

that steps should be taken against an allegedly recalcitrant member, he may refer the matter to the Disciplinary Panel for it to consider whether it should impose interim measures. This step is usually taken if the Head considers that there is a matter of public interest involved.

The first attempt by the Head fell at the first hurdle and was dismissed without any substantive hearing of the embryonic case against the subject member.

The Rules simply state that:

"..... notice of the hearing [shall be served] ... on the [member] with reasonable notice"

The questions arose: what constitutes "notice"; how much detail should such a notice include of the alleged breaches; how much detail should the notice describe of the penalties which the member could face; what would be "reasonable" notice. Against the backdrop of the enshrined right to a fair and public hearing, the fundamental issue was: had this member been adequately notified of the RICS' case against him such that he could prepare properly to answer the same.

In the instant case the notice of the hearing was contained in a letter in which the fact that a hearing was to take place was buried in the fourth paragraph of the first page. The letter did not mention the time at which the hearing would start, whether the member needed to do anything prior to the hearing, what the powers of the Disciplinary Panel would

be. Fortunately, the RICS prompted the member that a hearing was about to take place.

At the hearing the Disciplinary Panel heard submissions as to the inadequacy of the notice. After consideration it determined that the letter fell far short of what would be expected if a member's human right to a fair and public hearing was to be respected. Several matters which ought properly to have been included in the letter were identified, the most fundamental of which was that it should have been headed "Notice of Hearing"! The Disciplinary Panel stated that it would have expected the letter: to make it clear exactly what the nature of the RICS' case was and on what evidence it was relying; to have enclosed copies of any relevant documentation; to inform the member that he must respond to the charges even if he chose not to attend the hearing; to outline the range of interim measures available; to confirm that the decision was for the Disciplinary Panel to make not the RICS to dictate. The conclusion reached was that, in this case, the letter did not constitute the notice described in the Rules and the hearing could not proceed.

This is just one example of the many lacunas to be found in the 2007 Rules. So the next time a Surveyor client seeks your advice in this area, remember that many are left to explore....

Lisa A Sinclair



Forthcoming Seminar:

Tuesday 20th November 2007 at 6pm in Chambers

Andrew Butler & Mark Loveday on:

Renewing Business Tenancies: Tips and Pitfalls

1.5 CPD

To book a place please contact Susan Yacoub by email at

syacoub@tanfieldchambers.co.uk or 0207 421 5300.

For enquiries about property law advice or representation, please contact Kevin Moore, Senior Clerk by email at kmoore@tanfieldchambers.co.uk or on 020 7421 5300.

Please see our website for more details and individual profiles at www.tanfieldchambers.co.uk

Tanfield Chambers' dedicated conference facilities are readily accessible by the mobility-impaired. Please contact the clerks to agree fees in advance, whether on a fixed or hourly rate. Feedback on our service is welcomed and should be directed to the Senior Clerk, Kevin Moore. A copy of Chambers Complaints' Procedure is available on our website or on request.

THE PROPERTY GROUP

- Geraint Jones QC
- David Berkley QC
- Paul Staddon
- Mark Dencer
- David Daly
- Christopher Coney
- Charles Joseph
- Mark Loveday
- Michael Buckpitt
- Philip Rainey
- Phillip Aliker
- Lisa Sinclair
- Nicholas Isaac
- Andrew Butler
- Christopher Heather
- Mark Walsh
- Timothy Polli
- James Fieldsend
- Alejandra Hormaeche
- Marc Glover
- Ellodie Gibbons
- Adrian Carr
- Carl Fain
- Tom Carpenter-Leitch
- Tim Hammond
- Amanda Gourlay
- Andrew Sheftel
- Aisling Dwyer
- Louise Mankau
- Katherine Harmer

Property Group Newsletter

Issue 2 - Autumn 2007

As the nights draw in and another year winds its way to an end, we thought we would give you a quick update on some of the issues that have been discussed in Chambers recently. Since our last newsletter, Geraint Jones QC has been made Head of Chambers and I have taken over stewardship of the Property Team. The latest edition of the Legal 500 has recently been published with the Property Team moving up the rankings and I am proud that we have been described as having pushed ahead this year with excellent clerks and a strong range of property juniors – although we were all somewhat surprised that Michael Buckpitt was described as the “Daniel Craig of property law”!

