UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2010] UKUT 70 (LC)
LT Case Number: LRX/115/2008

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT - variation of lease - Landlord and Tenant Act 1987 sections 35 and 38 - whether the leases should be varied so as to require landlord to pay the tenants costs of variation - appeal allowed

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR WALES RESIDENTIAL PROPERTY TRIBUNAL

BETWEEN **BAYSTONE INVESTMENTS LIMITED** **Appellants**

and

MR S PERKINS AND OTHERS **Respondent**

Re: 1A, 2A, 3A and 5A Lady Margaret Court
Colchester Avenue,
Penylan, Cardiff

Before: HH Judge Jarman QC

Sitting at Cardiff Civil Justice Centre, 2 Park Street, Cardiff, CF10 1ET
on 23 February 2010

Dr Mohamed Gazi, a director of the appellant appeared on its behalf.
The respondents did not appear and were not represented.

No cases are referred to in this decision

DECISION

Introduction

1. This is an appeal from a determination dated 12 May 2008 of the Leasehold Valuation Tribunal for Wales (LVT) of an application made by the appellant under Part IV the Landlord and Tenant Act 1987 as the freeholder of a property known as Lady Margaret Court, Colchester Avenue, Cardiff. The property comprises seven shops with six maisonettes and a bedsit above. In 1989, long leases of the maisonettes were granted in common form, so far as material. It is common ground that the leases as granted made no provision for the landlord to pass on the cost of maintaining the common parts to the tenants and that accordingly there was no incentive for those parts to be properly maintained. The LVT varied the leases under section 35(2) of the Landlord and Tenant Act 1987 so as to make such provision, but also to provide that the landlord should pay the reasonable costs and disbursements of the tenants in connection with the deed of variation.

2. The appellant sought to appeal that decision on a number of grounds under section 175(2) of the Commonhold and Leasehold Reform Act 2002 and on 31 October 2008 His Honour Judge Huskinson granted permission to appeal by way of review in respect of the LVT decision as to the costs of the deed of variation but refused permission on all other grounds. This decision determines the appeal on that one ground.

Facts

3. As the LVT observed, there has been for many years an unfortunate history of litigation between the parties involving allegation and counter allegation on the one hand that the respondents have failed to make payments due under the leases and on the other that the appellant has failed to maintain insurance in respect of the property and to fulfil other financial obligations. However, all parties accepted before the LVT that the lack of incentive for the common parts to be maintained properly had led to a situation where such maintenance was lacking. The respondents accepted that such a state of affairs is unsatisfactory and that they were willing to make increased payments under the leases in order that the common parts should be properly maintained.

4. The view of the LVT, which has not been challenged, was that the property would benefit from what was referred to as a more “hands on” approach with regard to the management of the common parts and that the respondents would benefit in the long run by the improved condition of the property in terms of quality of life and possibly enhancement of the value of their leaseholds. It was for that express reason that the LVT declined to make an order for compensation under section 38(10) of the 1987 Act in favour of the respondents by reason of the variation.

5. Both parties asked for costs before the LVT, which declined to make such an order on the basis that both sides acknowledged that something needed to be done and it could not be said that either side had acted unreasonably.

6. However, in determining that the deed of variation should provide that the landlord should pay for the costs of variation, the LVT found that "…the landlord has brought this application and stands to benefit substantially as a result of this decision. It is only reasonable that the applicant should be responsible for all the costs involved in dealing with the variations to the leases and the registration at the Land Registry." In refusing permission to appeal on 17 July 2008 the LVT confirmed that the reasons for ordering the appellant to pay the costs of the variation were set out in the substantive determination as summarised above.

