UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – variation of leases – calculation of compensation – procedure – Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 Regulation 13 – determination without a hearing – whether lessor was not afforded proper opportunity to participate

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

BETWEEN **KEENEY CONSTRUCTION LIMITED** **Appellant**

and

(1) DR ZOE M BROOKE **Respondents**
(2) MR DAVID LEE
(3) MS CLARE BANNER AND MR DAVID BANNER
(4) MRS KATHERINE DOS SANTOS FERNANDES AND MRS ELIZABETH CLEMENTS
(5) MR GARETH MCCONNELL AND MS CRISTA FITZHENRY
(6) MS NATALIE SUTTON
(7) MR BORIS HOREL AND MS AURELIE HAROUTUNIAN
(8) MR ADAM PARKINSON AND MR FRANK PARKINSON
(Being lessees of 1-9 Classic Mansions, Well Street, London E9 7QH)

Re: 1-9 Classic Mansions
Well Street,
London E9 7QH

Before: His Honour Judge Nicholas Huskinson
Decision made upon written representations

There are no cases referred to in this decision.

DECISION

Introduction

1. This is a decision upon a preliminary issue which has been ordered to be determined in the appellant's appeal against a decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel ("the LVT") dated 25 August 2010. By that decision the LVT determined that £72,238.80 compensation was payable by the appellant to the respondents pursuant to section 38(10) of the Landlord and Tenant Act 1987 being compensation in respect of loss or disadvantage which the LVT considered the respondents were likely to suffer as a result of a variation to the leases under which the respondents held their respective flats as lessees from the appellant as lessor. The variation was in relation to the calculation of service charge.

2. It has been ordered that this preliminary issue should be determined upon written representations. In summary the preliminary issue is whether the appellant was not afforded the proper opportunity to participate in the proceedings of the LVT which led to the decision of 25 August 2010 and, if it was not afforded such opportunity, whether the LVT's decision should be quashed.

3. The grounds of appeal whereby the appellant challenges the LVT's decision contained two grounds:

(1) that the appellant was not afforded the proper opportunity to participate in the LVT's proceedings in determining whether compensation should be paid and the quantum thereof, as a result of which the decision reached by the LVT was made without any representations having been made by the appellant; and

(2) that the LVT in any event reached a decision upon the award of compensation which was wrong in law and adopted an incorrect basis for the assessment of compensation.

It is only the first ground of appeal which is the subject of the preliminary issue and is therefore the subject of this present decision by the Upper Tribunal.

4. The matter arises in the following way.

5. The appellant is the freehold owner of the Building comprising 1-9 Classic Mansions. The building was described by the LVT in its first decision dated 22 January 2010 in the following terms:

> "The building was found to be a four storey block of 9 residential flats above commercial premises on the ground floor immediately adjacent to a busy road in a mixed commercial and residential area and in very poor condition. The property was said to be 100 years old but this was probably not accurate: the building was, however, certainly of some age, probably of pre WWII construction. It was of shabby and neglected appearance, with piles of rubbish in the

rear ground floor external areas and flooding along the residential walkways. There were 3 flats per floor and the residential floors were approached by decrepit stairways. The ceilings on each level were in a decayed state and the underside of the staircase on each in poor condition. The former refuse chutes were rusted up and unusable and access to the flat roof was via an unstable staircase. There was serious pooling on the roof, clearly of long standing. The roof level accommodating the 3 water tanks is subject to severe flooding, in evidence at the time of inspection, due to insufficient pitch in the roof fall to allow rainwater to run off. There was evidence of badly cracked brickwork in various locations."

6. On 12 August 2008 the appellant applied to the LVT under section 35 of the Landlord and Tenant Act 1987 for an order that the leases be varied so far as concerns the provisions regarding the recovery of service charge. It is not necessary for the purposes of the present decision to examine the nature of the problems which the appellant said had arisen, but in summary they included the submission that the lessees occupied 70% of the area and paid 47.31% of the service charge.

7. It appears various procedural problems delayed this application coming on for a hearing before the LVT, but eventually there was a hearing on 9 and 10 December 2009 at which the appellant was represented by counsel and solicitors and at which the appellant called a witness. The lessees were represented by Mr Bruce Maunder-Taylor FRICS, MAE, who was accompanied, inter alia, by Dr Zoe Brooke. By its decision dated 27 January 2010 the LVT decided that the appellant's application was properly made in accordance with section 35 and that the leases should be varied in the manner applied for. In paragraphs 30 and 31 of this decision of 27 January 2010 (hereafter referred to as "the first decision") the LVT stated as follows:

"30. The effect, however, is to increase the residential Lessees' total share of the property's service charges from 47.31% under the present Leased (sic), to a total of 69.49% (including the new contribution from Flat 8). The variation is a material departure from the present Leases – the terms of which the Landlord knew or should have known when he entered into them – to the financial disadvantage of the Lessees taken together, and to all but two of them individually. The Tribunal concludes, in the exercise of its discretion under s38(10) of the 1987 Act, that compensation should be paid to the Lessees, having regard to their increased share of the cost of the prospective future service charges.

