Case No: A3/2013/1718

Neutral Citation Number: [2014] EWCA Civ 96

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT, CHANCERY DIVISION
MR JUSTICE MANN
CH20120456

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12th February 2014

Before :

LORD JUSTICE PATTEN
LORD JUSTICE LEWISON
and
LADY JUSTICE SHARP

- -

Between :

MORSHEAD MANSIONS LTD	**Appellant**
- and -	
MR DI MARCO	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Mr Philip Rainey QC & Mr Edward Hicks (instructed by **Payne Hicks Beach**) for the **Appellant**
Mr Mark Tempest (instructed by **Bar Pro Bono Unit**) for the **Respondent**

Hearing date : 6th February 2014

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Judgment

Lord Justice Lewison:

Introduction

1. Section 21 of the Landlord and Tenant Act 1985 entitles a tenant to require his landlord to supply him with a written summary of costs which will form part of a service charge. If so required the landlord must comply with the request within one month. Section 22 entitles a tenant who has received such a summary to require the landlord to afford him reasonable facilities for inspecting the documents supporting the summary. The landlord must comply with that request within two months. Failure to comply with these obligations without reasonable excuse is a summary offence punishable with a fine. The question raised by this appeal is whether the tenant is entitled to ask a civil court to grant a mandatory injunction to compel the landlord to comply with those obligations. HH Judge Hand QC answered that question "No"; but on appeal Mann J disagreed and answered it "Yes". His judgment is at [2013] EWHC 1068 (Ch); [2013] L & TR 27.

2. The landlords now appeal. Their appeal was presented by Mr Philip Rainey QC and Mr Edward Hicks. Mr Mark Tempest, appearing *pro bono*, presented Mr Di Marco's response.

3. Sometimes an Act of Parliament makes it clear whether a civil remedy is available in addition to a criminal sanction. For example section 1 of the Protection from Harassment Act 1997 prohibits harassment. Section 2 creates a criminal offence; and section 3 creates a civil remedy. Conversely sections 2 to 8 of the Health and Safety at Work etc Act 1974 impose duties on employers, but section 47 (1) (a) makes it clear that there is no civil liability for breach of those duties. Sometimes, as in the Landlord and Tenant Act 1988, Parliament creates a civil remedy but imposes no criminal sanction. The problem arises where, as here, the sections in question create a criminal offence, but are silent about the availability of a civil remedy. In such cases, as the judge rightly said, the question is one of interpretation of the statute as a whole.

4. For the reasons that follow I agree with the decision of HH Judge Hand QC and would allow the appeal.

The relevant facts

5. Mr Di Marco is the lessee of Flat 2 Morshead Mansions in Maida Vale. The lessor is Morshead Mansions Ltd. One of the terms of Mr Di Marco's lease required him to take up and retain a share in the landlord company. So the relationship between Mr Di Marco and Morshead Mansions Ltd is twofold: he is both a tenant of the company and a member of the company.

6. Under the terms of his lease Mr Di Marco is required to pay a service charge. The Fourth Schedule to the lease contains the relevant procedure. If so required by the landlord Mr Di Marco must pay four quarterly payments in advance and on account of the service charge. As soon as practicable after the end of each accounting year:

> "the Landlord shall furnish to the Tenant an account of the Expenses and the Service Charge payable for that Accounting Year such account to be certified by the Landlord's auditors and to contain a summary of the expenses incurred during the Accounting Year to which it relates and the relevant details and figures forming the basis of the Service Charge."

7. However, in parallel with the lease article 16 of the company's articles of association entitle it to require its members to make contributions to the costs incurred by the company in implementing its objectives. The contribution is to be made:

> "… in such amounts and in such manner as the Members shall approve by ordinary resolution passed in general meeting"

8. In practice the company uses article 16 in order to fund its activities. In a previous round of litigation between these parties this court decided that sums which Mr Di Marco was obliged to pay in his capacity of shareholder rather than in his capacity of tenant were not "service charges" as defined by the Landlord and Tenant Act 1985: *Morshead Mansions Ltd v Di Marco* [2008] EWCA Civ 1371; [2009] 1 P & CR 23.

