LRX/22/2008

LANDS TRIBUNAL ACT 1949

LANDLORD AND TENANT – service charges – preliminary issue – whether freeholder and former managing agent properly joined by LVT as respondents – held LVT had no jurisdiction to do so – appeal dismissed – Landlord and Tenant Act 1985 s27A

IN THE MATTER OF AN APPEAL AGAINST THE DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE NORTHERN RENT ASSESSMENT PANEL

BETWEEN **KEITH BARTON AND 13 OTHER LEASEHOLDERS OF ETON COURT, HARROGATE** **Appellants**

and

(1) ACCENT PROPERTY SOLUTIONS LIMITED
(2) ETON COURT (HARROGATE) MANAGEMENT COMPANY LIMITED
(3) GRAYCLIFFE HOMES LIMITED **Respondents**

Re: Flats Nos.1-8, 11-12, 14-16 and 21
Eton Court
Roseville Avenue
Harrogate
HG1 4SU

Before: N J Rose FRICS

Sitting at Harrogate County Court, 2 Victoria Avenue, Harrogate, North Yorkshire, HG1 1EL on 3 September 2008

Mr Keith Barton for himself and, with permission of the Tribunal, for the other Appellants and the Second Respondent
Colin Green, instructed by ACSL Legal of Charlestown, Shipley for the First Respondent
Mr A B Butterfield, with permission of the Tribunal, for the Third Respondent.

DECISION ON PRELIMINARY ISSUE

Introduction

1. This is an appeal by Mr Keith Barton, formerly the leaseholder of Flat 21, Eton Court, Harrogate (Eton Court), and the leaseholders of thirteen other flats in Eton Court, against the decision of the Leasehold Valuation Tribunal for the Northern Rent Assessment Panel, determining the amount of service charges payable in respect of Eton Court during the period 12 February 2004 to 28 February 2007 pursuant to section 27A of the Landlord and Tenant Act 1985 (as amended). The LVT's decision was dated 4 January 2008. It adjusted the relevant service charges in favour of all 20 leaseholders in Eton Court by a total of approximately £7,900. On 8 February 2008 the LVT granted the leaseholders permission to appeal against its decision.

2. The leaseholders were the applicants at the original LVT hearing. There were three respondents: Accent Property Solutions Limited (Accent), Eton Court (Harrogate) Management Company Limited (the management company) and Graycliffe Homes Limited (Graycliffe). Graycliffe had completed the construction of Eton Court in October 2004 and, as freeholder, granted individual 999 year leases of each of the flats. They formed the management company and issued one share to the leaseholder(s) of each flat. Graycliffe's directors were the original officers of the management company. They resigned in favour of Mr Barton of Flat 21 and Mr Christopher Woodcock of Flat 1 in about June 2006. Accent (formerly Domus Management Services Limited) provided management services to the management company throughout the period considered by the LVT.

3. The parties to the appeal to the Lands Tribunal were the same as those at the LVT hearing. It appeared from the appellants' statement of case that the Lands Tribunal was being asked to determine at least 30 separate issues. On 28 August 2008, therefore, I caused the following letter to be written to Accent's solicitors, ACSL Legal:

> "I have been asked to write to you by Mr N J Rose FRICS, the Member to whom this case has been allocated.
>
> The appeal has been listed for hearing in accordance with the Tribunal's simplified procedure. The Tribunal's Practice Directions dated 11 May 2006 makes it clear that cases heard under this procedure 'will almost always be completed in a single day'.
>
> Having read the papers the Member is of the view that, in order to deal with the matter properly, a considerably longer hearing will be required. He is therefore minded to remove the appeal from the simplified procedure and transfer it to the standard procedure, so that the matter can be re-listed appropriately.
>
> Before taking a decision, however, the Member has asked me if you would explain to the Tribunal:

(1) Why Accent claim to have locus in the proceedings

(2) How Accent could be affected by the outcome of the case.

I look forward to hearing from you."

4. Copies of the Tribunal's letter were sent to Mr Barton, in his capacity as both appellant and company secretary of the management company, and to Graycliffe.

5. Accent's solicitors replied on 29 August 2008 as follows:

"(1) Accent Property Solutions Limited (APS) is a managing agent.

They were employed by Eton Court (Harrogate) Management Company Limited ('the Management Company') to provide services to the Eton Court scheme.

The correct course of action would have been for the leaseholders to take action against the Management Company.

Mr Barton, one of the appellants (although now a former leaseholder) is the current secretary of the Management Company.

