UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – application for permission to appeal out of time – finality of litigation – Tribunal Procedure (Upper Tribunal) Lands Chamber Rules 2010, rule 21(2), 21(6)

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

BY

ANNA CHRISTIE

Re: 28 Pallant House,
Tabard Street,
London
SE1 4YD

Before: Martin Rodger QC, Deputy President

Determination by written representations

The following cases are referred to in this decision:

Taylor v Lawrence [2003] QB 528
The Ampthill Peerage case [1977] AC 547
Smith v Brough [2005] EWCA Civ 261
Birmingham City Council v Keddie [2012] UKUT 323 (LC)

DECISION

1. In this matter the Tribunal has to consider a request for an extension of time within which to make an application for permission to appeal against a decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel ("the LVT") given on 20 April 2011.

The proceedings before the LVT

2. The applicant is the long leaseholder of a flat on the London Borough of Southwark's Tabard Gardens Estate under a lease which obliges her to pay an annual service charge. The proceedings before the LVT concerned the applicant's liability to pay service charges in the year ending 31 March 2009. Proceedings, in which Southwark sought to forfeit the applicant's lease for non-payment of £7,838 service charges, plus a further £1,439 interest, were commenced in December 2009 at the Lambeth County Court. That part of the case which concerned service charges was transferred to the LVT by the District Judge on 4 October 2010.

3. The service charges in issue in the county court proceedings divided into three groups:

(a) service charges relating to three major works contracts, the applicant's share of which was said to be £4,263;

(b) routine service charge items, claimed at £3,032 of which, at one stage, the applicant admitted £1,140 in her defence; and

(c) a historic service charge debt of £542 which had accumulated under the management of a tenants' management cooperative which had ceased to have responsibility for the applicant's building in 2006.

4. The decision of the LVT, given after a two day hearing, was unfavourable to the applicant. It rejected her complaint that the appropriate statutory consultation under section 20 of the Landlord and Tenant Act 1985 had not been carried out. It found that the three major works contracts had been completed to a reasonable standard, that the various routine expenses were recoverable and (with the exception of a small credit to which the applicant was entitled) that the historic service charge debt payable.

5. The LVT gave its decision on 20 April 2011. The case was then returned to the county court which had referred it, where other issues, including a counterclaim by the applicant and Southwark's claim to forfeit the applicant's lease, remained to be considered.

The application to the LVT for permission to appeal

6. By virtue of section 175(1)(2) of the Commonhold and Leasehold Reform Act 2002, a party to proceedings before an LVT may appeal to the Upper Tribunal from the decision of the LVT, but only with the permission of the LVT itself or of the Upper Tribunal.

7. The applicant did not seek permission to appeal the LVT's decision until 25 April 2013.

8. On 14 May 2013 the LVT refused to admit the application for permission to appeal on the grounds that it was made out of time. As the LVT pointed out, regulation 20 of the Leasehold Valuations Tribunals (Procedure) (England) Regulations 2003 ("the 2003 Regulations"), which were then in force, imposes a time limit for applications to the LVT for permission to appeal to the Upper Tribunal, which should be made to the LVT within 21 days of the date on which the document which records the LVT's reasons for its decision was sent to the parties. Although the LVT had power to extend any period of time prescribed by the 2003 Regulations, an application for an extension had to be made before the relevant period of time had expired.

9. The LVT assumed that its decision had been sent to the applicant in April 2011, so that the application for permission to appeal which she made on 25 April 2013 came almost two years after the expiry of the 21 day period permitted by regulation 20. On that basis the LVT concluded correctly that it had no power to consider the application. The notice of the LVT's decision included a statement that in accordance with section 175 of the Commonhold and Leasehold Reform Act 2002 the applicant was entitled to make a further application for permission to appeal to the Upper Tribunal.

10. The LVT's decision refusing to admit the application was sent to the applicant on 17 May and received by her on 21 May 2013. She responded to it on 21 May by requesting that the LVT provide what she called "full written reasons" for its decision. On 29 May 2013 the LVT refused to provide further reasons and again pointed out the applicant's entitlement to apply to the Upper Tribunal for permission to appeal.