9. In 2003 and between 2007 and 2009 the company operated a dual system. It would send out both demands for service charge payable under the lease and also a demand for contributions levied under article 16. If the tenant paid the demand made under article 16 that would be treated as satisfying the demand for service charges under the lease. Since 2010 it has only used article 16 demands.

Mr Di Marco's claim

10. Mr Di Marco claims:

> "Order to require the claimant to provide the tenants with accounts for 2002 and Summaries of Costs for years 2003, 2004 and 2005 and to comply with the relevant part of the Landlord and Tenant Act 1985"
>
> "Order to require the Claimant to provide the defendant with facilities to inspect accounts receipts and other documents supporting the Claimant's summary of costs for 2007 pursuant to section 22 of the Landlord and Tenant Act 1985"
>
> "Order to require the claimant to provide the defendant and all the other tenants with a Summary of Costs for year 2009 and to comply with the relevant parts of the Landlord and Tenant Act 1985
>
> "In the alternative the defendant requests an order that the claimant shall substantially comply with the terms of sections 21 and 22 of the Landlord and Tenant Act 1985 with regard to its service charge expenses for year 2009."

The statutory landscape

11. The regulation of residential service charges has not been a legislative backwater. Regulation was first introduced by the Housing Finance Act 1972. Section 90 of that Act contained an obligation to provide a summary of costs in terms similar to those now found in section 21 of the Landlord and Tenant Act 1985. The Housing Finance Act 1972 was soon amended by the Housing Act 1974 which introduced a limitation on the recoverability of service charges; and then replaced by section 136 of and Schedule 19 to the Housing Act 1980, which made some changes to what had been section 90 of the 1972 Act. Those provisions were re-enacted in the Landlord and Tenant Act 1985, which has itself been amended by Part V of the Landlord and Tenant Act 1987, Part III of the Housing Act 1996, Part 2 of Commonhold and Leasehold Reform Act 2002 and the Housing and Regeneration Act 2008. Parliament has not been short of opportunities to create remedies for tenants.

12. The Landlord and Tenant Act 1985 was, at its inception, a consolidating Act. It is notable for a variety of legislative techniques, some of which quite clearly create obligations that have consequences in the civil law.

13. Section 3 of the Act imposes on a landlord a duty to inform the tenant of a change of landlord not later than the next rent day or, if that is within two months of the change, at the end of that period of two months. Section 3 (3) provides that failure to comply with that duty is a criminal offence. Section 3 (3A) spells out the consequences on the parties' civil rights and obligation. In short the outgoing landlord remains liable to the tenant for any breach of obligation under the tenancy (even if it takes place after the change of landlord) until such time as the tenant is notified of the change.

14. Section 8 of the Act employs a different technique. It is concerned with fitness for human habitation of houses. The technique that the draftsman has used in this section is to imply a condition of the tenancy that the house is fit for human habitation at the beginning of the tenancy, and an undertaking by the landlord to keep it fit for human habitation during the tenancy. Since these obligations take effect as deemed contractual provisions, it is clear that a civil remedy exists for their breach.

15. Likewise section 11 of the Act concerns repairing obligations in short leases. The technique this time is to imply a covenant by the landlord to keep certain parts of the dwelling in repair. Again, since these obligations take effect as implied covenants, it is plain that they give rise to civil remedies. Moreover section 17 of the Act deals in terms with the remedy of specific performance of repairing covenants.

16. Even in those sections of the Act which relate to service charges, there are some provisions that make it clear when a failure to comply with a statutory duty has civil consequences. Section 21B (introduced by the Commonhold and Leasehold Reform Act 2002) requires a demand for service charges to contain prescribed information about the tenant's rights and obligations. Section 21B (3) entitles a tenant to withhold service charges if that statutory duty is not complied with. Information is prescribed by the Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007.