(2) Due to the close proximity of Mr Barton (appellant) and the Management Company, APS do not feel that the Management Company's actions during the period under review would be discussed objectively."

6. On 1 September 2008 Mr A B Butterfield, Graycliffe's managing director, wrote to the Tribunal. He said:

"We confirm receipt of your letter dated 28 August 2008 to ACSL Legal and copies to ourselves, the contents of which are noted.

Previous to this we had attended Court relative to the enclosed court claim actioned by Mr Barton of Eton Court Management.

The judge dismissed the claim on the basis that there is, and never has been, a contract between Graycliffe Homes Limited and Eton Court Management. It was established that for a claim to be successful in court, there has to be either a written contract between any two parties.

Might I suggest, in view of the judge's findings, that we are removed as third respondents to the appeal."

7. In a letter to Accent's solicitors dated 2 September 2008, copied to Mr Barton and Graycliffe, the Tribunal said:

> "In the light of the views which have been expressed by your client and the Third Respondent, the hearing tomorrow will take the form of a Pre-trial review to consider the locus of the parties to the proceeding. If appropriate, directions will be given at the Pre-trial review for the future conduct of the appeal, which will be heard at a later date."

8. At the Pre-trial review Mr Barton appeared for all the appellants and for the management company with permission of the Tribunal. Mr Colin Green of counsel appeared for Accent and Mr Butterfield appeared for Graycliffe with permission of the Tribunal. At the conclusion of the hearing I ruled that the LVT had no jurisdiction to include either Accent or Graycliffe as parties to the application and that its decision was not binding on either of them. I added that I would give my reasons for this decision in writing. At the same time I would inform the parties whether I accepted Mr Barton's submission that the appeal should be allowed to continue against the management company only under the simplified procedure. This decision deals with those outstanding matters.

The LVT proceedings

9. Originally, the management company instituted two sets of proceedings in the LVT against Accent. The first related to the amount of service charges payable pursuant to section 27A(1) of the Landlord and Tenant Act 1985. The second was for the appointment of a manager under section 24 of the Landlord and Tenant Act 1987. On 18 April 2007 the LVT held a directions hearing, at which Mr Barton appeared for the management company and Accent was represented by two of its officers, Mr G Wragg and Ms B Craig. It is clear from the LVT's Order that the question of its jurisdiction had arisen, but no determination of the issue was made.

10. On 25 May 2007 the LVT issued the following Notice to the management company:

> "1. The Tribunal is minded to dismiss the above applications.
>
> 2. The grounds on which it is so minded are that the respondents, Accent Property Solutions, are agents of the applicant and are not an appropriate respondent. The applications constitute an abuse of the process of the Tribunal and are outside its jurisdiction.
>
> 3. On or before 22 June 2007, the applicant may request to appear before and be heard by the Tribunal on the question whether the application should be dismissed."

11. The management company duly asked to be heard by the LVT. A further hearing took place before a differently constituted Tribunal on 17 July 2007 at which the management company and Accent were represented by Mr Barton and Mr Wragg respectively. The LVT's Order of the same date contained fifteen directions, of which the following are relevant:

"1. The applications under section 27A, Landlord and Tenant Act 1985 and under section 24, Landlord and Tenant Act 1987 are consolidated.

2. The Tribunal grants Mr Keith Barton leave to be joined as an Applicant.

3. Any written application to be joined as an Applicant which is received by the Tribunal from a leaseholder of an apartment forming part of Eton Court, Roseville Avenue, Harrogate, HG1 4SU ('the property') will be successful provided the application is received no later than 13 August 2007. Later applications will be determined on their merits.

4. Eton Court (Harrogate) Management Company Limited is removed as an Applicant in these proceedings. Eton Court (Harrogate) Management Company Limited and Graycliffe Homes Limited are added as Second and Third Respondents respectively in these proceedings. Following this order and pending the addition of further applicants, Tribunal papers will be headed:

BETWEEN

Applicant	**Keith Barton**
Respondent	**(1) Accent Property Solutions Limited**
	(2) Eton Court (Harrogate) Management Company Limited
	(3) Graycliffe Homes Limited

12. It is to be noted that the LVT which made this Order took a different view from its predecessor as to the locus of Accent in the proceedings. It is not clear whether the reasons for that change of opinion were communicated to the parties.

