for the Respondents had already made representations and that Mr Bansil had been questioned by both the LVT and the Respondent's solicitor.

8. Mr Bansil confirms his reluctance to set out on the journey; nonetheless he made the journey by train and arrived not long after the hearing started. He says that although he initially refused to answer questions, in line with Ms Scott's advice, it was evident the Panel was anxious to proceed and so he answered questions within the scope of his witness statement.

9. Miss Bolt notes that the hearing had been listed to start at 11 a.m., with the site visit at 10 a.m. Both she and the Panel had managed to be present in good time although some had also had a long journey. She recollects that the Panel indicated that they hoped to hear the case in the morning and give a determination in the afternoon because they had noted that this matter had been going on for some time. However they appreciated that Ms Scott was likely to be late and agreed to adjourn the hearing until 11:30. Mr Bansil arrived at about that time. The Tribunal therefore decided to start the hearing, as he could listen on behalf of the respondent to Miss Bolt's submissions. Miss Bolt denies that she questioned Mr Bansil. She made submissions from 11:30 until 12:30 at which time the Panel decided to break for lunch in the expectation that Ms Scott would be present by 2 p.m. In fact Ms Scott arrived at 14:15 and the hearing restarted. Ms Bolt observes that Ms Scott made submissions that lasted until approximately 17:15.

10. I note that there are some differences of recollection between the witnesses but they do not seem to me to be significant. The general position is sufficiently clear.

**Conclusions**

11. I remind myself that the question is not whether I would have exercised my discretion differently if I had been sitting on the LVT: it is whether the way the LVT exercised its discretion deprived the Landlord of a fair trial. It is for the LVT to make its own procedural decisions, in the exercise of its discretion, in the light of all the circumstances in front of it at the time, including the length of time that the case has already taken. The LVT is entitled to be robust in its decisions and unsympathetic to what it may regard as avoidable delays. The Lands Tribunal will be reluctant to interfere with the exercise of the LVT's discretion unless it is satisfied that the conduct of the LVT is contrary to natural justice in the sense that it has denied one of the parties a fair trial by, for example, not giving that party a fair chance to deal with important issues.

12. The LVT said that having regard to public resources and the efficient dispatch of its business it expected parties and their representatives to plan ahead, make appropriate travel arrangements and to be on time. I strongly agree with that approach. Professional advocates ought to know that to be on time they may have to allow plenty of time for difficult travel and this may mean an early start or an overnight stay, particularly if trouble is forecast. The LVT was right to note that this was a comparatively longstanding matter and to conclude that it would determine the case on 10th March if it possibly could. In my judgement the way the LVT dealt with the question of Ms Scott's lateness was pragmatic, fair and even generous, notwithstanding the difficult conditions of that Monday morning. It is of significance that once she had arrived at the LVT, Ms Scott made no application for an adjournment and did not suggest that she was unable to deal with the issues. Indeed the Grounds of Appeal chiefly complain about the tight timetable the LVT had imposed before the hearing rather than of any real difficulties caused by Ms Scott not being present for the whole proceedings. In the event Ms Scott had three hours or so to make submissions and it was not suggested that was not enough.

13. In my judgement, once the full circumstances are understood, it is clear that what the LVT did was entirely open to it in the exercise of its discretion and the proper management of its business. Indeed, I consider that the decision the LVT made was plainly the right one. There was no breach of the rules of natural justice. The appeal on this ground is dismissed.

**APPLICATION FOR PERMISSION**

14. As the President foreshadowed, it now falls to be considered whether the other potential grounds of appeal should be granted permission to appeal.

15. The first issue is whether the LVT had the jurisdiction to determine the "reasonableness of service charges" under section 24 of the Leasehold Reform Housing and Urban Development Act 1993. It was a condition of the transfer that arrears of service charges should be settled prior to completion of the transfer. It was not suggested that such a provision, in itself, was unreasonable. The applicant accepts that the LVT had the power to determine "the cash accounts which substantiated such arrears figures". But the applicant wished to contend that the reasonableness of those charges could only be challenged by an application under section 27A of the Landlord and Tenant Act 1985. The applicant says that this point was raised in e-mails before the hearing and it