Philip Rainey

ISLINGTON LONDON BOROUGH COUNCIL V LUCY SHEHATA ABDEL-MALEK

LRX/90/2006

Decision of A J Trott FRICS dated the 7 August 2007

In a recent appeal brought before the Lands Tribunal, the Tribunal was asked to consider:

- (i) the requirements of the “old” consultation procedure prescribed by s.20 of the Landlord and Tenant Act 1985 (“the 1985 Act”) which applies to qualifying works undertaken prior to the 31 October 2003 (i.e. before the coming into force of the amendments to the procedure brought about by the Commonhold and Leasehold Reform Act 2002 (“the 2002 Act”)); and
- (ii) the degree of information to be included in a notice served under s.20B of the 1985 Act, which provides:
 - (1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.
 - (2) Subsection (1) shall not apply, if within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

The appeal followed a decision of the

LVT, in favour of the respondent lessee, that the local authority had not:

- (i) followed the correct consultation procedure prescribed by s.20 of the 1985 Act; and
- (ii) demonstrated that relevant costs had been incurred at the date of service of a notice under s.20B(2) of the 1985 Act.

Facts

The case arose out of a programme of cyclical repairs; enhancements; and window replacement that the local authority proposed to carry out at four different residential blocks within the Borough.

The local authority prepared a specification of works covering all four blocks with the intention of granting a single contract for the works. The prepared specification and an accompanying tender form were sent to six contractors; five of the contractors submitted tenders.

In due course the local authority purported to serve on the respondent lessee a notice under s.20 of the 1985 Act.

The notice:

- (i) described the work that was to be undertaken at the respondent lessee’s block;
- (ii) specified the respondent lessee’s estimated contribution;
- (iii) was accompanied by two pages of the complete tender from each contractor that had submitted a bid, which in each case gave the total amount of the tender for all four blocks but did not give separate figures for the individual blocks. In respect of the tender from the lowest bidding contractor there was a summary of the tender for each block

Thereafter the local authority accepted the contractor who had submitted the lowest tender and the works to the four blocks began. Under the local authority’s contract with the contractor three stage payments were approved.

After the works had been carried out to the respondent lessee’s block and after the date for the third and last stage payment under the contractor’s contract, the local authority wrote to the respondent lessee enclosing an estimated invoice for the works. The letter stated that the figure was based on the information contained in the s.20 notice that they had issued previously. It was the local authority’s intention to rely on this letter for the purposes of s.20B of the 1985 Act.

About five months after the local authority’s letter practical completion of the works (in total) took place and one year later the defects liability period expired. Stage payments to the contractor continued to be approved (notwithstanding the terms of the contractor’s contract) up to seven and half months after the third and final date provided for in the contract.

The decision of the LVT

In respect of the local authority’s purported s.20 notice the LVT made the following findings:

- (i) the local authority had failed to provide at least two estimates within the s.20 notice as required by s.20(4);
- (ii) the forms of tender did not provide any detailed breakdown of the costs for each building; and
- (iii) whilst there was a breakdown for the successful contractor, the respondent lessee had no way of assessing the other tenders in relation to her building and therefore the tenders did not comprise proper estimates as

required by s.20(4)(a)

Although the LVT's findings in relation to the s.20 notice disposed of the matter, they went on to consider in the alternative the validity of the local authority's letter served with the intention of complying with s.20B of the 1985 Act. In this respect the LVT found that the local authority had not shown that the relevant costs as stated in that notice had been incurred at the date of the letter and therefore the s.20B notice was invalid and unenforceable.

The decision on appeal

In respect of the issues relating to the purported s.20 notice the Lands Tribunal determined on the appeal that:

- (i) It was incumbent upon the local authority to provide the respondent lessee with copies of all of the estimates that it had obtained for the works to her block; this it failed to do.
- (ii) It was only in respect of the successful tender that details of the estimated cost of the works to the respondent lessee's block were provided. However this was done by means of a summary rather than copying the actual estimate. A landlord should copy the actual estimates obtained and not provide a summary of them – *Richmond Housing Partnership v Ball and Others* (6 December 2004, unreported).
- (iii) The purpose of s.20 is to give a tenant sufficient information by way of copy estimates to be able to compare and make observations on the estimates for those works for which he is liable to contribute by way of a service charge. Such information is required in respect of all tenders and not merely the lowest. It was not relevant to the appeal that to provide copies of the actual estimates would be contrary to the local authority's policy and would cause it administrative difficulty.

In respect of the issues relating to the purported s.20B notice the Lands Tribunal determined on the appeal that:

- (i) the notification required under s.20B(2) is in respect of costs that have been incurred and not costs that are to be incurred. The use of the passive past tense in s.20B limits the relevant costs to those costs that have been incurred.