13. The leaseholders of thirteen other flats subsequently applied to be joined as applicants and gave Mr Barton written authority to represent them at the LVT. At the LVT directions hearing on 17 July 2007 it was agreed that Accent's retainer as managing agent ended on 28 February 2007, since when the management company had managed the development itself. As a result, the application for the appointment of a new manager under section 24 was withdrawn at the final LVT hearing on 19 November 2007. At that hearing Mr Barton appeared for all the appellants and Mr Butterfield for Graycliffe. Accent were not represented.

Related litigation

14. Mr Barton has brought two other sets of proceedings against Accent in connection with their management of Eton Court. In the first he sought an Order requiring Accent to supply information concerning insurance premiums payable on the building. In the second he referred to the decision of the LVT to disallow part of the service charge expenditure. He alleged that as a consequence of that decision, Accent "holds trust moneys representing surplus service

charge contributions paid by the leaseholders" and asked for an Order requiring Accent "to account for those trust moneys". At the first of two hearings before District Judge Swan at Macclesfield County Court on 20 May 2008, Mr Barton conceded that he could only claim one-twentieth of the LVT's total adjustment of £7,900, or approximately £390. However, as the Judge put it, Mr Barton "held out the somewhat daunting prospect to this Court today of a further 19 claims by other tenants of Eton Court for one-twentieth of the adjustments" made by the LVT. Judge Swan struck out both claims, with costs, holding that Mr Barton had no right of action against Accent.

15. In addition, in his capacity as secretary of the management company, Mr Barton made a claim for service charges against Graycliffe. This action was referred to by Mr Butterfield in his letter to the Lands Tribunal dated 1 September 2008 (para 6 above). On 6 August 2008, also sitting at Macclesfield County Court, Deputy District Judge Buckley dismissed the claim after considering the Court file.

16. Finally, again on behalf of the management company, Mr Barton has applied to the President of the Royal Institution of Chartered Surveyors to appoint an arbitrator to determine a dispute or disputes with Accent arising from the management agreement dated 22 January 2004. Mr Barton said that he had not yet received instructions from the directors of the management company as to precisely which matters would form the subject of the arbitration. The arbitration had been stayed to allow time for mediation.

Statutory provisions

17. Section 19(1) of the Landlord and Tenant Act 1985 provides that:

> "Relevant costs shall be taken into account in determining the amount of a service charge payable for a period –
>
> (a) only to the extent that they are reasonably incurred, and
>
> (b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;
>
> and the amount payable shall be limited accordingly."

18. Section 27A(1) provides that:

> "An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to –
>
> (a) the person by whom it is payable,
>
> (b) the person to whom it is payable,
>
> (c) the amount which is payable

(d) the date at or by which it is payable, and

(e) the manner in which it is payable."

The parties' submissions

19. Mr Green said that there was no contractual relationship entitling the individual leaseholders to involve Accent in proceedings under section 27A. Accent were not a party to the leases of the individual flats. The only contract relevant to the provision of services in the building was between the management company and Accent. He submitted that the LVT (and the Lands Tribunal on appeal) had no jurisdiction to determine an action against a former managing agent, which was not a party to the lease or a person by or to whom the service charge was payable.

20. Mr Green referred to a letter from Mr Barton to the Lands Tribunal dated 31 March 2008, in which he said:

> "Our position is that we respond to the appeal on the basis that in reality the claim is against either the first respondent who was controlling funds and expenditure during the period under review or the third respondent. The third respondent was in control of this company until 26 June 2006 when control was passed to the leaseholders. It was following that change that a number of issues began to emerge and these led in turn to the application before the LVT."

21. Mr Green submitted that, although Mr Barton had written that letter as secretary of the management company, it clearly expressed his view that the purpose of the LVT proceedings was to enable the leaseholders to bring a claim against Accent or Graycliffe. That, he submitted, was outside the jurisdiction of either Tribunal in respect of an application under section 27A.

22. Finally, Mr Green referred to section 27 of the appellants' statement of claim. This alleged that the LVT had been wrong to accept the floor areas which had been used to apportion the service charge. Measurements made subsequent to the LVT hearing had shown that all measurements were incorrect by up to 30%. Paras 27.6 and 27.7 of the statement of claim read as follows:

> "In the case of apartments 3, 10, 18 and 21 charges have been understated but the leaseholders are not the same as the original purchasers of the apartments. It is not considered fair to the new leaseholders that additional charges should be raised upon them. It is requested that these charges be paid by the first and/or third respondents.
>
> In the case of apartments 1, 4, 5, 15, 19 and 20 charges have been understated. The appellants consider that it would be unfair to raise additional charges upon those leaseholders at this stage and request that these charges be paid by the first and/or third respondents."