The application to the Upper Tribunal for permission to appeal

11. On 11 June 2013 the applicant made an application for permission to appeal to the Upper Tribunal. The applicant acknowledged that the Tribunal would receive the application more than 14 days from the date in which the LVT sent its decision refusing permission to appeal but explained that the letter of 17 May 2013 accompanying the decision had not notified her of her rights of appeal and in particular of the time limit for doing so.

12. Where no application for permission to appeal (or for an extension of time) has been made to the LVT within the 21 days allowed by regulation 20 of the 2003 Regulations, the LVT has no power to admit the application for consideration. In those circumstances rule 21(1) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 ("the 2010 Rules") allows an application

for permission to appeal to be made direct to the Upper Tribunal. That opportunity is itself subject to a time limit. Rule 21(2) of the 2010 Rules provides that:

> "An application for permission to appeal must be made in writing and received by the Tribunal no later than 14 days after the date in which the tribunal that made the decision under challenge sent notice of its refusal of permission to appeal or refusal to admit the application for permission to appeal to the applicant."

13. Applications to the Upper Tribunal for permission to appeal which are made following a refusal by the LVT to admit an application to it on the grounds that it was made late, are subject to specific treatment under the 2010 Rules. In such cases rule 21(6) provides as follows:

> "If the tribunal that made the decision under challenge refused to admit the applicant's application for permission to appeal because the application for such permission or for a written statement of reasons was not made in time –
>
> (a) the application to the Tribunal must include the reason why the application to the other tribunal for permission to appeal or for a written statement of reasons, as the case may be, was not made in time; and
>
> (b) the Tribunal must only admit the application if the Tribunal considers that it is in the interests of justice for it to do so."

14. Subject to one point taken by the applicant, the application to this Tribunal for permission to appeal was made in the circumstances described in rule 21(6), namely after a refusal of the LVT to admit a late application. It follows that the Upper Tribunal may only admit the application for permission to appeal and go on to consider it on its merits if it considers that it is in the interests of justice for it to do so.

When did time for making the application start to run?

15. In her application the applicant argues that, despite the original LVT decision having been made on 20 April 2011, the time allowed for her to make her application for permission to appeal did not start to run until 29 May 2013, which was the date on which the LVT refused to provide any further explanation for its decision not to admit the application.

16. The basis of the applicant's contention is that when the LVT sent her a copy of its original decision in 2011 it did not also notify her of her rights to appeal against that decision. Hence, the applicant argues, the decision did not amount to a valid "notice of decision within Schedule 1 of the Tribunal Procedure (First Tier Tribunal) Rules 2008". As the decision has not been validly notified to her, she suggests "the time for her to appeal against it, far from having expired, has not yet started to run."

17. The applicant's contention is based on a misconception. At the time the LVT reached its original determination in this case, the relevant provisions relating to the making and contents of decisions were contained in regulation 18 of the 2003 Regulations. Regulation 18(3) required that a decision of the LVT must in every case be recorded in a document as soon as possible after the decision had been made; where the document did not record the reasons for the decision, those were to be recorded in a separate document as soon as possible after the decision had been recorded (regulation 18(5)); the document recording the decision, or the reasons for the decision, were to be signed and dated by the Chairman of the Tribunal or other appropriate person (regulation 18(6)); a copy of a document recording a decision, or the reasons for a decision were to be sent to each party (regulation 18(9)).

18. Regulation 18 contained no requirement that the LVT include in its decision a statement of a party's right of appeal. Nor was any such requirement contained elsewhere in the 2003 Regulations.

