UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2012] UKUT 62 (LC)
UTLC Case Number: LRX/122/2010

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – preliminary issues – LVT determining that application barred by estoppel and laches – decision founded on error of fact – appeal allowed

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF A LEASEHOLD VALUATION TRIBUNAL

BETWEEN **PAULINE LAWTON** **Appellant**

and

55 ELGIN CRESCENT LIMITED **Respondent**

Re: Garden Flat
55 Elgin Crescent
Notting Hill
London W11 2JU

Before: The President

Sitting at 43-45 Bedford Square, London, WC1B 3AS
on 15 February 2012

Justin Bates instructed by Hockfield & Co for the appellant
The respondent did not appear

No cases are referred to in this decision.

The following cases were referred to in argument

Daejan Investments Ltd v Benson [2011] 1 WLR 2330
Majorstake Ltd v Curtis [2008] 1 AC 787
Paddington Basin Developments Ltd v West End Quay Estate Management Ltd [2010] 1 WLR 2735
Re Loftus [2007] 1 WLR 591
Collin v Duke of Westminster [1985] QB 581
Johnson v Moreton [1980] AC 37

DECISION

1. The appellant is the long leaseholder of the Garden Flat, 55 Elgin Crescent, Notting Hill, London W11 2JU, a building that contains five flats. The respondent company, which is owned by the lessees of the other four flats, is the freeholder. There is a long and unsatisfactory history to the present appeal. The dispute underlying it arose as long ago as November 2004, when the appellant contested a service charge demand, saying that she was in credit as she had paid monies on account of certain works and those funds had not been exhausted. Eventually, after the parties had been unable to resolve this dispute, on 2 October 2008 the respondent issued proceedings in the Hitchin County Court. The appellant defended the claim on the basis that, inter alia, she was in credit. The proceedings were transferred to the Central London County Court and then on 6 April 2009 they were transferred to the leasehold valuation tribunal.

2. The LVT held a pre-trial review on 27 May 2009, following which the tribunal gave directions. It identified the issues as follows:

> "5. The Tribunal has identified the following issues to be determined: namely service charges from 2003 set out in an account annexed to the Defence and Counterclaim in the county court Action. These included an allegation that a TV installation was not within the terms of the lease, that there had been a failure to comply with Section 20 of the Landlord and tenant act in respect of major works and allegations of destruction of a waste water system."

The tribunal directed that Ms Lawton should serve a statement covering a number of matters, including "(v) specifying as appropriate all breaches of Section 20 of the Landlord and Tenant Act 1985 on which the Respondent intends to rely". (At a number of points the directions transposed "Applicant" and "Respondent", but their meaning is clear.)

3. The appellant, in accordance with the directions that were given, provided a statement of case. In this she said that on 25 July 2002 she had paid the respondent £13,702.52 as her 20% share of the cost of imminent major works. When the final account came for the works certain items, which she listed, had been charged against this advance payment, and she disputed her liability and requested that credit should be given for the itemised amounts. These totalled £4,655.73. In respect of two of the items, scaffolding and works to prevent damp ingress, she said that the requirements of section 20(4) of the 1985 Act had not been complied with in that two quotes for the works had not been served on the tenants. In respect of a third item, works to the top floor flat, she said that no alternative quotes had been served as required by section 20. These three items accounted for £3,815.90 of the total.

4. The hearing was held on 17 and 18 August 2009. Ms Lawton appeared in person, and the company was represented by counsel. Somewhat surprisingly the tribunal (differently constituted from the one that had held the pre-trial review in May) decided that it was not concerned with the matters that Ms Lawton had raised in her defence and

counterclaim in the county court action and in the statement of case that she had served pursuant to the directions given after the pre-trial review. Its decision included the following:

> "13. The Tribunal considered that the application transferred to them by the county court related to the years 2007 and 2008 and that their jurisdiction was limited to consideration of the reasonableness of service charge costs in those years."
>
> 14. The respondent did not dispute the validity of the service charges for these years and, indeed, at the conclusion of the hearing, she said that she would immediately pay them.
>
> 15. Accordingly the Tribunal determines the costs of £2,446.99 to be reasonable, reasonably incurred, and therefore payable.
>
> 16. The Tribunal indicated to the respondent that if she wished to pursue her claim in respect of the major works she should make her own application to the Leasehold Valuation Tribunal. In the absence of such an application the tribunal considers that it has no jurisdiction to consider the respondent's defence, first raised in the county court."

