UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2014] UKUT 0503 (LC)
LT Case Number: LRX/55/2011

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – application by tenant under section 27A of the Landlord and Tenant Act 1985 for a determination of the service charges payable in respect of periods more than six years prior to the date of application – preliminary decision of LVT finding appellant time barred on basis of unreasonable delay – whether laches or Limitation Act 1980 applies to bar the application

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF A LEASEHOLD VALUATION TRIBUNAL OF THE LONDON RENT ASSESSMENT PANEL

BETWEEN:

ANDREW PARISSIS **Appellant**

and

BLAIR COURT (ST JOHN'S WOOD) MANAGEMENT LIMITED Respondent

Re: Flats 13 and 14 Blair Court,
2 Boundary Road,
London NW8 6NT

Before His Honour Judge Huskinson
Sitting at: The Royal Courts of Justice, Strand, London WC2A 2LL
on
4 November 2014

The Appellant in person
Mrs Edelle Carr, Company Secretary of the Respondent on behalf of the Respondent

The following cases are referred to in this decision:
Warwickshire Hamlets Limited v Gedden [2010] UKUT 75(LC).

DECISION

Introduction

1. This is an appeal against the preliminary decision of the Leasehold Valuation Tribunal (LVT) dated 11 April 2011. In accordance with written directions given by the LVT on 15 February 2011 the sole preliminary question was whether the appellant was legally entitled to make these two applications to challenge service charges relating to the years 2001, 2002, 2003, 2004 and/or 2005 or whether he was out of time. The LVT decided that the length of time that the appellant had taken to bring the proceedings was unconscionable, that the respondent would be significantly prejudice by this delay, and that the LVT therefore had no jurisdiction because the appellant was time barred from 10 November 2004 – 10 November 2010, being the date of the applications.

2. The reason given for the LVT's decision was summarised as follows in paragraph 17:

> "The reason for this decision is two-fold; both the unreasonable delay on the part of the Appellant in making this application and the clear view of the Tribunal that there is no question of any trust having arisen in relation to the any (sic) monies collected in respect of the major works or the legal charges as these are each distinctly identifiable costs."

3. The appellant holds two separate flats, namely flat 13 and flat 14, at Blair Court upon long leases which make provision for the payment of service charge as an additional rent. There is before me a lease (in fact an underlease) dated 5 February 1974 in respect of flat 13 whereby that flat was demised for 85 years from the 27 March 1971 (except the last 22 days thereof). The lease is not in modern form and the provisions for the payment of service charge are brief.

4. There is some question between the parties as to when the appellant became the owner of the two flats and whether this was, in respect of at least one of the flats, after the commencement of the period in respect of which an application under section 27A of the Landlord and Tenant Act 1985 was made. However nothing turns upon that point for the purposes of the present decision.

5. It appears that two separate applications were made by the appellant to the LVT. The LVT records the date of the applications as being 10 November 2010. At the hearing of the appeal I was however told that both parties agreed that the relevant date was 6 December 2010.

6. It appears that the appellant has made previous applications under section 27A to the LVT in respect of service charge payable for his flats which led to decisions from the LVT in August 2008 and in June 2010. These decisions involved consideration of the respondent's consultation procedure in respect of major works under section 20.

7. As regards the matters that were the subject of the present applications the LVT in its decision of 11 April 2011 in paragraph 3 stated:

"The Tribunal identified the following issues to be in dispute:

(a) whether the Appellant is entitled to question whether or not the correct consultation procedures were followed in relation to major works in 2001 in the sum of £44,785 for external decorations, 2002 in the sum of £37,600 for unspecified works, 2003/04 for roof repairs in the sum of £54,943;

(b) satellite expenditure in 2004 in the sum of £13,579 and in 2004 in the sum of £8,388;

(c) whether the lease allows the charges of legal costs of £470 in 2001, £1,489 in 2002, £705 in 2003 and £2,732 in 2005;

(d) whether the Respondents were entitled by the construction of the Lease to recover costs on water supply charged, common parts heating, porter's desk telephone, paladin hire, porters and running costs of the porter's flat.

8. At a directions hearing the LVT ordered that there should be decided as a preliminary question the matter recorded in paragraph 1 above.