19. I suspect the source of the applicant's contention about the content of the LVT's decision derives from a different set of procedural rules which do not apply to the LVT. The Social Entitlement Chamber of the First-tier Tribunal determines disputes over social security benefits and child support payments. Its procedural rules are the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 ("the 2008 Rules"). Rule 33(2) of the 2008 Rules provides that a tribunal in the Social Entitlement Chamber must provide to each party, as soon as reasonably practicable after the making of a decision, a decision notice stating the tribunal's decision, and containing notification of the right to apply for a written statement of reasons, notification of any right of appeal against the decision and a statement of the time and manner in which such right of appeal may be exercised.

20. The 2008 Rules have no application to the LVT which has never been part of the Social Entitlement Chamber nor subject to its Rules.

21. I am satisfied that the LVT's decision of 20 April 2011 was compliant with regulation 18 of the 2003 Rules and that the 21 days permitted for the making of an application to the LVT for permission to appeal began to run on the date on which the LVT's decision was sent to the applicant. Precisely what that date was is not clear from the documents before the Tribunal. Ordinarily one would expect a decision of the LVT to be sent to the parties within a matter of days of being made. However, in this case the only evidence I have seen of the decision being sent to the applicant is a letter dated 5 August 2011 from the LVT's case officer, which comprises a single short sentence: "Further to our conversation today, please find enclosed a copy of the Tribunal's decision". It may be that a copy of the decision had not reached the applicant before the date of that letter and that it was sent in response to a conversation with the case officer, or it may be that the applicant was requesting a further copy of a decision she had already received.

22. In view of the uncertainty over the date on which the decision was first sent to the parties, I am prepared to assume that time began to run on 5 August 2011 and that the time for an application to the LVT for permission to appeal therefore expired on 26 August 2011. The application eventually made to the LVT on 25 April 2013 was therefore about 20 months late.

23. In passing I would note that the application to the Upper Tribunal was also late, although time for making this application can be extended under the power contained in rule 5(3)(a) of the 2010 Rules. It should have been made within 14 days of the date on which the LVT sent notice of its refusal to entertain the application made to it; that date was 17 May 2013, so time expired on 31 May 2013 but the application was not received until 17 June 2013. Rather than making the application promptly the applicant instead wrote requesting that the LVT provide what she described as "full written reasons" for its refusal to grant permission to appeal. Once again, I suspect the applicant had in mind the different procedures governing the Social Entitlement Chamber. I am satisfied that the LVT had already recorded its full reasons for its decision sent to the applicant on 17 May 2013, in which it additionally informed the applicant of her entitlement to make a further application to the Upper Tribunal. Contrary to the applicant's suggestion, the LVT's decision was not incomplete or defective because it omitted to specify the time limit for an appeal to the Upper Tribunal.

The basis of the application

24. As I have already explained, in the circumstances of this case, rule 21(6) of the 2010 Rules provides that the Tribunal must only admit the application for permission to appeal if the Tribunal considers that it is in the interests of justice for it to do so.

25. The basis of the application is that on 2 December 2011, more than six months after the LVT's decision in the applicant's case, a differently constituted LVT gave a decision in favour of the leaseholder in a similar dispute between the Southwark and another of its tenants on the Tabard Gardens Estate, Mr Woelke. The proceedings between Southwark and Mr Woelke had also been transferred to the LVT by the Lambeth County Court, and shared some common features with the applicant's own earlier case. Mr Woelke's case concerned some, though not all, of the service charges for major works, but he did not challenge the routine or historic charges which also featured in the applicant's case.

26. In Mr Woelke's case the LVT decided that Southwark had not demanded the service charges in a manner compliant with the terms of the lease. Put shortly, the third schedule to Southwark's standard form of long lease provides for it to notify the leaseholder as soon as practicable after the end of the service charge year of the total amount of the service charge, and to provide a breakdown of the costs incurred and a statement of the manner in which the costs have been apportioned and the balance due from the leaseholder. Southwark's practice at the time had been to separate the routine service charges from the charges payable in respect of major works. Rather than including the major works in its estimate of the service charge for the forthcoming year, or in its statement of account at the end of the year, the major works charges were accounted for discretely at the expiry of the defects liability period under major works contracts. In Mr Woelke's case the LVT decided that this approach to service charge billing was impermissible and that, as a result, Mr Woelke was not yet liable to make any payment towards the cost of the major works. The LVT indicated that it considered that it was open to Southwark to serve a revised service charge statement, compliant with the terms of the third schedule to the lease, in which case Mr Woelke would come under a liability to make the disputed payments. The LVT dismissed a number of other challenges by Mr Woelke to his underlying liability to meet the cost of the major works and described his success as resting on a "technicality".