5. Quite why the tribunal took the view that Ms Lawton was not able to raise the very matters which had constituted her defence and counterclaim in the proceedings that had been transferred to the LVT and which had been the subject of the LVT's directions and Ms Lawton's statement of case is not clear. But she wasted no time in following the tribunal's advice and, on the second day of the hearing into what had been rendered an uncontested claim by the tribunal's decision on its jurisdiction, she made the application which has led to the present proceedings. The application said that the year in question was that ending on 31 March 2004 and that the service charge items in dispute were major works carried out in 2002 and 2003. The questions she wished the tribunal to decide included "A Whether S20 procedures were satisfactorily carried out in reaspect of the entire contract"; and "B In the alternative whether S20 procedures were satisfactorily carried out in respect of sub-contracts within the works".

6. On 23 September 2009 the LVT held a pre-trial review. As at the previous substantive hearing Ms Lawton appeared in person and the company was represented by counsel. Two jurisdictional questions were raised by counsel: whether the application was time-barred under the Limitation Acts; and whether Ms Lawton was estopped from making all or part of her application due to her previous conduct in relation to the items in dispute. The tribunal directed that these two matters should be heard as preliminary issues, and it gave further directions dealing with statements of case and documentation.

7. The preliminary issues were the subject of a hearing before another differently constituted tribunal on 1 February 2010, Ms Lawton representing herself and the company being represented by counsel, and the tribunal gave its decision on 18 March 2010. It rejected counsel's contention that the claim was time-barred and a further contention that the LVT had no jurisdiction because by paying her service charge contribution in 2002 for the major works the charges were deemed to have been agreed

or admitted by her. Counsel went on to submit that Ms Lawton was estopped from asserting that the company had failed to consult the lessees in accordance with the requirements of section 20 or alternatively that she was time-barred by the equitable principle of laches because she had not instituted proceedings either promptly or expeditiously and the company had been prejudiced by the delay. The LVT acceded to both of these submissions. It said this:

> "14. The Tribunal considered the equitable principles of the estoppel and laches together because the Respondent essentially relied on the same conduct on the part of the applicant in relation to both. It was clear from the documentary evidence before the Tribunal that at no stage did the Applicant put the Respondent on notice that she would pursue a challenge in relation to the major works based on its failure to validly consult with the lessees in accordance with section 20 of the Act. That point was only raised when this application was issued on 18 August 2009 despite, it seems, the Applicant being kept fully informed of the scope and estimated cost of the major works. As a consequence, the Respondent had, undoubtedly, acted to its detriment. Had the Applicant taken the point as to consultation at an early stage, the respondent would have had an opportunity to consider its position and thereby prevent any further irrecoverable costs from being incurred. Accordingly, the Applicant is estopped from challenging the failure on the part of the Respondent to consult the lessees generally in relation to the major works or any particular item comprising those works."

8. In relation to laches the LVT said that Ms Lawton's case was that she had been unable to make the application earlier because the company had failed to give disclosure of relevant documents. The tribunal rejected this argument. It concluded that there had been unreasonable delay on Ms Lawton's part in asserting or enforcing a right to challenge the major works, and it went on:

> "Therefore, the Tribunal accepted the Respondent's submission that the delay on the part of the Applicant in bringing this application had resulted in significant prejudice to it because it was not now in a position to properly respond evidentially to the application. Accordingly, the Tribunal found that the application was now time-barred by reason of the equitable defence of laches."