17. There are other statutory provisions which also deal with service charges. Most importantly, section 19 of the Landlord and Tenant Act 1985 limits the recovery of

service charges to costs reasonably incurred, and where the costs relate to the carrying out of works or the provision of services, only if the works or services are carried out to a reasonable standard. This section makes it clear that it interferes with contractual rights and obligations because it provides that "the amount payable shall be limited accordingly". In addition, the landlord must comply with the consultation requirements of section 20; and if he does not then, unless the requirements are dispensed with by the appropriate tribunal, his recovery is limited to £250 per tenant.

18. It is, I think, also relevant to mention some further statutory provisions relating to service charges. Section 47 of the Landlord and Tenant Act 1987 requires a written demand given to a tenant of a dwelling to include the name and address of the landlord and, if that address is not in England and Wales, an address for service. If a written demand does not contain that information then section 47 (2) provides that any part of the amount demanded that consists of a service charge is to be treated for all purposes as not due from the tenant at any time before that information is supplied. This provision thus contains a civil sanction.

19. Section 84 of the Housing Act 1996 entitles a recognised tenants' association to appoint a surveyor to advise on matters relating to service charges. Schedule 4 to that Act confers certain rights on the surveyor. One of those rights is a right to require the landlord to permit him to inspect documents, exercisable by notice given to the landlord. Paragraph 5 of the Schedule provides that if the landlord has not complied with the notice within one month:

> ".. the court may, on the application of the surveyor, make an order requiring [the landlord] to do so within such period as may be specified in the order."

20. Paragraph 5 (3) imposes a time limit of four months within which the application must be made. It is notable that the application can only be made by the surveyor: it cannot be made by a tenant or by the tenants' association. In addition the appointment of a surveyor must be made by a recognised tenants' association: it cannot be made by a single tenant acting on his own.

21. Part V of the Leasehold Reform, Housing and Urban Development Act 1993 enables tenants to require a management audit. The right is exercisable by two or more qualifying tenants of dwellings; or if there is only one qualifying tenant of the relevant premises, by that tenant alone. The right is exercised by giving notice under section 80 of the Act. If the right is exercised then the auditor (who must be a qualified accountant or surveyor) is given certain rights exercisable on behalf of the tenants. These rights include a right to require the landlord to provide a summary of the kind described in section 21 of the Landlord and Tenant Act 1985; and the right to reasonable facilities for inspecting the documents supporting the summary. The landlord must comply with the auditor's request within one month of the giving of the notice: Leasehold Reform, Housing and Urban Development Act 1993, section 81 (1). Importantly, sections 81 (4) and (5) go on to provide:

> "(4) If by the end of the period of two months beginning with—
>
> (a) the date of the giving of the notice under section 80, or

> (b) the date of the giving of such a notice under section 79 as is mentioned in subsection (3) above,
>
> the landlord or (as the case may be) a relevant person has failed to comply with any requirement of the notice, the court may, on the application of the auditor, make an order requiring the landlord or (as the case may be) the relevant person to comply with that requirement within such period as is specified in the order.
>
> (5) The court shall not make an order under subsection (4) in respect of any document or documents unless it is satisfied that the document or documents falls or fall within paragraph (a) or (b) of section 79(2)."

22. Thus again we see in this legislation express provision enabling the court to make a mandatory order of the kind that the tenant seeks in our case. However, there are also limitations on this right. First, unless there is only one qualifying tenant in the relevant premises, the initial notice must command the support of at least two tenants. Second, the application for the mandatory order can only be made by the auditor (who is a qualified professional): it cannot be made by the tenants.