16. The main point on the claimed service charge concerns that element that represents the costs of court proceedings against one of the leaseholders for arrears of charges. Those arrears amounted to £3,625. The costs of the proceedings were £7,732. The facts were not entirely clear to the LVT but it seemed to them that there was a County Court claim, met by a counterclaim. At a case management hearing on the 13th of January 2006 a settlement was reached. Counsel and a solicitor represented the applicant landlord. The defendant Pracys were unrepresented. The Court made a consent order but the LVT was not provided with a copy. That settlement dealt with the money outstanding but said nothing as to costs. The LVT found (in paragraph 44) that

- "Ordinarily the costs would be raised and dealt with expressly as one of the terms of settlement of litigation even if that be that there shall be no order as to costs or that the parties agreed to bear their own costs;
- At all material times prior to 13 January 2006 it was the Respondent's intention to recover its legal costs from the Pracys and not to put the costs through the service charge;
- At the negotiations at court on 13 January 2006 the Respondent was represented by a solicitor and by counsel; the Pracys were not legally represented;
- It is inconceivable that either the Respondent's solicitor or counsel would have overlooked the question of costs as a component of the settlement so that if the question of costs was not addressed in the negotiations it was deliberately not addressed by the Respondent;
- The settlement of the proceedings was intended to be a clean break settlement so that in the absence of any express provisions as to costs it is to be inferred or implied that the parties intended that each party should be responsible for its own costs;
- At the time of settlement the Respondent intended that it would not pursue the Pracys for costs; it would not put the costs through the service charge and that it would bear its own costs;
- At some later point and following discussions between the respondent and BLR the Respondent changed its mind and sought to put the costs through the service charge;
- In August 2005 when Miss Bowell's query was answered the litigation against the Pracys was in full swing and the Respondent would have been aware of the legal fees; the fact that such fees was not raised reinforces our finding that at that time the respondent was not intending to put the legal fees through the service charge;
- In January 2006 when Mrs Crowley's query was answered the legal proceedings had just been settled and the Respondent would have known that a substantial bill was imminent. The fact that legal fees was not mentioned further reinforces our

17. The LVT dealt with that matter by first considering whether the lease, properly construed, provided for the recovery as a service charge of legal fees incurred in connection with proceedings brought against the lessee alleged to be in arrears. However, I shall approach the matter in a different order.

18. I consider that the findings of the LVT in paragraph 44 were findings it was entitled to reach on the somewhat limited material before it. In particular the LVT was entitled to infer that in those circumstances where litigation that had incurred substantial costs was settled between the parties with no mention of costs, the party that had incurred the costs being represented by both counsel and a solicitor and the party that might be liable to pay them not being represented at all, the agreement was that each party should bear its own costs. To my mind, if the Pracys had appreciated that it might be suggested that the settlement would expose them to a liability for costs that amounted to more than double the total claim for arrears, they would have been unlikely to settle. The LVT was also entitled to infer and find that, having forgone the opportunity to claim its costs from the Pracys, the respondent landlord decided that it would not put the costs through the service charge. It seems to me that there would be a powerful case on behalf of the 'innocent' leaseholders that it would be quite unreasonable for the landlord, apparently without expressing any reason why it should do so, to forego the opportunity to collect the costs from the leaseholder that had caused them to be incurred. Equally, the Pracys themselves might have had good reason to challenge as unreasonable a manoeuvre that caused them to settle on the basis that each party would bear their own costs, only to find that a quarter of the landlord's costs came round again as part of a service charge.

19. Those findings of fact were legitimate inferences about the intentions of the Applicant landlord. They lead inexorably to the conclusion that it would be unreasonable for the applicant landlord to claim those costs as part of the service charge but they are not the sort of judgments about reasonableness that would normally fall under section 27A. It was sensible and within the LVTs jurisdiction under section 24 to deal with the matter as it did.

20. Those findings of fact made by the LVT are unassailable and dispose of the point. However, if it were necessary to do so I would go further and say that the LVT directed itself carefully on the law at paragraphs 22 to 33 and was entitled to construe the lease as it did for the reasons it gave in paragraphs 45 to 47, none of which disclose any error of law.

21. As for the other two very short issues concerning the accounts, the first is disposed of by the observation that the LVT simply preferred the evidence of Ms Christie, which it was perfectly entitled to do. On the second point, the LVT accepted the argument of the Applicant landlord that the sums in question remained due and payable by the Pracys.

22. There is nothing in any of the other matters that raises a point of law. The LVT explained why it declined to make an order for costs in favour of the Applicant landlord. That was a rational exercise of its discretion.

23. Permission to appeal on the remaining grounds is therefore refused.

Dated 14 July 2009

His Honour Judge Mole QC