23. It was clear, Mr Green said, that Mr Barton was asking the Tribunal to order Accent or Graycliffe to pay certain charges – something which the Tribunal had no power to do.

24. Mr Butterfield said that his company had not been given prior notice of the LVT hearing on 17 July 2007, at which it had been added as a respondent. He had not been asked whether he objected to this course of action. He was not a lawyer. He assumed that, since the LVT had ruled on the point, his company had no alternative but to attend the main hearing. He was most unhappy that so much time and money had been wasted as a result of Mr Barton's decision to embark on multiple litigation over a dispute which should have been resolved in an amicable fashion.

25. In reply Mr Barton denied any improper behaviour. He pointed out that Accent had been represented at the LVT hearing in July 2007, when the parties to the application were amended. Accent did not complain about the LVT's ruling, nor did they appeal against the LVT's subsequent decision on the substantive application. Thus, since July 2007 Accent had agreed to be a party to the proceedings and they had only sought to withdraw that agreement shortly before the Lands Tribunal hearing. The leaseholders had made allegations of false accounting and incorrect charges by Accent and inaccurate information supplied by them. Only Accent were in a position to explain these matters. His principal concern in pursuing the matter was that the leaseholders did not understand certain charges which had been made by Accent. He wanted to ensure that any moneys which had been wrongly paid to Accent should be accounted for and handed over. Whilst the arbitration would cover many of the matters considered by the LVT, it could not deal with all of them.

26. If the Lands Tribunal concluded that Accent should not have been a party to the appeal, Mr Barton still wished to continue the proceedings against Graycliffe, although he accepted that Mr Butterfield was not in a position to give any evidence on the relevant points. If Graycliffe, too, were excluded, the proceedings should continue with the management company as sole respondent.

Conclusions

27. I start with the position of Accent. They were not a party to any of the twenty occupational leases of flats in Eton Court. The leases were made between Graycliffe (the Landlord), the management company and the particular tenant or tenants. There was thus no privity of contract between the appellants and Accent, and Accent was neither a person by whom a service charge was payable nor one to whom it was payable. The opinion of the LVT which considered the locus of Accent on 25 May 2007, therefore, was correct. The applications against Accent under section 27A were an abuse of the process of the LVT and should have been dismissed. The fact that the issue of jurisdiction has only been raised at the last moment before the Lands Tribunal, whilst unfortunate, is not significant. If the LVT had no statutory jurisdiction to determine the application, Accent's acquiescence in the LVT's incorrect decision could not give the LVT such a jurisdiction. The LVT had no power to include Accent as a respondent and its decision was not binding on Accent.

28. The position of Graycliffe is slightly more complicated, since they were a party to each of the individual leases. They were not involved in the payment or receipt of service charges, however. By clause 4.7 the leaseholders covenanted to:

> "Pay to the Management Company the Service Charge at the times and in the manner provided in the Fifth Schedule hereto such charge to be recoverable in default as rent in arrear."

29. By clause 7.2 the management company covenanted:

> "To carry out or provide the services [defined as the services set out in the Sixth Schedule] PROVIDED ALWAYS that the Management Company shall not be responsible for any inconvenience or loss occasioned by the failure or breakdown of any such services or for any loss or damage occasioned by negligence or default of the Management Company its agents or employees in regard to such services or the fulfilment of its obligations."

30. The Landlord's covenants are contained in clause 6 of the lease. It covenants to give quiet enjoyment (6.1), to incorporate similar regulations to be observed by the tenant in every lease of a flat in the building (6.2) and to observe or procure the observance of the tenants' regulations in respect of any parts of the building which the landlord may retain or which may come into its possession subsequently.

31. By clause 6(4) the landlord covenants

> "That the Landlord will at the written request of the Tenant or any mortgagee of the Tenant enforce by all means available to the Landlord at the entire cost of the Tenant the covenants entered into by the Management Company and the tenants of the flats in the Estate PROVIDED THAT:
>
> (a) The Landlord shall not be required to take or continue any action or incur costs and expenses under this sub-clause until such security as the Landlord in the Landlord's reasonable discretion may from time to time require has been given by the Tenant or the Tenant's mortgagee requesting action.
>
> (b) The Landlord may at the Landlord's reasonable discretion require the Tenant or the persons requesting action at their expense to obtain for the Landlord from the Counsel nominated by the Landlord advice in writing as to the merits of the contemplated action in respect of allegations made in that event the Landlord shall not be bound to take action unless Counsel advises that the action should be taken and that it is likely to succeed.
>
> (c) The Tenant shall join in any action or proceedings arising out of this sub-clause if so required by the Landlord.