23. Sections 21 and 22 of the Act, by contrast, carry no explicit consequences for the parties' civil rights or obligations. The only explicit sanction for breach of the duties imposed by those sections is the potential for prosecution for the commission of a criminal offence. If convicted of an offence under either of those sections the maximum punishment is a fine not exceeding level 4 on the standard scale. At the moment that means that the maximum fine is £2,500. If the landlord is a body corporate, the directors or managers may also be liable to prosecution and punishment: Landlord and Tenant Act 1985 section 33. A prosecution for an offence under the section may be brought by a local housing authority: Landlord and Tenant Act 1985 section 34. In addition a tenant may himself bring a private prosecution under section 6 of the Prosecution for Offences Act 1985: see *R (Gujra) v Crown Prosecution Service* [2012] UKSC 52; [2013] 1 AC 484 for a historical review. In general a summary offence may not be tried unless the information is laid within six months from the time when the offence was committed: Magistrates Courts Act 1980 section 127 (1). The burden of proof is, of course, proof to the criminal standard: that is to say beyond reasonable doubt.

24. Lastly, to complete the picture, section 21A of the Landlord and Tenant Act 1985 (inserted by the Commonhold and Leasehold Reform Act 2002 and itself amended by the Housing and Regeneration Act 2008) will entitle a tenant to withhold service charges if the landlord fails to comply with his statutory duties under section 21 (itself substituted and amended by those Acts). The new provisions, although enacted, have not yet been brought into force.

Principles of construction

25. It is well settled that the question whether legislation which makes the doing or omitting to do a particular act a criminal offence renders the person guilty of that offence liable also in a civil action for damages at the suit of any person who thereby

suffers loss or damage, is a question of construction of the legislation: *Cutler v Wandsworth Stadium Ltd* [1949] AC 398. The starting point is a presumption that where an Act creates an obligation, and enforces the performance in a specified manner, performance cannot be enforced in any other manner: *Doe d Murray v Bridges* (1831) 1 B & Ad 847, 859. But where the only specified remedy is a criminal sanction there are exceptions to that general presumption. The first possible exception is where the legislation in question is passed in order to protect or benefit a particular class of individuals. Health and safety at work legislation may fall into this category. The second possible exception is where the legislation creates a public right and a particular member of the public suffers particular, direct, and substantial damage other and different from that which was common to all the rest of the public: *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173, 185. However, in the end it is still a question of construction of the relevant legislation.

26. Thus in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 731 Lord Browne-Wilkinson said:

> "The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action: *Cutler v Wandsworth Stadium Ltd* [1949] AC 398; *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173. However, the mere existence of some other statutory remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy."

27. Even if there is no sanction at all for failing to comply with a statutory duty, it does not necessarily follow that there is a private right of action: *St John Poulton's Trustee in Bankruptcy v Ministry of Justice* [2010] EWCA Civ 392; [2011] Ch 1. In deciding whether Parliament intended to create a remedy in private law the court must examine the statutory landscape as a whole: see *Poulton's Trustee in Bankruptcy v Ministry of Justice* at [44] and following.

28. In order to fall within the first exception the legislation must have been intended to confer on members of the protected class a cause of action sounding in damages

occasioned by the breach. The sorts of damage which would qualify are personal injury, injury to property or economic loss. The mere fact that someone in the class would be adversely affected by the breach of duty is not enough, unless he suffers damage that the law regards as recoverable damages: *Pickering v Liverpool Daily Post and Echo plc* [1991] 2 AC 370, 420. Mr Tempest submitted that it was not necessary for a breach of statutory duty to sound in damages before the court could infer that a civil remedy was intended. I do not accept that argument, which is, in my judgment, contrary to the clear reasoning in *Pickering*. That reasoning is consonant with the general principle that, with some exceptions, a tort is not complete until the victim has suffered a recoverable loss.

