UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2010] UKUT 138 (LC)
LT Case Number: LRX/175/2008

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

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

LANDLORD AND TENANT – service charges – whether LVT had miscalculated service charge costs and had regard to Appellant's arguments – appeal allowed in part – service charge calculation amended to give effect to LVT decision – Appellant not permitted to pursue set-off claim as a breach of County Court order and abuse of process.

BETWEEN	**FREDERICK MASRI**	**Appellant**
	and	
	THE WELLCOME TRUST LIMITED	**Respondent**

Re: Flat 3, 10 Lennox Gardens, London SW1X 0DG

Before: Her Honour Judge Alice Robinson

Appeal by written representations

The following cases are referred to in this decision:
Canary Riverside Pte Ltd v Schilling LRX/65/2005

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DECISION

1. The Appellant appeals to the Lands Tribunal, with permission, from a decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel (hereafter "the LVT") dated 16 September 2008 whereby the LVT decided that service charges payable by the Appellant for 2007 were £1,011.95.

2. The Appellant is the lessee of Flat 3, 10 Lennox Gardens, London SW1X 0DG pursuant to a lease dated 28th November 2003 for a term ending on 26 September 2015 of which the Respondent is lessor. By clause 4 of the lease the Appellant covenanted to pay to the Respondent 14.09% of the cost of performing the covenants set out in the Third Schedule, in summary for the maintenance and management of 10 Lennox Gardens.

3. On 3 June 2008 the Appellant applied to the LVT for a determination as to the reasonableness of the service charges for the year ending 25 December 2007. The Respondents had sought to recover a service charge based on total annual costs of £19,104.30. After recording a number of concessions by the Respondent and making a number of further deductions the LVT concluded:

> "Accordingly, as a result of all of the above the Tribunal determines that the service charge costs payable by the applicant for the year ending 24 December 2007 are £1,011.95p as shown on the Schedule attached at Annex 3."

Annex 3 contains a table identifying those sums conceded and those sums disallowed by the LVT resulting in annual costs of £7,182.05 of which 14.09% is £1,011.95.

4. The Appellant was granted permission on 16 June 2009 to challenge the LVT's decision on three grounds:

> (1) Failure to take into account the sums of £488.57 and £2,605.77 (which had been disallowed in the decision) when calculating the service charge payable of £1,011.95.
> (2) Failure to have regard to and/or give reasons for rejecting the Appellant's argument that the costs of 4 invoices totalling £4,442 should be disallowed.
> (3) Failure to have regard to and/or give reasons for rejecting the Appellant's 'counterclaim.'

Ground (1): failure to take into account £488.57 and £2,605.77

5. In paragraphs 31 to 36 the LVT dealt with the Respondent's claim for £7,692.02 for repairs and maintenance under the head Building Costs. It stated in paragraph 31:

> "As a result of the concessions detailed in paragraph 22 above these costs are now reduced to… £2,605.77p"

In paragraph 36 the LVT concluded that for the reasons relied upon by the Appellant those costs were not payable. Those reasons were that the costs related to basement damp works which had been the subject of an earlier compromise. Therefore the effect of the LVT's decision was to reduce the claim for £7,692.02 to nil.

6. In paragraph 40 the LVT held that the costs of £488.57 for Professional fees under the head Building Costs were also not payable.

7. However, in Annex 3 to its decision where the LVT sought to calculate the effect of its decision on the substantive issues, neither the sums of £2,605.77 or £488.57 are deducted. Annex 3 therefore does not give proper effect to the LVT's reasons and results in the Building Costs being £5,292.34 when they should be £2,198. Accordingly this ground of appeal succeeds.