31. The Respondent Lessees are directed to submit to the Tribunal their claim for compensation supported by expert evidence within 2 months of the date of this Decision (that is to say by 31 March 2010) and to serve the same upon the Landlord's advisers by the same date, in default of which the present determination will take effect and the draft Order submitted by the Landlord will be issued. Within 2 months of receipt of the claim for compensation by the Tribunal and the Landlord's advisers the Landlord shall submit to the Tribunal and the Lessees' advisers any response to the Lessees' claim for compensation. The application for compensation will then be set down for determination by the Tribunal, either upon the Tribunal's paper track without an oral hearing, or if an oral hearing is requested by either party within 7 days of the Landlord's response, on the first available date for such oral hearing. Any further Directions required will be issued in due course upon receipt of the claim for compensation. Following a determination on compensation the draft Order submitted at the hearing will updated as necessary and duly issued. It in any case requires a typographical amendment to the effect that the application is under s.35, not 37."

8. In consequence of these paragraphs in the first decision, the respondents, through Mr Maunder-Taylor, on or about 30 March 2010 submitted a statement of case in which Mr Maunder-Taylor examined the amount of compensation properly to be paid under section 38(10) and gave evidence in support of a claim that the compensation should comprise two elements being respectively £39,038.80 and £38,500.

9. It appears that this statement of case by Mr Maunder-Taylor was served on the appellant's solicitors Layzells. However for reasons which are not entirely clear (see further paragraph 15 below) no response was made on behalf of the appellant.

10. In consequence the LVT issued its decision of 25 August 2010 ("the second decision), which is the decision which is the subject of the present appeal. In paragraph 1 under the heading "Background" the LVT said this:

> "The Decision is supplementary to the Tribunal's Decision dated 27 January 2010, in which the Respondent Lessees were directed to submit to the Tribunal their claim for compensation by 31 March 2010. This was received by the Tribunal, with copy to the Respondents' solicitors, by 30 March 2010. No response was received from the Respondents and neither party had requested a hearing on this issue. On 21 June 2010 Mr Maunder Taylor wrote to the Tribunal submitting that the Respondents appeared not to wish to make any response, since the wording of the Tribunal's Decision in their Decision of 27 January 2010 suggested that it was discretionary (and not mandatory) for the Respondent Landlord to respond, and requesting that in default of any request from them for an oral hearing that the matter should be determined on the Tribunal's paper track without a hearing. A reconvened meeting of the Tribunal was then set down for a paper determination on 29 July 2010."

The LVT then went on to consider the statement of case submitted by Mr Maunder-Taylor on behalf of the respondents and the LVT effectively accepted his submissions and calculated the total compensation payable at £72,238.80.

11. The appellant after receiving this second decision applied to the LVT for permission to appeal upon the two grounds mentioned in paragraph 3 above. It is unclear when this application for permission to appeal was submitted. It appears from the document mentioned in the next paragraph that the application may have been made on 8 October 2010, but no point has ever been raised by the LVT or the respondents to the effect that the application was made out of time.

12. By a document dated 18 August 2011 the LVT granted permission to the appellant to appeal to the Upper Tribunal and stated:

> "1. The Tribunal has considered the Applicant's request for Leave to Appeal dated 8 October 2010 and further letter of 1 August 2011.
>
> 2. The application relates to the Tribunal's decision of 25 August 2010 that compensation of £72,238.80 is payable by the Applicant to the Respondent leaseholders under s.38(10) of the

Landlord and Tenant Act 1987 in connection with a variation of lease granted under s.35 of the Act.

3. The Applicant contends that he did not receive, and was not in the position to make representation on, the Respondent leaseholders' Statement of Case, in particular its evidence on prospective repair and maintenance costs at the property, and the appropriate basis for calculation of compensation.

4. Whilst the Tribunal made its decision of 25 August in the belief that the Applicant had received the Statement of Case and had made no response to it, the Tribunal accepts that there is at least doubt on this matter.