29. If as a matter of construction the legislation in question does not confer on the individual in question a right of action in damages, then the mere fact that the prohibited activity is a criminal offence does not entitle that person to an injunction to restrain the commission of the criminal offence. He is entitled to an injunction, if at all, in reliance on an independent cause of action at common law or in equity. It is a very unlikely intention to attribute to Parliament an intention (a) to legislate for the protection or benefit of a protected class, but (b) not intend to confer on members of the class a right to sue for damages yet (c) to intend that they should have the right to an injunction: *CBS Songs Ltd v Amstrad Consumer Electronics Plc* [1988] Ch. 61, 76-78. Mr Tempest accepted that this was so, and did not assert a right to an injunction based merely on the fact that a criminal offence had been committed. Conversely, as Mr Rainey accepts, if the legislation does confer on a member of the protected class a right to sue in damages, then in appropriate circumstances the court may grant an injunction in aid of that private right of action.

The judge's conclusion

30. The judge expressed his succinct conclusion at [23]:

> "I have come to a different conclusion to that reached by the judge below. In my view the sections create a duty owed to the tenants in respect of which the tenants have a direct civil enforcement remedy. It seems to me that tenants who have qualifying tenancies are a class of persons who suffer harm if there is a breach. The duties are not owed to the public at large. They are designed to achieve a situation in which that class of persons has certain information which members of that class need in order to be able to check that their interests in paying no more than they should pay are properly respected and given effect to. … They are the persons who will suffer if there is a breach …While the criminal sanctions provide an incentive to comply with the provisions, they are less likely to achieve the intended result (the production of records and information) than injunctive relief which is specifically framed and geared to the provision of the information… While there have been prosecutions under section 25 (in the present matter and in *Taber*, to give two examples) I do not consider it likely that Parliament intended that to be the only enforcement route. Nor does the prospective introduction of the additional sanction of the right to withhold rent support Mr Rainey's case as to

> Parliament's intention. It is an additional sanction, and no doubt useful in that it provides an additional incentive to keep the matters out of the courts completely, but it does not provide a useful pointer as to which courts the tenant has to go to in order to achieve what the tenant really needs. … In my view Parliament intended the duties to be enforceable in the same manner as other civil duties, that is to say by application to the civil courts."

Discussion

31. The answer to the conundrum is not easy, as the disagreement between HH Judge Hand QC and Mann J demonstrates. But I have come to the conclusion that HH Judge Hand QC was right. My principal reasons are as follows.

32. First, the only sanction that the Landlord and Tenant Act 1985 provides for a failure to comply with section 21 or 22 is a criminal sanction. It seems to me, therefore, that if another remedy exists it must be by way of necessary implication. Second, sections 21 and 22 (or their predecessors) have been on the statute book for over thirty years, and apart from increases in the maximum fine from time to time, no change of substance has ever been made to them. Third, during that same period Parliament has made many changes to the overall statutory regime for the regulation of residential service charges, so it cannot be said that the topic has been neglected. Fourth, during that same period Parliament has introduced a variety of civil remedies for tenants whose landlords fail to comply with statutory requirements but (until the recent amendments which are not yet in force) has not done so directly in relation to a failure to comply with section 21 or 22. Fifth, and this follows on from the fourth point, although it has been created piecemeal what we now have is in substance a statutory code. Sixth, Parliament has explicitly provided for the making of a mandatory order in the circumstances to which section 84 of the Housing Act 1996 and section 81 of the Leasehold Reform, Housing and Urban Development Act 1993 apply. The circumstances of the present case fall outside those sections. If Parliament has chosen to create a remedy in specific circumstances, it is very unlikely that it intended that same remedy to be available in different circumstances. Seventh, the Landlord and Tenant Act 1985 itself demonstrates a variety of techniques for imposing civil liability (e.g. implied conditions, implied undertakings and implied obligations), none of which apply to sections 21 or 22. Eighth, in revisiting this area of the law most recently, Parliament has provided the tenant with a civil remedy, namely a right to withhold service charge. But what it has not done is to give the tenant either a right to sue in damages or the right to a mandatory injunction.