Ground (2) failure to have regard to and/or give reasons relating to 4 invoices totalling £4,442

8. As explained in the Appellant's Reasons for Application for Permission to Appeal to the Lands Tribunal, the 4 invoices relied upon are for £1,645, £1,068, £1,400 and £329 respectively. Tab F of the Respondent's bundle before the LVT contains a detailed breakdown of the service charge costs and shows all 4 of these sums claimed as part of the £7,692.02 claimed for repairs and maintenance under the head Building Costs as follows:

Invoice date	*Supplier/Other*	*Invoice Number*	*Details*	*£*
01/03/2007	Kwik-Jet Ltd	12403	Unblocked main drains – 26/02/07	329
01/06/2007	Water Hygiene Management Ltd	8921	Replumb cold water services within basement flat	822.50
01/06/2007	Water Hygiene Management Ltd	8922	Redecorate bathroom – basement flat	822.50
12/10/2007	AS Ramsay Building Contractors Ltd	8023	Retention – damp works contract	1,068.02
C/fwd	Accrual		Provision for alternative accommodation for basement flat tenant during works	4,900

The £1,645 figure is made up of the 2 invoices for £822.50 each. The £1,400 forms part of the £4,900. This is explained in paragraph 27 of the Respondent's Statement in Reply to the LVT (tab D of the Respondent's bundle before the LVT) which concedes that £3,500 of the £4,900 should not be included in the costs (which concession is recorded in paragraph 22 of the LVT decision) but that the remaining £1,400 should be included.

9. As described in paragraph 5 above, the LVT reduced the £7,692.02 repairs and maintenance figure under the head Building Costs to nil. In its reasons the LVT has therefore deducted in full the 4 sums totalling £4,442 relied upon by the Appellant. Once effect is given to the first ground of appeal in paragraph 7 above, the second ground of appeal falls away.

Ground (3) failure to deal with the Appellant's 'counterclaim'

10. As explained in the Appellant's Reasons for Application for Permission to Appeal to the Lands Tribunal, the Appellant sought to deduct from any service charges due from him a set-off or counterclaim for damages for breach of covenant. The breach of covenant relied upon related to an alleged failure by the lessor to repair a smoke vent since 1999, see pages 30 and 94-100 of the Appellant's bundle before the LVT.

11. At the date of the Appellant's application to the LVT relating to the 2007 service charges (3 June 2008) there were already proceedings on foot between the parties in the West London County Court started in April 2008 in which the Appellant claimed damages against the Respondent for breach of repairing covenant relating to a flooding incident and the consequences thereof, see tab D.10 of the Respondent's bundle before the LVT.

12. In his application to the LVT the Appellant did not seek to assert a right to set-off or counterclaim for damages for breach of covenant by the Respondent. On the contrary, the application states at the bottom of a Schedule which lists the service charge costs claimed and those the Appellant accepted:

> "COUNTERCLAIMS + set-off
>
> NO-NOTICE water disconnect specific and general damages [settled at door of LVT] (650)
>
> Damages for multiple long-term breaches of covenant (to be determined by the County Court)
>
> Loss of amenity: long term neglect of derelict stairwell (500)"

To the right of this the Schedule states "NOT RELEVANT TO THIS APPLICATION" and no allowance is made in the service charge alleged to be payable for any of the above items, see tab A of the Respondent's bundle before the LVT.

13. On 21 July 2008 the County Court made an order in the Appellant's claim for damages for breach of covenant that (paragraph 2):

> "unless the Claimant do file and serve a draft amended Claim Form and draft amended Particulars of Claim by 4.00pm on Monday 18th August 2008, he shall be debarred from bringing, making, raising or pursuing any claims or causes of action as against the Defendant arising out of the Claimant's interest in and occupation of Flat 3, 10 Lennox Gardens, London SW1X 0DG which had accrued at the date hereof other than those pleaded in the existing Claim Form and Particulars of Claim (provided that nothing in

> this Order shall prevent the Claimant from bringing, making, raising or pursuing any application in the [LVT] of which the said Tribunal is already seised or which it has exclusive jurisdiction to determine." See tab D.10 Respondent's bundle before the LVT.

There is no evidence the Appellant filed a draft amended Claim Form and draft amended Particulars of Claim within the time specified. It is also clear that any claim for damages for breach of covenant for failure to repair a smoke vent since 1999 had accrued by 21 July 2008.