- (ii) The 18 month limitation period contained in s.20B does not apply to any part of the relevant costs that are yet to be incurred.
- (iii) For a valid s.20B notice it is necessary to show: (a) that such relevant costs have been incurred by the date of the notice; and (b) that the notice itself stated this to be the case.
- (iv) There was a lack of evidence about what costs were incurred and when in respect of the respondent lessee's block.
- (v) The letter served by the local authority (upon which it intended to rely for the purposes of s.20B) did not state that it was a notice under s.20B(2) and it referred to an estimate of costs both in the letter and in the attached "estimated invoice". The letter contained no reference to or analysis by the local authority of what costs it had actual incurred at the time of the letter. The letter provided no new information to what had been given under the earlier purported s.20 notice.
- (vi) The submission that s.20B does not require the amount of the costs to be specified was rejected. The purpose of the section is to give warning of a bill for expenditure and to enable the tenant to set aside provision to meet it – *Gilje v Charlgrove Securities* [2004] 1 All ER 91. A tenant will be unable to budget for known (incurred) expenditure unless the amount of the costs incurred is identified in the s.20B(2) notice. It is not sufficient to rely on the estimated costs contained in a s.20 notice as these are estimated costs to be incurred rather than costs incurred.
- (vii) Although it was on the evidence probable that costs had been incurred on the respondent lessee's block by the date of the letter intended to comply with s.20B, and that the respondent lessee was aware of this and that she had sufficient information before her following the service of the purported s.20 notice to budget and provide for her estimated contribution to the service charge, these matters could not vitiate the LVT's decision that the local authority had not shown that the costs as stated in the s.20B notice had been incurred at that date. The costs referred to by the local authority in its notice were the

estimated costs to be incurred. The notice repeated the information that had been given in the s.20 notice but this did not satisfy the particular requirement of s.20B to identify the costs that had been incurred. Whilst the local authority could probably have identified the costs incurred at the date of its letter it had failed to do so.

Practice Points

The decision is materially of relevance to the points made in relation to s.20B.

The relevance of the s.20 issue is limited to qualifying works undertaken prior to the 31 October 2003. This is because of the changes to the consultation procedure brought about by the Commonhold and Leasehold Reform Act 2002 and the regulations made thereunder.

In relation to s.20B the importance for landlords is that thought must be given to the contents of the notice. Where the relevant costs to be included in the notice form part of a wide scale programme of works it is necessary for landlords to carefully analyse the extent of the works for which each paying tenant is liable for and determine in respect of that work what costs have actually been incurred. Landlords will benefit from a well organised system of management which readily identifies where costs are being expended and how and when they are being incurred. Any notice to be served under s.20B must:

- (i) state that it is a notice served under s.20B(2);
- (ii) state that costs have been incurred that the tenant would subsequently be required under the terms of his lease to contribute to by the payment of a service charge; and
- (iii) specify the actual amount of costs incurred

James Fieldsend

*For further information on the material statutory provisions and the law and practice relating to service charges, see **Service Charges and Management: Law and Practice** written by Tanfield Chambers and published by Thomson/Sweet & Maxwell under their Practitioner Series*

JUST THE BEGINNING

Old hands always say that obtaining an order for specific performance is only a beginning and *Ahmed and Ahmed v Wingrove* [2007] EWCH 1177 (Ch) was no exception. In 2006, an Order was made on Mr Wingrove's counterclaim ordering specific performance of the sale

of a parcel of building land, see [2006] EWCH 1918 (Ch). The parcel in question was only part of a plot owned by the Ahmeds and its sale had the effect of isolating a small part of a plot to which access was only afforded by a footpath. There was no express reservation of

a vehicular, or any other, way over the parcel. The order was resisted on the bases that the agreement containing the option was void for uncertainty, that the conditions precedent to the options being exercised had not been satisfied, that the option had been exercised out of time

and that the option agreement should be rectified to provide that the option was to be exercised at earlier date. All of these arguments were rejected and the Court set a date for completion and made other consequential directions.

Prior to the date set for completion, the Ahmeds erected fencing around the parcel and built a gate into that fencing opening onto the smaller retained plot. Significantly, a motor vehicle was left on this plot. The Ahmeds maintained that the smaller plot enjoyed a way over the parcel and refused Mr Wingrove access to the parcel to ensure that the new fences had been built in the correct positions.

When the set date for completion came, Mr Wingrove failed to complete arguing that the issues relating to the position of the new fences and the asserted way of necessity needed first to be resolved. The Ahmeds refused to communicate after that date arguing that the Order for specific performance had been discharged as time for its performance was of the essence. The matter returned to Court.