The Law

7. Section 35 of the Landlord and Tenant Act 1987 as amended by the Commonhold and Leasehold Reform Act 2002 provides so far as relevant as follows:

> (1) Any party to a long lease of a flat may make an application to a [leasehold valuation tribunal] for an order varying the lease in such a manner as is specified in the application.
>
> (2) The grounds on which any such application may be made are that the lease fails to make satisfactory provision with respect to one or more of the following matters, namely –
>
> …..
>
> (d) the provision or maintenance of any services which are reasonably necessary to ensure that the occupiers of the flat enjoy a reasonable standard of accommodation (whether they are services connected with any such installations or not, and whether they are services provided for the benefit of those occupiers or services provided for the benefit of the occupiers of a number of flats including that flat);…
>
> (3) For the purposes of subsection (2)(c) and (d) the factors for determining, in relation to the occupiers of a flat, what is a reasonable standard may include –
>
> (a) factors relating to the safety and security of the flat and its occupiers and of any common parts of the building containing the flat; and
>
> (b) other factors relating to the condition of any such common parts.

8. Section 38(1) provides that if, on an application under section 35, the grounds on which the application was made are established to the satisfaction of the LVT an order may be made varying the lease specified in the application in such a manner as is specified in the order.

Submissions

9. On behalf of the appellant it was submitted that the decision to order that the deed of variation should contain a clause whereby the appellant is responsible for the respondents' costs of variation is wrong in principle. It was pointed out that the observation by the LVT that the appellant would benefit substantially from the variation was not particularised. Moreover on this issue no account was taken of the benefit to the respondents and this is to be contrasted with the findings of the LVT in respect of its reasons for not awarding compensation or making an order for the costs of the hearing before it. The appellant also emphasised the long history of the disputes between the parties and submitted that the LVT had failed to have regard to the costs incurred by the appellant in the course of those disputes.

10. Although not expressly relied upon by the appellant, Judge Huskinson in giving limited permission to appeal expressed the view that it was reasonably arguable whether the LVT had power to order that the deed of variation should include the provision as to the cost of variation referred to above, and supposing that such a power exists, whether it was open for the LVT on the facts found to make such an order and whether the LVT gave legally sustainable reasons for so ordering.

Conclusions

11. In the absence of argument as to whether such a power is given by section 38 of the 1987 Act I am prepared to accept for present purposes that the section which confers a wide discretion on the LVT to make an order varying the lease "in such manner as is specified in the order" is wide enough to embrace a variation which requires one party to pay the costs of the variation.

12. In my judgment the LVT did not fall into error in failing to take into account the history of disputes between the parties. Various orders, including costs orders have been made in the course of those disputes, and the LVT properly focused upon the need to vary the leases in question in deciding how the costs of such variation should fall.

13. However, the reasoning of the LVT in determining that the leases should provide that the appellant should bear the respondents' costs of the variation does not sit easily with the findings which it made in relation to the application for compensation and in relation to the costs of the hearing before it. Indeed, in my judgment the two sets of reasons are inconsistent and irreconcilable. It is not appropriate for the determination of the LVT to be interfered with on an appeal by way of review unless that determination is wrong in principle. On the findings made by the LVT, its determination as to the costs of the variation in my judgment falls within that category. In setting out its reasons that the appellant had brought the application and stood to benefit substantially, the LVT failed to take into account on this issue the findings which it made in respect of compensation and costs of the hearing, namely that all parties regarded the present situation as unsatisfactory, that some provision should be made in the leases for the respondents to contribute to the costs of maintaining the common parts, that such a provision

was likely to be of benefit to the respondents, and that it could not be said that any party had acted unreasonably.

14. In my judgment those factors should also have been taken into account in deciding whether to order that the deed of variation should make provision for the costs of variation. Once those factors are taken into account, then in my judgment the decision is clear: that each party should bear its own costs of the variation. That is consistent with the decisions of the LVT not to order compensation and not to make an order for the costs of the hearing.

15. Accordingly the appeal is allowed to the extent that the leases as varied should not contain a provision the landlord should pay the reasonable costs and disbursements of the tenants.

Dated 10 March 2010

His Honour Judge Jarman QC