14. The Appellant's Statement of case before the LVT is undated but the copy in the Respondent's bundle before the LVT has been annotated "Received 30/7/08." On page 21 of it the Appellant raises his argument for "Counterclaim + set-off of my damage arising from long-term breach of repairing (e.g. smoke vent) + other covenants."

15. In my judgment the Appellant was precluded from raising that argument in the present LVT proceedings. The effect of the County Court order dated 21 July 2008 is that the Appellant was precluded from raising this argument in any proceedings against the Respondent unless the circumstances fall within the proviso to paragraph 2 of the Order. These are that the Appellant has made an application to the LVT of which the LVT is already seised or which it has exclusive jurisdiction to determine. Plainly the LVT does not have exclusive jurisdiction to determine a claim for damages against the Respondent for breach of repairing covenant. Further, while the LVT was seised of the Appellant's application relating to 2007 service charges on 21 July 2008, this expressly excluded any counterclaim or set-off. The particulars given by the Appellant quoted in paragraph 12 above are in response to a part of the application form which states:

> "You will be given an opportunity later to give further details of your case and to supply the Tribunal with any documents that support it. At this stage you should give a clear outline of your case so that the Tribunal understands what your application is about." (emphasis added)

Accordingly as at 21 July 2008 the Appellant's application to the LVT did not include a counterclaim or set-off. The service of a Statement of Case (on whatever date) which purported to include such a claim could not alter that.

16. It could be said that the Appellant's Statement of Case made clear a wish to pursue his argument that he had a counterclaim or set-off for failure to repair the smoke vent and that the LVT had a discretion to allow him to raise it. Pursuant to the Leasehold Valuation Tribunals (Procedure)(England) Regulations 2003 (SI 2003 No.2099) no particular formality is required in an application and particulars of the grounds on which a service charge is challenged are not required by regulation 3(1) or (3). In the decision refusing permission to appeal the LVT stated that "The applicant's 'counterclaim' was not dealt with because under this heading the applicant sought to relitigate costs already determined at previous hearings." Although the Appellant had previously raised breaches of repairing covenant, I am not aware of any evidence that he had previously raised failure to repair the smoke vent in other proceedings. Therefore the LVT's decision not to deal with the 'counterclaim' was reached on an erroneous basis and in any event, reasons should have been given in the substantive decision for not dealing with the 'counterclaim', even if briefly.

17. However, the appeal is not allowed on this ground and even if it were allowed I would not remit the case to the LVT just to deal with this issue. It would have been open to the LVT to refuse to deal with the counterclaim on the grounds that it should more properly have been litigated in the County Court proceedings and that the attempt to get it before the LVT was a device to circumvent the clear terms and intention of the Order of 21 July 2008 and thus an abuse of process, see *Canary Riverside Pte Ltd v Schilling* LRX/65/2005 at paragraph 43. In the light of all the evidence I have no hesitation in saying that the LVT would have taken this course of action.

18. I refer also to paragraph 5.9 of the Interim Practice Direction. If I had been aware of the full facts when I granted permission to appeal on this ground I certainly would not have done so. In the light of the fact that the Appellant had a proper opportunity to litigate a claim for damages for breach of repairing covenant over many years since 1999 when he first raised the matter with the managing agent and in the 2008 County Court proceedings which the learned judge clearly intended should bring finality to all such claims to date, I do not consider it would have been proportionate or expedient to allow the Appellant to litigate this issue in a re-hearing before the LVT.

19. The appeal is allowed to the extent that the costs to be taken into account for the purposes of the 2007 service charge are reduced to £4,087.71 (-£322.19 + £2,198 + £1,225.76 + £2,059.81 -£1,073.67) and the service charge payable by the Appellant shall be 14.09% of that namely £575.96. There is no need for the case to be remitted to the LVT.

Dated 12 May 2010

Her Honour Judge Alice Robinson