UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2012] UKUT 419 (LC)
UTLC Case Number: LRX/96/2012

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – costs – breach of covenant – LVT determining breach of covenant remedied – costs awarded against landlord – no limit specified – finding that proceedings not vexatious or abuse of process – appeal allowed – Commonhold and Leasehold Reform Act 2002 Sch 12 para 10

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

BETWEEN **MERCIA INVESTMENT PROPERTIES LTD** **Appellant**

and

MARGARET NORTHWAY **Respondent**

Re: 14 Court Road
Banstead
Surrey
SM7 2PH

Determination on written representations

The following case is referred to in the decision:

GHN (Trustees) Ltd v Glass LRX/153/2007

DECISION

1. This is an appeal by a landlord against a decision of a Leasehold Valuation Tribunal, the LVT having granted permission to appeal. It concerns an award of costs made to the respondent tenant on an application under section 168(4) of the Commonhold and Leasehold Reform Act 168(4) for a determination as to whether there had been a breach of covenant of the tenant's lease. Under the lease the tenant was required within one calendar month after assignment of the lease to produce notice of the assignment to the landlord. The landlord's case was that she had failed to do this.

2. The facts were that the respondent, who at the time of the LVT proceedings was elderly and resident in a nursing home, had became tenant of the property on 6 May 2011 pursuant to a transfer of that date. On 2 November 2011 the landlord's managing agents wrote to the respondent stating that a breach of covenant had occurred as she had failed to send notice of the assignment within the specified period. The letter asked the respondent to admit the breach within 7 days and said that a failure to do so would result in an application to the LVT for determination that a breach had occurred. On 7 November 2011 the respondent's solicitors sent a notice of assignment to the managing agents together with a cheque for £132 in respect of the registration fee. This amount was debited from the respondent's account on 11 November 2011.

3. On 21 February 2012 the appellant made application to the LVT under section 168(4) for a determination that a breach of covenant had occurred. In accordance with the tribunal's directions the applicant filed a statement of case and the respondent's solicitors filed a statement contesting the application. The application was determined on written representations. The respondent claimed that the breach was rectified by the service of the notice and cheque on 7 November 2011 and was remedied when the applicant presented the cheque to the bank on 11 November 2011. She said that the application should be dismissed on the grounds that it was vexatious and an abuse of the process and that the applicant should be ordered to pay her costs.

4. The LVT in its decision of 11 May 2012 held that there had been a breach of covenant but that on the facts it had been waived by the applicant when the cheque had been presented to the bank on 11 November 2011. It went on:

> "This was well before the start of these proceedings and although the Tribunal does not explicitly find that the proceedings themselves are vexatious or an abuse of the process they are perhaps not that far from being so. The Tribunal has considered the full decision of *GHM Trustees Ltd v Glass*…In that case the respondent had done nothing to remedy the breach and the breach still existed. In the instant case the presentation of the cheque by the Applicant materially changes things. The Applicant therefore does not succeed in this matter, the costs of the application are disallowed pursuant to the provisions of Section 20C of the Act and that the Applicant must discharge the Respondent's costs in this matter."

5. The appellant applied to the LVT for permission to appeal on the ground that, having concluded that a breach of covenant had occurred, it should have made a determination in its favour. It relied on the decision of this Tribunal in *GHN (Trustees) Ltd v Glass* LRX/153/2007. It also sought permission to appeal against the order for costs on the ground that the LVT had had no power to make the order that it had made. The LVT refused permission on the first ground, but it granted permission on the second ground. It said in relation to this:

> "…the Tribunal has considered the Application for Permission to Appeal and in the light of it's finding that the conduct of the Applicant was "*not far short*" of being vexatious or an abuse of process, but was not actually vexatious or abusive, accepts that the Tribunal was in error to determine that the Applicant must discharge the Respondent's costs in what is essentially a no costs jurisdiction…"

6. Both parties have submitted statements of case, and the appeal, on the ground on which the LVT gave permission, is being determined on the basis of these without a hearing. These representations fall to be considered in the light of the relevant provision, paragraph 10 of Schedule 12 to the 2002 Act, which provides:

> "(1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).
>
> (2) The circumstances are where –
>
> (a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or
>
> (b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.
>
> (3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed –
>
> (a) £500, or
>
> (b) such other amount as may be specified in procedure regulations.
>
> (4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph."

7. The appellant says that, having determined that the application was not vexatious nor an abuse of process the test at paragraph 10(2)(b) fails, so that the LVT had no power to award costs. In any event, it is said, if the tribunal had found the application to be vexatious, which it did not, the amount to be paid by any party is limited by virtue of sub-paragraph (3)(a) to £500.

There is no power to make an order in the terms of the LVT's order, which was in effect an unlimited costs order for unspecified costs.

8. The respondent's solicitors say that the LVT made the order for costs having determined the application in favour of the respondent based on the respondent's contention that the application was vexatious and or frivolous. On 15 May 2012, following the decision in the case, they wrote to the appellant saying that the amount of costs incurred was £750 plus VAT. They say that the tribunal was entitled to award costs. Moreover the appellant has continued since the hearing to act vexatiously by demanding payment for costs incurred by the appellant in connection with the application to the LVT.

9. In granting permission to appeal the LVT said that it accepted that it was in error in making the award of costs in the respondent's favour since, although it had found that the appellant's conduct was not far short of being vexatious or an abuse of process, it was not actually vexatious or an abuse of process. Although it did not address the question by reference to the particular terms used in paragraph 10(2)(b) – "frivolously, vexatiously, abusively, disruptively or otherwise unreasonably" – it is clear that, having received the application for permission to appeal, which asserted that it had no power to make an unlimited costs order, it reviewed its conclusion and concluded that it had been wrong, for the reason that it gave, to make an award of costs. The order for costs was clearly unlawful in that it was made without reference to the £500 limit imposed by paragraph 10(3)(a), and I see no reason to question the LVT's revised view that, since the appellant's conduct was not vexatious, no award of costs should be made. The appeal is therefore allowed, and the LVT's decision to order the appellant to pay the respondent's costs is quashed.

Dated 20 November 2012

George Bartlett QC, President