27. In its decision in Mr Woelke's case the LVT drew attention to a decision of a previous LVT in a case involving another of Southwark's tenants, Mrs Jean-Paul. The decision in Mrs Jean-Paul's case, which was to a similar effect to that in Mr Woelke's, had been made much earlier, on 21 July 2009. Although the decision had been the subject of an appeal to the Upper Tribunal by the leaseholder, Mrs Jean-Paul, the LVT's decision that its billing practices were not compliant with the terms of its standard lease was not challenged by Southwark. The LVT had also made it clear that Southwark was not prevented by its decision from reissuing service charge demands in a form which complied with the procedures laid down by in the lease. The LVT dismissed the other challenges by the leaseholder to the cost of the major works and found that the full amount claimed by Southwark would become payable one month after the service of proper demands.

28. As the LVT pointed out when refusing to admit the application for permission to appeal against its decision in this case, the applicant had not relied on the point on which the Woelke case was decided.

29. In her application for an extension of time and for permission to appeal, the applicant describes the Woelke case as "the superseding decision". In the light of Woelke, and in addition to the point already dealt with about the commencement of time for appealing, she argues in summary:

(a) It is in the interests of justice for her appeal to be admitted and to succeed so as to conform to the outcome of Woelke and Jean-Paul.

(b) It was a factual error, an error of law, and unreasonable for the LVT not to take account of Southwark's departure from the procedure for billing service charges laid down by the lease of her flat, as it had done in the other cases.

(c) The case had been transferred from the county court to the LVT because the LVT was an expert tribunal, and it was incumbent on the LVT to use that expertise to identify points which may not have occurred to an unrepresented party, especially one opposed by a well resourced public authority with access to legal advice. The applicant relies on statements in decisions of the Upper Tribunal's Administrative Appeals Chamber to the effect that once an appellant has expressed a grievance in a letter of appeal, it is for the tribunal to identify the decisions which are the source of the appellant's grievance and to treat the letter of appeal as being against those decisions.

(d) It was unfair for one leaseholder's case to be determined by an LVT which declined to provide legal advice and assistance to the parties before it, whereas other LVT's (the majority, the applicant suggests) were more proactive in identifying points of which unrepresented parties might be unaware.

(e) Under the heading "jurisdiction" the applicant makes a number of submissions which are concerned with the reasonableness of the costs of the major works, the standard of cleaning and the apportionment of electricity charges. None of these

points is relevant to the question whether it is in the interests of justice for the applicant to be granted the opportunity to seek permission to appeal out of time.

(f) Finally, the applicant records a generalised suspicion on her part that the LVT had been guilty of bias in favour of Southwark, had failed to record all of the evidence she gave, and had made defamatory statements about her in its decision. These suggestions are supported only by a complaint that the LVT had not been sufficiently interested in the detail of what the work which one builder had been paid £30,000 to carry out. In my judgment these suggestions are unsubstantiated and add nothing to the applicant's case.

30. Because of the information already available and the preliminary view of the proper outcome of the application which I formed on reading the case papers, I have not invited the prospective respondent to any appeal, Southwark, to make submissions in response. The applicant herself sent a copy of her application to Southwark and sought its consent to re-open the LVT's decision. In a letter dated 20 May 2013, a copy of which has been provided to the Tribunal by the applicant, Southwark did not agree to the matter being re-opened and did not support her application; on the contrary, it would be resisted. It made its position clear to the applicant in the following passage:

> "It is that simple, the decision by the LVT in the *LBS v Woelke* matter is a decision at first instance which is not binding on any other court or tribunal in the country. In the circumstances we do not consider the finding in the *LBS v Woelke* matter to be relevant to your matter. In any event we are in the process of appealing that decision and the appeal is due to be heard at the Upper Tribunal at the end of June of this year."