9. The appellant appeals with permission granted by me. There are statements of case on behalf of both parties, settled by counsel. The respondent's solicitors wrote to the Tribunal shortly before the hearing to say that the respondent would "not be opposing or agreeing to the application"; that it left the decision in the hands of the tribunal; and that they, the solicitors, did not have instructions to incur the cost of preparing for or attending the hearing. Mr Justin Bates appeared for the appellant. He advanced four arguments. Firstly, he said, the LVT's decision was predicated on a material error of fact in that, contrary to what it said, Ms Lawton had made clear on a number of occasions from November 2004 onwards that she would pursue a challenge to the major works based on a failure to comply with section 20. Secondly, he submitted that the decision was perverse in the *Wednesbury* sense because, since Ms Lawton had effectively been invited to issue fresh proceedings, no reasonable LVT could have concluded that such proceedings were unreasonably brought so as to be inequitable. Mr Bates's third contention was that a leaseholder could never be estopped from claiming

the protection of sections 19 and 20 of the 1985 Act because the provisions were protective provisions designed to benefit an entire class and could not therefore be waived. And, fourthly, he said that the LVT was wrong to hold that laches applied because it appeared to have concluded that a 6 year limitation under the Limitation Act applied, thus excluding the operation of the doctrine of laches; although in any event the limitation period was 12 years because a claim based on a statutory right was an action on a specialty.

10. In the event it is sufficient if I deal with Mr Bates's first submission. The LVT's unequivocal statement was that "It was clear from the documentary evidence before the Tribunal that at no stage did the Applicant put the Respondent on notice that she would pursue a challenge in relation to the major works based on its failure to validly consult with the lessees in accordance with section 20 of the Act." Mr Bates drew attention to the following statements in documents referred to by Ms Lawton in her witness statement of 21 January 2010:

(a) In a letter dated 25 November 2004 to Mr Cohen of Colin Cohen Property Management Ltd (who, it appears was acting on the company's behalf) Ms Lawton sought a refund of £2,651.80, of which most related to "ARH Schedule of Items: 26 March 2003 – Scaffolding No Landlord and Tenant Act 1985 Section 20 procedure followed."

(b) Mr Cohen's reply of 4 January 2005 relating to this point said: "I refer you to the section 20 notice dated 27th March 2002 which states that ARH have received three quotations for the works and that these quotations were received on the basis of the specification prepared by ARH covering the necessary repairs and redecorations. Paragraph 29 of the specification called 'Scaffolding' clearly provides that 'the Contractor is to provide all necessary scaffolding'. The section 20 procedure was correctly followed and therefore this item was rightfully included as a service charge item."

(c) Ms Lawton, having in a letter of 18 February 2005 said that the copy of the specification sent to her did not refer to scaffolding, reiterated her request for a refund in a letter dated 19 October 2005, and a schedule accompanying it contained the same entry as in (a) above.

(d) Her defence and counterclaim of 13 October 2008 in the county court proceedings exhibited the schedule in (c).

(e) Her statement of case of 15 June 2009 in the first LVT proceedings expressed her reliance on section 20 (see paragraph 3 above).

11. It is clear therefore that the LVT's conclusion in relation to both estoppel and laches was founded on an error of fact. That error was fundamental to its conclusion and its decision cannot stand. In view of the fact that Ms Lawton had raised the section 20 point, it could in my judgment only have concluded that she was not disentitled by either equitable doctrine from advancing her case under sections 19 and 20. There is no need for me to deal with the other matters that Mr Bates advanced on her behalf.

12. It is extremely regrettable that the relatively small amount in issue should have given rise to a proliferation of hearings – two pre-trial reviews and two substantive hearings before LVTs, and this appeal – and, as things stand, it is only the preliminary issues in the second proceedings that have so far been decided. The whole of Ms Lawton's substantive case as originally set out in her defence and counterclaim in the county court proceedings has yet to be determined. I can only express the hope that the parties will now reach agreement and thus avoid the need for further fruitless expenditure on this long-running dispute.

Dated 23 February 2012

George Bartlett QC, President

Addendum

13. The appellant seeks an order under section 20C of the 1985 Act that none of the costs of the landlord incurred in connection with the proceedings before the LVT and this Tribunal should be regarded as relevant costs in determining the amount of service charge payable by the appellant. In view of my conclusions it is clearly appropriate that an order in those terms should be made, and I accordingly do so.

Dated 6 March 2012

George Bartlett QC, President