5. Accordingly, the Tribunal grants leave to appeal."

13. On 25 October 2011 the Upper Tribunal (George Bartlett QC, President) ordered that the issue whether the appellant was not afforded the proper opportunity to participate in the proceedings of the LVT should be determined as a preliminary issue. Certain directions were given including an order for the service by the appellant of any witness statements.

14. The respondents in due course served respondent's notices opposing the appeal. By various communications including letters from Dr Zoe Brooke dated 18 October and 21 October 2011 the respondent's (who indicated that Dr Zoe Brooke was authorised to represent them all) stated that they relied so far as concerns this appeal on the statement of case which had been submitted by Mr Maunder-Taylor on 30 March 2010. Thus they relied upon the substantive submissions of Mr Maunder-Taylor in relation to the quantification of compensation. No representations have been made by the respondents specifically directed towards the appellant's first ground of appeal, which is the subject of this preliminary issue.

15. In accordance with the directions of this Tribunal the appellant submitted a witness statement of Russell Leckstein who is a consultant in the firm of Layzells, the solicitors to the appellant. He explained he had only recently joined Layzells and that the majority of the facts and matters set out in the statement were based on his perusal of the file, because the person who previously had conduct of the file at the relevant time had left the firm, moved abroad and was no longer contactable – in consequence a statement could not be provided by that individual. Mr Leckstein confirmed that Layzells on 30 March 2010 received a copy of the respondents' statement of case, namely Mr Maunder-Taylor's statement regarding the quantification of compensation. There was however no communication from the LVT on Layzells' file subsequent to the LVT's first decision. Mr Leckstein drew attention to paragraph 1 of the LVT's second decision and noted that Mr Maunder-Taylor apparently wrote to the LVT on 21 June 2010 submitting that the appellant appeared to wish to make no response to his statement. Mr Leckstein pointed out that neither Mr Maunder-Taylor nor the LVT contacted the appellant or its solicitors to check whether it wished to file a response. Mr Leckstein said that the claim for compensation was allocated to the paper track without any representations from the appellant, which he submitted was highly unusual and prejudicial.

16. In due course Dr Brooke on behalf of the respondents submitted to the Upper Tribunal an expert report on the condition of the Building so as to give a more up-to-date estimate regarding costs. The contents of this report are not however relevant to my consideration of the preliminary issue.

17. Further directions were given by the Upper Tribunal dated 5 September 2012. There was then a further delay because, it seems, no party had submitted a copy of the second decision to the Upper Tribunal. This omission was remedied. The matter has now been allocated to me to decide upon written representations.

18. As I have already remarked, there are no written representations on behalf of the respondents specifically dealing with the matter raised in the preliminary issue. However I take the respondents as opposing the appeal on this ground. On behalf of the appellant the written representations are contained in the grounds of appeal and in Mr Leckstein's statement.

Legal principles/procedural regulations/practice directions

19. The Practice Directions of the Lands Chamber of the Upper Tribunal dated 29 November 2010 describe in paragraph 4.2 certain categories of reason for applying for permission to appeal, one of which is that the LVT:

> "…took account of irrelevant considerations or failed to take account of relevant consideration or evidence, or there was a substantial procedural defect."

20. In my judgment for the appellant to succeed upon the preliminary issue, insofar as reliance is placed on procedural defect, it is necessary for the appellant to show that there has been a substantial procedural defect which had led to prejudice to the appellant to such an extent that natural justice requires that the LVT's second decision be quashed.

21. Regulation 13(1) and (2) of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 makes provision for determinations without a hearing in the following terms:

> "(1) A tribunal may determine an application without an oral hearing, in accordance with the following provisions of this regulation, if –
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> (a) it has given to both the applicant and the respondent not less than 28 days' notice in writing of its intention to proceed without an oral hearing; and
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> (b) neither the applicant nor the respondent has made a request to the tribunal to be heard,
>
> but this paragraph is without prejudice to paragraph (3).
>
> (2) The tribunal shall –

(a) notify the parties that the application is to be determined without an oral hearing;

(b) invite written representations on the application;

(c) set time limits for sending any written representations to the tribunal; and

(d) set out how the tribunal intends to determine the matter without an oral hearing."

Regulation 2 states that "application" means (for present purposes) an application to a Tribunal of a description specified in Schedule 1 (which includes an application for variation of leases).