9. Permission to appeal to the Upper Tribunal was granted by the then President, George Bartlett QC, by a decision dated 5 August 2011 in the following terms:

"1. In the light of the decision of this Tribunal in *Warwickshire Hamlets Ltd v Gedden* (LRX/156/2008) an appeal against the LVT's determination that it had no jurisdiction as the application was time-barred would have a real prospect of success. It should be noted that an appeal against the decision in *Warwickshire Hamlets Ltd v Gedden* is due to be heard by the Court of Appeal on 12 or 13 October 2011. An appeal in the present case ought not to be set down for hearing before the Court of Appeal has given judgment.

2. The appeal will be by way of rehearing."

The hearing of the present matter was held back until resolution of the appeal in the *Warwickshire Hamlets* case. In fact that case ultimately was settled and no judgment from the Court of Appeal was given. Accordingly no authoritative decision from the Court of Appeal upon any question of limitation was given in that case. However the reason for the present case coming before the Upper Tribunal so long after the grant of permission to appeal is because the case was awaiting the final conclusion of the *Warwickshire Hamlets* case.

10. In an order of the Upper Tribunal giving directions dated 30 January 2014 the Deputy President observed that neither party currently had legal representation, that the issues in the appeal are complex and of importance, and that the parties may each wish to consider seeking legal advice or seeking pro bono representation. In the event neither party did so with the result that at the hearing before me the appellant appeared in person and the respondent was represented by Mrs Carr, its company secretary. Neither of them claimed any legal expertise.

11. In these circumstances I have concluded that this is not an appropriate case in which to attempt to give a detailed analysis of what if any limitation periods apply generally to applications under section 27A, whether by landlord or tenant.

The LVT's decision

12. The LVT noted that there was a history of dispute between the appellant and the respondent; that there had been two applications before the LVT in relation to consultation undertaken by the respondent in 2007 and 2010 in respect of major works undertaken in 2007 and CCTV works in 2009; and that in neither of those applications was any reference made by the appellant to any dissatisfaction with the works undertaken in earlier years. The LVT observed that the legal position in relation to how far a tenant can go back when challenging service charges is complicated and that there are a number of differing views by different Tribunals and the Lands Tribunal. The LVT observed that it did not consider it was bound by any such earlier decisions. The LVT concluded that section 21 of the Limitation Act 1980 was not applicable because the bulk of the dispute related to charges for major works in respect of which no trust arose. The LVT referred to two earlier decisions of an LVT and also to the decision of the Upper Tribunal in *Warwickshire Hamlets Limited v Gedden* [2010] UKUT 75(LC). The LVT concluded that it was clear there were no definitive rulings in relation to the question of limitation. The LVT referred again to the two separate earlier sets of proceedings brought by the appellant against the respondent under section 27A (being proceedings which did not challenge the consultation procedures adopted for the works referred to in paragraph 7 above). The LVT observed that if the present application were to proceed the respondent would be required to produce evidence of the correctness of the procedures adopted for the period 2001-2003/4 which would cause considerable prejudice in the view of the lack of documentation available and the length of time since the managing agents responsible were dismissed. In paragraph 17 the LVT concluded as follows:

> "The Tribunal has concerns that the Appellant is going on a fishing expedition in order to see if he can ascertain whether or not the correct procedure was followed. There is no evidence that he has any basis for the assumption that the correct procedures were not followed. The length of time that the Appellant has taken to bring these proceedings is unconscionable and the Respondents would be significantly prejudiced by this delay. The Tribunal therefore determines that the Tribunal has no jurisdiction, as the Appellant is time barred from 10 November 2004 to 10 November 2010, being the date of the application. The reason for this decision is two fold; both the unreasonable delay on the part of the Appellant in making this application and the clear view of the Tribunal that there is no question of any trust having arisen in relation to the any (sic) monies collected in respect of the major works or the legal charges as these are each distinctly identifiable costs."

