UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2009] UKUT 136 (LC)
LT Case Number: LRX/122/2008

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – alleged breach of covenant to insure – whether LVT has jurisdiction to consider an application under Commonhold and Leasehold Reform Act 2002 section 168(4) where unpaid insurance premium is less than £500

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

BETWEEN **BARBARA HELEN GLASS** **Appellant**

and

CLAIRE McCREADY **Respondent**

Re: 7 Westfield Close
Enfield
Middlesex
EN3 7RU

Before: His Honour Judge Huskinson

CASE DECIDED UPON WRITTEN REPRESENTATIONS

DECISION

1. The Appellant appeals to the Tribunal, with permission, from the decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel ("the LVT") dated 28 July 2008 whereby the LVT decided it did not have jurisdiction to determine the application made to it by the Appellant. Having so found the LVT purported then to dismiss the Appellant's application under regulation 11 of the Leasehold Valuation Tribunals (Procedure)(England) Regulation 2003.

2. The Respondent has not indicated any intention to participate in this appeal and no written representations have been made on her behalf. The Appellant served a statement of case and has subsequently agreed to the matter being decided by this Tribunal upon written representations. I proceed accordingly.

3. The Appellant is the freehold owner of Westfield Close, Enfield, Middlesex which consists of 20 maisonettes in five blocks each containing four maisonettes. By a lease dated 19 January 1960 the Appellant's predecessor in title demised 7 Westfield Close ("the Premises") to the predecessor in title of the Respondent for a term of 999 years from 25 March 1958 at the rent and upon the terms and conditions therein contained. The Property comprised an upper maisonette.

4. Clause 2(12) of the lease contained a covenant by the lessee in the following terms:

> "(12) Forthwith to insure and at all times during the said term to keep insured against loss or damage by fire and such other risks which from time to time the Lessor may determine the demised premises in such value as from time to time the Lessor may determine in the names of the Lessor and the Lessee through the agency of the Lessor with the British Law Insurance Company Limited or such other insurance office as the Lessor shall determine And whenever required to produce to the Lessor or its agent the policy or policies of every such insurance and the receipt for the last premium thereof and that in default thereof the Lessor may (without prejudice to the power of re-entry under the clauses hereinafter contained) insure the demised premises in manner aforesaid and pay the premiums payable in respect thereof and that the premiums so paid and all incidental expenses shall be repaid by the Lessee to the Lessor on demand ...."

5. By a letter dated 4 April 2008 from the Appellant's husband to the Respondent the Appellant stated that the Respondent had failed to pay the insurance premium due on 8 January 2008 to the Appellant's brokers namely Towergate ghbc. The letter reminded the Respondent of the terms of her lease and indicated that unless matters were resolved within seven days two separate forms of proceeding will follow, namely:

> "1. An application to the Leasehold Valuation Tribunal for you are in breach of lease. This aspect is exceedingly serious and you will need to seek urgently your own

Solicitor's advice. Refer them to section 168(4) of the Commonhold & Leasehold Reform Act 2002, and ...

2. We will issue proceedings through the Court for payment of the premium."

6. By letters dated 8 May and 18 June 2008 the Appellant made an application to the LVT under section 168(4) of the 2002 Act. The Appellant drew attention to clause 2(12) of the lease and stated that the Respondent (in common with other lessees in Westfield Close) had been advised that arrangement for building insurance should take place through the broker appointed by the Appellant namely Towergate ghbc and stated that the Respondent initially did this but had failed to meet payment of the premiums. The Appellant enclosed various documents including a copy of the current insurance certificate and also a copy of the letter to the Respondent dated 4 April 2008 referred to above.

7. In paragraph 3 of its decision the LVT records how it raised the question of jurisdiction with the parties:

"By letters dated 26th June 2008 and 1st July 2008 the parties were notified that the Tribunal did not consider it had jurisdiction to determine this application due to:

(i) Section 167 of the Act which does not allow a landlord to exercise the right of re-entry or forfeiture for the lessees failure to pay a small sum (less than £500);

(ii) The sum claimed by the Applicant does not exceed that amount;

(iii) The sum claimed is a service charge within the meaning of section 18 of the Landlord and Tenant Act 1985;

(iv) There can be no claim made under section 168 of the Act in relation to the non-payment of a service charge; section 169(7)."