The principles to be applied

31. I have already referred to the direction in rule 21(6) of the 2010 Rules. If the LVT refused to admit an application for permission to appeal because it was not made in time, this Tribunal may only admit the application if it is in the interests of justice for it to do so.

32. The decision whether to admit such an application must also be made bearing in mind the overriding objective of the 2010 Rules, expressed in rule 2(1), which is to enable the Tribunal to deal with cases fairly and justly.

33. The decision must also take account of the very well established public interest in the finality of litigation, which applies just as much to proceedings before tribunals as it does in court. The decision of the Court of Appeal in *Taylor v Lawrence* [2003] QB 528 concerned that court's power to reopen an appeal after it had given a final judgment. Giving the judgment of the Court, at paragraph [6], Lord Woolf CJ referred to:

" …. a fundamental principle of our common law – that the outcome of litigation should be final. Where an issue has been determined by a decision of the court, that decision should definitively determine the issue as between those who were party to the litigation. Furthermore, parties who are involved in litigation are expected to put before the court all the issues relevant to that litigation. If they do not, they will not normally be permitted to have a second bite at the cherry."

Lord Woolf went on to refer to an earlier decision of the House of Lords, *The Ampthill Peerage* case [1977] AC 547, in which Lord Wilberforce said (at p.569A-E):

"English law, and it is safe to say, all comparable legal systems, place high in the category of essential principles that which requires that limits be placed upon the right of citizens to open or to reopen disputes. ….. Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth (I do not say that this is such a case), and these are cases where the law insists on finality. For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals: so the law, exceptionally, allows appeals out of time: so the law still more exceptionally allows judgments to be attacked on the ground of fraud: so limitation periods may, exceptionally, be extended. But these are exceptions to a general rule of high public importance, and as all the cases show, they are reserved for rare and limited cases, where the facts justifying them can be strictly proved."

34. In *Smith v Brough* [2005] EWCA Civ 261 the Court of Appeal considered a request for an extension of time to make an application for permission to appeal to it in a case involving a boundary dispute. The application was made 39 months after the time limit provided by the Civil Procedure Rules. Lady Justice Arden cited what Lord Woolf had said in *Taylor v Lawrence* and drew attention to a further relevant consideration, at paragraph [35]:

"Interest in the closure of litigation is not only the interest of the public. Successful claimants also have an interest in finality and they are entitled to expect that if they have won at trial, and the time for appeal has passed, that that is the end of the matter."

Discussion

35. In considering whether the interests of justice require that the applicant be given permission to appeal out of time in this case, I begin by acknowledging that if the argument considered by the LVT in the Woelke case had been taken in the applicant's case, it is very likely that a similar conclusion would have been reached. It can safely be assumed, from the evidence recorded in the Woelke case, that Southwark adopted the same approach to billing for major works in the case of all its leaseholders. If that approach was applied in this case the conclusion which would be likely to have been reached was that so much of the service charge as related to the major works was not yet due

from the applicant. The applicant would probably have remained liable to pay the routine and historic service charges totalling £3,574, since it was Southwark's practice to account for those in accordance with the procedure laid down by its standard lease.

36. The approach taken in Woelke would have delayed the applicant's liability to contribute £4,263 towards the cost of the major works, but it would not have eliminated it. As the LVT found in both the Woelke and the Jean-Paul cases, there would appear to have been nothing to stop Southwark from issuing fresh demands, calculated in accordance with the terms of the lease, and then to amend its claim in the county court to recover the same sum by a different route. Having recently heard the appeal in the Woelke case, the Tribunal is aware that that is exactly what has happened in the county court in those proceedings while the appeal has been waiting to be heard.