(d) The Tenant shall indemnify and reimburse the Landlord for costs and expenses reasonably and properly incurred by or awarded against the Landlord arising out of this sub-clause (including reasonable reimbursement for the time spent by the Landlord or any agent or servant of the Landlord)."

32. It is clear that the obligation to provide services is imposed upon the management company. Graycliffe as landlord is under no obligation to become involved in the provision of services other than in the case of default by the management company and then only on the basis of specific conditions. There is no suggestion that Graycliffe have been asked to become involved in this way. For that reason, and also because Graycliffe took no part in the payment or receipt of service charges, Graycliffe should not have been added as a respondent in the LVT proceedings.

33. I turn to Mr Barton's submission that the Lands Tribunal appeal should continue between the leaseholders and the management company. I consider that such an action would constitute an abuse of process. The position of both parties is identical, so there would be no dispute for the Tribunal to determine. In the result I dismiss the appeal. The decision of the LVT is not binding on Accent or Graycliffe. There was no application for costs and I make no order on the subject.

34. I would make two additional observations. The first is that this is the fifth hearing by a court or tribunal relating to substantially the same subject matter. Each hearing will have resulted in significant expenditure, both private and public, and each has been completely unsuccessful. Mr Barton has now embarked on a sixth instalment of litigation, this time on behalf of the management company. In doing so, he is exposing the company to the risk of significant costs. Prima facie Mr Barton would have no personal responsibility for such costs since he is no longer a shareholder. In the course of the hearing I recommended to Mr Barton that the management company should seek legal advice before taking any further steps in the arbitration and I reiterate that recommendation now.

35. The second observation relates to the LVT's decision to grant permission to appeal. I consider that decision to have been inappropriate. The LVT made 36 individual adjustments to the amounts claimed. Its permission to appeal was unconditional and no reasons were given. The effect of the decision was to authorise the complete re-hearing of the dispute.

36. The Lands Tribunal's approach to the grant of permission to appeal against the decision of a Residential Property Tribunal is set out in its Practice Directions dated 11 May 2006. The relevant paragraphs are as follows:-

"6.8 **Approach of the Lands Tribunal to the grant of permission**

On the application form applicants are asked to specify whether their reasons for making the application fall within one or more of the following categories:

(a) the decision shows that the RPT wrongly interpreted or wrongly applied the relevant law.

(b) The RPT took account of irrelevant considerations, or failed to take account of relevant consideration or evidence, or there was a substantial procedural defect.

(c) The point or points at issue is or are of potentially wide implication.

6.9 The application must make clear whether the appellant is seeking

(i) an appeal by way of review, or

(ii) an appeal by way of review, which if successful will involve a consequential re-hearing, or

(iii) an appeal by way of re-hearing.

Unless the application otherwise specifies, the application will be treated as an application for an appeal by way of review.

6.10 The Tribunal will grant permission to appeal only where it appears that there are reasonable grounds for concluding that the RPT may have been wrong for one or more of the reasons (a) to (c). In considering whether to grant permission on such grounds the importance of the point both to the decision itself and in terms of its wider implications will be a factor to be taken into consideration, in determining the proportionality and expedience of permitting an appeal to proceed. Where a successful appeal by review will necessitate a re-hearing, the Tribunal will have regard to the scope of such re-hearing in considering the proportionality of granting permission."

37. My understanding is that LVTs do in general adopt a similar approach when considering applications for permission to appeal, and it is unfortunate that the LVT appears not to have done so in this case.

38. Finally, I direct that copies of this decision be sent to each of the appellants represented by Mr Barton. They are:

	Flat
Christopher Woodcock & Angela Woodcock	1
Nicholas Nelson Lindon	2
Carolyn Hobday	3
Dean Harold Dickinson & Melissa Jane Dickinson	4
Timothy J Wilson	5
Michael James Watson Knight & Sally Knight	6
Colin Groves Warburton	7
Richard James Ponsford & Angela Elizabeth Ponsford	8

Francis Peter Charles Farmer & Anne Elizabeth Farmer	11
Mark Sawyer & Virginia Sawyer	12
Manish Patel & Dimple Patel	14
Kenneth William Armer & Margaret Mary Armer	15
Christina Maria Peers	16
Keith Barton	21

Dated 17 September 2008

N J Rose FRICS