8. There was a hearing before the LVT. The Appellant did not attend but had made written submissions. The Respondent did attend. The Respondent's position is summarised in paragraph 2 of the LVT's decision:

"Ms McCready asserted that since she had acquired the lease in February 2004 she had always arranged her own buildings insurance with the knowledge of the landlord or her agents, impliedly raising the issue of whether section 164 of the 2002 Act applies. Ms McCready provided proof of payment of the latest premium paid to CIS Cooperative Insurance for buildings and contents insurance from 01/10/2007 with a renewal due on 1/01/2009."

9. The LVT decided it did not have jurisdiction to entertain the application for the following reasons:-

> "The Tribunal determines that although not referred to in the lease as a service charge, the insurance premium is nevertheless defined as such by section 18 of the Landlord and Tenant Act 1985; *see also section 167(5) 2002 Act.* As such the Tribunal does not have jurisdiction to determined this application; *section 169(7) 2002 Act*. In any event, even if the sum claimed were not a service charge, the sum claimed falls under the £500 limit set by statute and on the ground the LVT is of the opinion that it is without jurisdiction to determine the application as the Applicant cannot exercise a right of re-entry or forfeiture based on this small sum."

Having so found, the LVT went on to determine that the application had been incorrectly made such that it should be dismissed under regulation 11 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003. This decision to dismiss the application under Regulation 11 is puzzling. Regulation 11 gives power to an LVT to dismiss an application on the basis that it is frivolous or vexatious or otherwise an abuse of the process of the Tribunal. This contemplates the dismissal of an application which is within the jurisdiction of the LVT but which, on the merits, is frivolous or vexatious or otherwise an abuse of the process of the Tribunal – it does not contemplate the dismissal of an application which the LVT has no jurisdiction to entertain at all. It appears clear that the intention of the LVT was to decide it had no jurisdiction to entertain the application and I interpret the LVT's decision as only deciding that point. Plainly the LVT has not given any legally sustainable reasons for dismissing the application on the basis it was frivolous or vexatious or otherwise an abuse of the process of the LVT. Having decided it had no jurisdiction to entertain the application it would have been inappropriate for the LVT to have purported to make any such finding adverse to the Appellant on the merits of the case.

Statutory provisions

10. The Commonhold and Leasehold Reform Act 2002 section 164 makes certain provisions in relation to insurance otherwise than with a landlord's insurer. The LVT mentioned this matter in the course of its decision. However this is not relevant to the question of jurisdiction. Also the section applies where there is a long lease of "a house", whereas in the present case the Property demised to the Respondent would not appear to have been a house within the statutory definition.

11. Section 168 of the 2002 Act provides as follows:

> (1) A landlord under a long lease of a dwelling may not serve a notice under section 146(1) of the Law of Property Act 1925 (c. 20) (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied.
>
> (2) This subsection is satisfied if –
>
> (a) it has been finally determined on an application under subsection (4) that the breach has occurred,

(b) ...

(c) ...

(3) ...

(4) A landlord under a long lease of a dwelling may make an application to a leasehold valuation tribunal for a determination that a breach of a covenant or condition in the lease has occurred.

(5) ..."

12. Section 169 makes supplementary provisions in relation to section 168 and provides in subsection (7):

> "Nothing in section 168 affects the service of a notice under section 146(1) of the Law of Property Act 1925 in respect of a failure to pay –
>
> (a) a service charge (within the meaning of section 18(1) of the 1985 Act), or
>
> (b) an administration charge (within the meaning of Part 1 of Schedule 11 to this Act)."

Appellant's submissions

13. In her statement of case the Appellant advanced the following arguments:

(1) Even if the Appellant's complaint against the Respondent was properly to be construed as merely being a complaint regarding the non-payment of some money which could be categorised as a service charge, the LVT still had jurisdiction to determine under section 168(4) whether the Respondent was in breach of covenant as alleged. Section 169(7) does not oust this jurisdiction – the LVT is concerned with determining if a breach has occurred rather than being concerned with the consequences of such a breach (if established) and whether a section 146 notice can be served. The fact that the amount of the unpaid insurance premium was less than £500 is irrelevant.

(2) A determination that the Respondent was in breach of her covenant regarding insurance is a question of importance. I read this as an argument that what is at issue here is more than the mere question of whether the Respondent has failed to pay a money sum of £239.01 to the Appellant. Instead the issue is whether the Respondent has breached the provisions of covenant 2(12) regarding her obligation to take out insurance as there provided.