37. Nonetheless, there would no doubt be a practical benefit to the applicant in being able to reopen the issue of her liability for the cost of major works. Her liability would, at the very least be delayed, and the burden of interest reduced. The sum required to satisfy any judgment Southwark has already obtained might be easier for her to raise, and that might prevent her from seeing her flat repossessed (although that is a matter of speculation).

38. On the other hand, the applicant's complaints against the LVT and against Southwark are not justified.

39. Southwark is correct when it says that decisions of one LVT are not binding on another, and it was therefore under no duty to inform the LVT in the applicant's case that the decision in Mrs Jean-Paul's case had gone against it almost two years earlier. As for the LVT, far from being under a positive duty to investigate the billing practices of Southwark, and to consider for itself whether they were compliant with the terms of the lease, the recent jurisprudence in this Tribunal indicates that it was right to confine itself to the issues identified in the extensive statements of case which the parties had prepared to define the issues in the county court. The applicant took many points, some procedural and others substantive, in her defence and counterclaim, but she did not say that she challenged her liability to pay the service charge because it had not been demanded strictly in accordance with the terms of the lease. It has been suggested in a number of recent decisions of the Tribunal that the LVT should confine itself to the issues identified by the parties, and even that it lacks jurisdiction to go beyond them. For example, in *Birmingham City Council v Keddie* [2012] UKUT 323 (LC), His Honour Judge Gerald said this:

> "It is the jurisdiction and function of the LVT to resolve issues which it is asked to resolve, provided they are within its statutory jurisdiction. It is not the function of the LVT to resolve issues which it has not been asked to resolve, in respect of which it will have no jurisdiction. Neither is it its function to embark upon its own inquisitorial process and identify issues for resolution which neither party has asked it to resolve, and neither does it have the jurisdiction to do so. To do so would be inimical to the party-and-party nature of applications to the LVT and would greatly increase the costs (frequently recoverable from the tenant through the service charge) and difficulties attendant to service charge disputes which by their nature are frequently fractious, involving relatively small sums within a complex matrix of divers items of expenditure."

The LVT cannot therefore be criticised for confining itself to the points which the parties, and the county court, had asked it to decide.

40. The LVT considered and, with one minor exception, dismissed all of the challenges raised by the applicant to the service charges which Southwark claimed from her. She did not then appeal those adverse conclusions and for at least 20 months she, and Southwark, continued on the assumption that the LVT's decision was final and conclusive. In my judgment it would be wrong now to upset that settle assumption and admit the applicant's application for permission to appeal so long after the expiry of the time permitted by the 2010 Rules.

41. The interests of justice, and in particular the public interest in there being finality to litigation, seem to me to point decisively against allowing the proposed appeal to proceed. If permission were given to the applicant to appeal, and if an appeal was pursued and eventually succeeded, there is no reason to think that Southwark would be unable to revise the service charge demands to include in them all of the costs of major works previously omitted and claimed separately. It would be likely to do so in any event, without waiting for the outcome of the appeal. Once that task had been undertaken, the applicant would have no defence to the sums on which the LVT has already ruled in Southwark's favour.

42. The LVT which decided in Mr Woelke's favour described his success as having been achieved on a technicality. Southwark failed to implement procedures which the parties had agreed ought to be implemented before the applicant would become liable to pay for services. Nonetheless, the applicant continues to have the benefit of Southwark's expenditure on the major works carried out in 2005 and 2006. The effect of admitting an appeal would be to delay the final recovery by Southwark of sums which it expended in proper compliance with its obligations to the applicant and its other leaseholders. It would increase the costs devoted by the parties to the recovery of moderate sums. It would draw on the resources of this Tribunal and the LVT which would otherwise be deployed on resolving disputes between other parties. In those circumstances justice does not require that the applicant should now be permitted to bring an appeal. Indeed, justice requires that she should not be. Accordingly her application for an extension of time within which to seek permission to appeal is dismissed.

Dated: 11 July 2013

Martin Rodger QC
Deputy President