The Ahmeds argued that as time was of the essence for the exercise of an

option so time was of the essence for its subsequent completion, that there was an implied reservation of a way over the parcel and that there was no evidence that the new fencing encroached on the parcel. In these circumstances the Ahmeds had the right to treat the Order as discharged and they wanted their costs of the earlier hearing when specific performance was ordered against them.

Mr Wingrove argued that once an order for specific performance had been made the parties' contractual rights in respect of time for performance were displaced. Whether or not to impose a sanction if an order is not complied with is a matter for the discretion of the Court. It was not open to an innocent party, where the other side has failed to complete, to terminate the contract as of right even if time was of the essence. In fact, time was not of the essence either under the terms of the contract or any order of the Court. The Court's discretion should be exercised in favour of Mr Wingrove because he was justified in not completing while the position of the fence and the assertion of a way were not resolved. Mr Wingrove should be allowed, prior to completion, to see that the fence was correctly

positioned and a declaration that there was no right of way. The only way that could be impliedly reserved was by a way of necessity and there was no necessity on the facts of the instance case. *Hillelv Christorides* (1991) 63 P&CR 301 should not be followed because in that case there had been a breach of a peremptory order to complete that justified the order for specific performance being discharged.

In a carefully reasoned judgment, Mr Michael Furness QC, sitting as a Deputy High Court Judge, accepted Mr. Wingrove's arguments and allowed Mr Wingrove access to the parcel and the remainder of the plot to ascertain the position of the fence, declared that there was no right of way over the parcel and set a new date for completion but making time of the essence. The Deputy High Court Judge gave Mr Wingrove his costs on the basis that the Ahmeds had acted unreasonably in refusing access to measure out, even though they were not legally obliged to afford such access, and in maintaining an unarguable claim to a right of way.

Paul Staddon

Paul Staddon acted for Mr. Wingrove

PROCURING AN ADVANTAGE

In *OBG Ltd. -v- Allan* [2007] 2 WLR 920 the House of Lords clarified the law in relation to two of the so-called "economic torts", namely procuring breach of contract ("procurement"), and causing loss by unlawful means ("unlawful means"). Reference should be made to the decision for a full statement of the ambit of each tort, but broadly, procurement has the effect of making A liable to B if A causes C to breach its contract with B, while unlawful means results in such liability if A performs, with the intention of harming B, an act which is unlawful vis-à-vis C.

Traditionally, the economic torts have surfaced in trade disputes, but it is interesting to consider what application they could have in a property context. Their particular strength lies in their capacity to cut across the kind of tripartite situations which frequently characterise property disputes. It is notable that all three of the conjoined appeals in *OBG* (one of which was the well-known dispute between OK! and Hello! over the Michael

Douglas/Catherine Zeta-Jones wedding photographs) had property or intellectual property aspects.

An example of the potential application to property law is given by one of the early cases considered by the Lords in *OBG*, *Tarleton -v- M'Gawley* (1790) 1 Peake NPC 270. In *Tarleton*, the captain of a ship at anchor off west Africa fired cannon shots at local traders who were using canoes to approach and do business with a rival merchant vessel. This was actionable by the rival vessel as unlawful means; had the captain knowingly used the same tactic to prevent the delivery of goods under a concluded contract, it would, Lord Hoffmann suggested, have constituted procurement as well. A modern, land-based parallel involving neighbouring businesses would be easy enough to imagine.

These causes of action could also repay careful consideration in a variety of other property-related situations. A landlord might well be able to recover lost rent

from a person whose harassment of his tenant has caused him to vacate. The holder of an option to buy land could claim directly against a rival buyer who purchases in disregard of his right. And a head landlord who commits an act or omission which puts his tenant in breach of a sub-lease, say by allowing insurance to lapse or causing disrepair, could find himself directly answerable to the sub-tenant, notwithstanding considerations of privity of contract or estate.

While it would always be necessary to establish the requisite degree of knowledge and intent on the part of the wrongdoer, it can be seen that these torts could open up causes of action where it might have seemed that none existed. The extent of their usefulness in a property context remains to be seen.

Andrew Butler

SURVEYORS BEWARE!

There are some 160,000+ firms of Surveyors operating in the UK of which only a handful, some 3,000 handle clients' money. Not surprisingly, therefore, this makes the misuse or misappropriation of that money ring major alarm bells with

the RICS. The RICS Rules of Conduct in every edition emphasise that any breach which concerns clients' money will lead to disciplinary proceedings.

However the operation of the Disciplinary

Rules issued in June 2007 has already disclosed various lacuna.

The disciplinary process may incorporate 2 stages: interim measures; full hearing. If the Head of Regulation decides