Conclusions

14. In my judgment the LVT was wrong to decide it had no jurisdiction to entertain the Appellant's application. The terms of clause 2(12) are set out above. This covenant by the lessee commences with a covenant to insure and at all times to keep insured against certain risks the Property through the agency of the lessor with a named insurer (or such other insurance office as the Lessor shall determine). The lessee also covenants whenever required to produce to the lessor or her agent the policy and the receipt for the last premium. These are self standing obligations of the lessee under covenant 2(12). The clause goes on to make provision giving the lessor certain specific rights as to how the lessor may act if the lessee is in default of these obligations, but these rights are expressly stated to be without prejudice to the power of re-entry. Thus the lessor, on default by the lessee, is entitled to insure the Property and to pay the premiums and to recover the premiums and all incidental expenses from the lessee on demand. However this obligation on the lessee to repay certain money sums to the lessor is not the totality of the lessee's obligations under clause 2(12). The lessee remains bound by the opening provisions of clause 2(12), namely to place insurance as there provided for and to produce a copy of the policy and a receipt for the last premium. As I understand the Appellant's complaint of breach of covenant which the Appellant makes against the Respondent it is a complaint that the Respondent has breached covenant 2(12) in the forgoing manner, namely that she has failed to take out insurance as there required. The Appellant's complaint is not merely that the Respondent has failed to pay a money sum of £239.01.

15. Accordingly I consider, with respect, that the reasoning which led the LVT to decide it had no jurisdiction is flawed. The LVT did have jurisdiction to determine whether there had been a breach by the Respondent of clause 2(12).

16. If, contrary to my conclusion given above, this case should be treated as an application under section 168(4) by the Appellant merely in respect of an alleged breach of covenant constituted by the Respondent failing to pay this money sum of £239.01 in respect of insurance premium, then even in those circumstances I do not consider that the LVT would have lacked jurisdiction. It may be arguable that the jurisdiction should in those circumstances have been exercised under section 81(1) of the Housing Act 1996 as amended. It is not appropriate in this decision made on the written representation procedure, in circumstances where representation has only been made on behalf of one party, to make any findings as to whether the application should have been under section 81 or under section 168(4). However even if the application should have been made under section 81 rather than section 168(4), I conclude that the LVT should have entertained the application and treated it as made under section 81 rather than declining jurisdiction because the wrong section (if it was the wrong section) had been referred to in the application.

17. I do not in any event agree that the fact that the breach complained of was non payment of a sum due by way of service charge of less than £500 (supposing that this were the correct analysis of the breach complained of) would give the LVT good reason to decide it had no jurisdiction. It may first be noted that there is no provision in the statute in section 168 or elsewhere to indicate that the jurisdiction under section 168(4) is limited to a case where, if the

breach complained of is a failure to pay money, the money involved is more than £500. Secondly it may be noted that section 167(1) restricts a landlord's exercise of a right of re-entry or forfeiture for failure by a tenant

> "... to pay an amount consisting of rent, service charges or administration charges (or a combination of them) ("the unpaid amount") unless the unpaid amount –
>
> (a) exceeds the prescribed sum, or
>
> (c) consists of or include an amount which has been payable for more than a prescribed period."

There could be a case where, for instance, there existed unpaid rent or admitted unpaid service charge in the sum of £x (less than £500) and where it was alleged by the landlord that the tenant was also in breach by failing to pay a further sum of service charge of £y (where £y is also less than £500 but £x plus £y is more than £500). In these circumstances a landlord understandably might wish to obtain a determination from the LVT (whether under section 168 of the 2002 Act or section 81 of the Housing Act 1996) regarding whether the tenant was in breach by having failed to pay £y, because once the landlord had obtained such a determination then the landlord could rely upon the non-payment of £x plus £y and would have overcome the £500 limit. In such circumstances the LVT's task would be to make the relevant decision (under section 168(4) or section 81 as the case may be) whether or not the amount allegedly wrongly unpaid is less than £500. The LVT should not direct itself that it only has jurisdiction to consider the alleged breach constituted by this failure to pay a sum of less than £500 if the LVT can be satisfied that an answer favourable to the landlord will result in the landlord being entitled to forfeit the tenant's lease.

18. In the result therefore I allow the Appellant's appeal. The LVT did not consider the merits of the Appellant's application, but instead merely declined to entertain it as a matter of jurisdiction. Now that I have found that the LVT does have jurisdiction to entertain the Appellant's application the matter must be remitted to the LVT so that the LVT can consider the Appellant's application on its merits.

Dated 16 July 2009

His Honour Judge Huskinson