The parties' submissions

13. At the hearing before me neither party wished to give any formal evidence on oath. The matter proceeded upon the papers before the Tribunal coupled with certain general discussion which, while of general background interest, does not assist on the determination of this preliminary issue. As far as concerns the submissions actually made upon the preliminary issue:

(1) The appellant relied upon and developed his statement of case. In summary he referred to his email of 5 March 2011 (which he contended the LVT had overlooked) which referred to an observation of the Law Commission to the effect that the Limitation Act 1980 does not contain a limitation period which explicitly applies to restitutionary claims. The email also referred to an earlier case in which the appellant was involved before the LVT concerning *Buttermere Court* (LON/00BK/LSC/2010/0767) in which the LVT had concluded that the appellant was not barred by any provision of the Limitation Act 1980 from advancing the claims made in that case. The appellant also referred to the decision of the Upper Tribunal in *Warwickshire Hamlets v Gedden*. He complained that the LVT was wrong in paragraph 17 of its decision in observing that there was no evidence that the appellant had any basis for the assumption that the correct procedures were not followed by the respondent. He pointed out that no evidence on these points had been put in for the purposes of the preliminary issue and this conclusion should not have been made in advance of evidence – he said that he would be able to provide the relevant documentation. He also relied upon another LVT decision in relation to *St George's Wharf (LON/00AY/LSC/2010/0286)*.

(2) On behalf of the respondent Mrs Carr argued that the LVT's decision should be upheld because the service charge under the lease was reserved as rent and therefore the six year limitation period under section 19 of the Limitation Act 1980 was applicable.

Discussion

14. I note the recognition in text books on the subject that there is doubt regarding the extent (if at all) to which the Limitation Act 1980 applies to an application to a leasehold valuation tribunal under section 27A and that there is recognition that different considerations may apply dependant upon whether the application is by a landlord or by a tenant. See *Commercial and Residential Service Charges* (Rosenthal and Others) at paragraph 42-21 and following; and see *Service Charges and Management* (third edition) Tanfield Chambers chapter 19.

15. I am only concerned with these two section 27A applications by this appellant, who is a tenant.

16. There is nothing before me to suggest (and the appellant did not seek to suggest) that monies obtained by the respondent for the major works during the relevant period between 2001 and 2004 were spent on anything other than these major works. No doubt the monies received for these works by the respondent from the tenants were held under the statutory trust imposed by section 42 of the Landlord and Tenant Act 1987. However this is not a case where it can be said that trust property received by a trustee has been converted to that trustee's use so as to engage section 21 of the

Limitation Act 1980. The case is different from the unusual facts which existed in the *Warwickshire Hamlets* case. To that extent I agree with the LVT's conclusion in paragraph 17 of its decision. On this point I adopt the following passage in paragraph 42-31 of *Commercial and Residential Service Charge*:

> "42-31. The facts in *Gedden* were, however, somewhat unusual and it seems unlikely that, where the relevant costs are simply determined to be unreasonable under section 19 or irrecoverable for some other reason (for example, due to a failure to follow consultation requirements), this could lead to the conclusion that the funds had been converted to the use of the landlord. It might be argued that, whenever the landlord settles a debt to a third party using service charge funds which are subsequently determined not to be payable, he has converted the funds to his own use since, otherwise, the debt would fall to be settled from the landlord's own pocket. That would appear to be an unwarranted extension of section 21(1), however, since, at the point of payment, the landlord would have no way of knowing that the service charges would subsequently be determined not to be payable on the basis of unreasonableness or otherwise."

17. The LVT in paragraph 17 determined that it had no jurisdiction because the appellant was time barred. I read this as simply a conclusion that the appellant was time barred and that therefore the appellant's applications did not fall to be considered further by the LVT, rather than actually a decision that the LVT had no jurisdiction to consider the section 27A applications at all.

18. The LVT concluded that the appellant was time barred because of "unreasonable delay". The LVT did not conclude that the appellant was time barred by virtue of any specific section of the Limitation Act 1980. This reference to "unreasonable delay" and the earlier reference to the length of time that the appellant had taken to bring the proceedings as being "unconscionable" suggests that the LVT was in effect applying the principle of laches, although not expressly doing so in so many words. However as pointed out in the *Warwickshire Hamlets* case in paragraph 60 the doctrine of laches cannot apply to a section 27A application because such an application is an exercise of a statutory right rather than a claim for equitable relief.

19. As regards Mrs Carr's argument that section 19 of the Limitation Act 1980 operates to bar the section 27A application because service charge under the present leases is reserved as rent, I cannot accept that argument. Section 19 provides:

> "No action shall be brought … to recover arrears of rent, or damages in respect of arrears of rent, after the expiration of six years from the date on which the arrears became due."

The appellant, by making his applications under section 27A to the LVT, was not bringing an action to recover arrears of rent or damages in respect of arrears of rent. Instead the appellant was making applications to the LVT for a determination of what was properly payable by way of service charge for a particular period. Accordingly the applications are not barred by section 19.