Discussion

22. Regulation 13 lays down the manner in which an LVT may determine an application without an oral hearing. The Regulation would on the face of it appear to be framed in relation to the determination of an application, rather than part of an application. In the present case the appellant's application for a variation in the terms of the leases, being an application made under section 35 and following of the Landlord and Tenant Act 1987, was an application which was not being determined without a hearing. There had been a hearing at which the appellant was represented by counsel. It may well be that, if all parties expressly agree, it is permissible for an LVT to decide on written representations some discrete part of an application which is otherwise proceeding by way of an oral hearing. However there was no such express agreement in the present case.

23. I am prepared for present purposes to assume (without deciding) that an LVT has power (despite the absence of prior agreement from the parties) to utilise Regulation 13 for the purpose of putting properly in place procedurally a determination without a hearing in respect of part of an application, being an application which has been proceeding with a hearing. It would be wrong upon a written representation decision, where neither party had advanced any argument upon the point, for me to express any view upon this point bearing in mind it is not necessary to do so.

24. Even assuming the LVT had power to bring into operation Regulation 13 in respect of part of this application, which had hitherto proceeded by way of oral hearing, I conclude that the procedure was not properly followed. Regulation 13(2) provides that the LVT must notify the parties that the application "is to be determined without an oral hearing." Also the LVT must invite written representations, must set time limits for these written representations, and must set out how the LVT intends to determine the matter without an oral hearing. I have set out in paragraph 7 above paragraph 31 of the LVT's first decision. This gives certain directions for the submission of representations and then states:

> "The application for compensation will then be set down for determination by the Tribunal, either upon the Tribunal's paper track without an oral hearing, or if an oral hearing is requested by either party within 7 days of the Landlord's response, on the first available date for such oral hearing."

25. In my judgment this is not a sufficiently clear and unequivocal notification to the parties that the application "is to be determined without an oral hearing". The paragraph also does not appear to comply with Regulation 13(2)(d).

26. Quite apart from the foregoing there is the following matter of concern, namely that in its second decision the LVT appears to have taken into consideration a representation dated 21 June 2010 from Mr Maunder-Taylor submitting that the appellant appeared not to wish to make any response. I conclude that the LVT took this representation into consideration because the LVT expressly refers to it in paragraph 1 of the second decision. In my judgment in the circumstances of the present case the LVT was wrong to take into consideration that representation without specifically checking with the appellant that it did not wish to make any response to Mr Maunder-Taylor's representations upon the quantification of compensation. I say "in the circumstances of this case" because the circumstances were these, namely it seems to me almost inconceivable that the appellant did not wish to make representations in response to Mr Maunder-Taylor's representations. The appellant had fully participated in the proceedings which led to the first decision both by representation by counsel and the calling of a witness. Also at the hearing, which led to the first decision, submissions had been advanced on behalf of the appellant that it was rare for compensation to be awarded and that such compensation had to be supported by expert evidence (paragraph 28 of the first decision). Mr Maunder-Taylor's written representations sought compensation in a substantial sum. Accordingly it was to the highest degree improbable that the appellant was content for the matter to be determined without a hearing and without the appellant making any representations.

27. In my judgment in these particular circumstances the LVT took into consideration something which it should not have taken into consideration (namely Mr Maunder-Taylor's letter of 21 June 2010) and the LVT failed to take into consideration something which it should have taken into consideration, namely the extreme improbability that the appellant was content for the matter of compensation to be decided without a hearing and without the appellant making any representations in response.

28. I do not overlook the fact that the appellants' solicitors did receive a copy of Mr Maunder-Taylor's statement of case and they had available to them the LVT's first decision, including the directions in paragraph 31. Mr Leckstein is unable to explain why no response was made by the solicitors (see paragraph 15 above). It is unfortunate that no response was made. However for the reasons mentioned above I consider that there was a substantial procedural defect and there was also a taking into account of an irrelevant consideration and a failure to take into account a relevant consideration on the part of the LVT. It is in my judgment self evident that as a result of these matters the appellant has suffered substantial prejudice, because the compensation has been decided by the LVT in the absence of any representations or evidence from the appellant.

Conclusion

29. In the result I find upon the preliminary issue that the LVT's second decision, namely that dated 25 August 2010, was made in circumstances where the appellant was caused substantial

prejudice by a substantial procedural defect and by the LVT taking into account an irrelevant consideration and omitting to take into account a relevant consideration.

30. In consequence I allow the appellant's appeal upon the preliminary issue. I quash the LVT's decision dated 25 August 2010. The question of compensation must be remitted for a fresh decision by the LVT which should be the subject of a hearing at which the appellant has the opportunity to appear and call evidence. The LVT should give directions for such a hearing.

Dated: 11 July 2013

His Honour Judge Nicholas Huskinson