33. In addition there are a number of other more minor reasons. First, it is plain that a failure to comply with sections 21 or 22 will not cause personal injury or damage to property. It is difficult to see what claim for economic loss could arise, given that the landlord is precluded by other provisions of the Act from recovering service charges which are unreasonable in amount. Mr Tempest however submitted that the tenant might incur costs; and that that was itself a recognised head of loss sounding in damages. He might incur legal costs in going, for example, to the leasehold valuation tribunal (where costs are not recoverable) when timely provision of the information would have avoided that expense. However, when the Landlord and Tenant Act 1985 was passed (and for many years afterwards) jurisdiction over service charge disputes

was given to the county courts, in which costs are recoverable. The jurisdiction is now exercisable (in England) by the First Tier Tribunal (Property Chamber) although in Wales it remains with the LVT. These different tribunals operate under different costs regimes. I accept that legal costs incurred in pursuing a third party can sometimes be recoverable as damages. But in our case the only (hypothetical) costs incurred are those in proceedings between the same parties. In general such costs are not recoverable as damages: see *Cockburn v Edwards* (1881) LR 18 Ch D 449, 459; *Ross v Caunters* [1980] 1 Ch 297, 324. The point can, I think, be tested this way. Suppose that a tenant makes a request which a landlord fails to comply with. The tenant then goes to the county court for an injunction, succeeds and is awarded his costs. Can he recover as damages the shortfall between his actual costs and his costs as assessed by the court? Mr Tempest accepted that he could not, in the light of the principles to which I have referred. But if he could not recover those costs, why should he be able to recover costs incurred in a different tribunal? Although the judge said that the tenants would suffer "harm" as a result of a breach of duty, this is no more than an "adverse effect" the sufficiency of which was rejected in *Pickering*. The possibility of irrecoverable costs is, in my judgment, too slender a basis upon which to infer that Parliament must have intended a tenant to have a civil remedy; particularly when the identity of the tribunal exercising powers over service charges has changed from time to time over the years without any change in the substance of section 21 or section 22. Sections 21 and 22 are, as Mr Rainey submitted, essentially procedural. Second, the question of reasonable excuse is only available as a defence in criminal proceedings. The statutory duty itself is strict. That makes it less likely that Parliament would have intended to create a civil liability shorn of that defence. Even if the question whether the landlord had a reasonable excuse went to a discretionary remedy such as the grant of an injunction, it could not affect a claim for damages, which is the primary remedy for breach of statutory duty. Third, the fact that the local housing authority is a prosecuting authority is some indication that Parliament expected that authority to enforce compliance. Fourth, many lessees (including Mr Di Marco) will have contractual rights to the provision of information. This is normal in leases of flats. In my judgment Parliament is likely to have had in mind the normal way in which leases of flats are drafted. Thus for most tenants of flats there is no need for a statutory remedy, since the contract will suffice. In our case Mr Di Marco has the benefit of a provision that as soon as practicable after the end of each accounting year the landlord "shall furnish" the tenant with a certified summary of the expenses incurred. If the landlord does not do that, then on the face of it, it is in breach of obligation. The breach will be complete (at the earliest) at the end of the financial year in question. Since the lease is made by deed, Mr Di Marco has a period of twelve years in which to bring a claim. In his Defence and Counterclaim Mr Di Marco pleaded a breach of the Fourth Schedule to the lease, but did not base his claim to relief upon that alleged breach of contract. Nothing in this judgment should be taken as expressing a view about the availability of relief based on that alleged breach of contract, rather than by reference to sections 21 and 22 of the Landlord and Tenant Act 1985. Fifth, where Parliament has provided that the maximum punishment for the offence is a fine not exceeding level 4 on the standard scale it is unlikely that Parliament also intended the landlord (and its directors) to be potentially liable, at the suit of a private individual, to a fine of an unlimited amount or, in an extreme case, up to two years imprisonment as a sanction for failing to comply with an injunction.

Result

34. Accordingly for all these reasons in my judgment Mann J came to the wrong conclusion. I would allow the appeal.

Lady Justice Sharp:

35. I agree.

Lord Justice Patten:

36. I also agree.