20. Section 9 of the Limitation Act 1980 provides:

> "(1) An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued."

In my view an application by a tenant under section 27A to seek a determination by an LVT as to how much is payable in respect of service charges cannot be said to be an action to recover any sum recoverable by virtue of any enactment. If in the present case the appellant were able to establish that the amount of service charge properly payable for a particular period was less than the amount he actually paid, then he may be able to make a restitutionary claim for repayment of the excess. If eventually a restitutionary claim is made the claim will not be for recovery of a sum recoverable by virtue of an enactment. It will be a restitutionary claim for recovery of an overpayment.

21. Section 5 of the Limitation Act 1980 provides:

> "An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued."

Halsbury Law of England (fifth edition) volume 68 states at paragraph 957:

> "It seems that restitutionary claims for money received may also be regarded as founded on a simple contract."

If in the future the appellant succeeded in establishing there had been an over payment and if he brought a restitutionary claim in the county court for repayment of this overpayment the limitation period in section 5 would appear to be applicable, but questions could then arise under section 32 as to whether the action was for relief from the consequences of a mistake and, if so, as to the date when the appellant discovered the mistake or could with reasonable diligence have discovered it. That is a matter for the future in any restitutionary claim which the appellant might make. Also an application under section 27A by a tenant is not necessarily made with a view to the making of a claim in restitution. Instead the tenant may wish to have the determination of the LVT as a precursor to an application under section 24 of the Landlord and Tenant Act 1987 for the appointment of a manager. Accordingly I conclude that section 5 of the Limitation Act 1980 does not bar the applications made under section 27A by the appellant. The appellant's applications under section 27A are not actions founded on simple contract.

22. Section 8 of the Limitation Act 1980 provides:

> "(1) An action upon a speciality shall not be brought after the expiration of 12 years from the date on which the cause of action accrued.
>
> (2) Sub-section (1) above shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act."

A speciality includes a statute, see *Halsbury's Laws* volume 68 paragraph 976. It is not necessary for me to consider whether an application under section 27A constitutes an action upon a speciality because, even if it did, the present applications would not be time barred because they were made within 12 years of the relevant date.

23. The LVT concluded that the delay between the relevant service charge years and the date on which the appellant eventually made the present applications would cause considerable prejudice to the respondent. The LVT also considered it to be significant that the appellant had made two separate applications under section 27A in relation to these premises in respect of later works to the block, but had not included the present complaints regarding these earlier service charge years. The LVT considered that the delay was unconscionable and unreasonable. In these circumstances it may be that, upon this matter being remitted to the LVT (as I conclude it must be) the LVT will give consideration, either of its own motion or because of an application to do so by the respondent, to the question whether the appellant's applications should be dismissed as being "frivolous or vexatious or otherwise an abuse of the process of the tribunal" within regulation 11 of the Leasehold Valuation Tribunals Procedure (England) Regulations 2003 or any relevant successor regulations. The LVT in the present case did not consider regulation 11. The Upper Tribunal cannot consider regulation 11 upon this appeal, not least because the necessary notice under regulation 11(2) has not been given to the appellant. As that is entirely a matter for the future I make no observations upon the merits of any argument which may in due course be advanced by the respondent to the effect that the present applications should be dismissed under regulation 11 as an abuse of the process of the Tribunal.

Conclusion

24. In the result I conclude that the LVT was wrong in finding that the appellant's applications were time barred. The appellant's appeal is allowed. The matter is remitted to the LVT, for more precisely to the First-tier Tribunal as successor to the LVT so that the First-tier Tribunal can consider the appellant's applications under section 27A.

25. At the conclusion of the hearing the appellant asked the Tribunal to make an order that the respondent shall pay to him an amount of £450 being the fee paid by the appellant to the Upper Tribunal in respect of these proceedings. The appellant has succeeded upon this appeal. However his delay in making these section 27A applications was the subject of criticism by the LVT and may give rise to an argument under regulation 11 (see paragraph 23 above). I have regard to the Tribunal Procedure (Upper Tribunal) Lands Chamber Rules 2010 Rule 10(6) and (7). In all the circumstances of the present case I conclude it would be just for the fee of £450 to be borne equally by the appellant and by the respondent. I therefore order the respondent to pay to the appellant £225 being one half of the fee paid.

Dated: 11 November 2014

His Honour Judge Huskinson