UPPER TRIBUNAL (LANDS CHAMBER)

LT Case Number: LRX/8/2009

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

APPLICATION
under section 175(2) of the Commonhold and Leasehold Reform Act 2002 for
PERMISSION TO APPEAL
against the decision of a Leasehold Valuation Tribunal

Applicant: Ascham Homes Ltd

Property: 3 Brantwood Close, London E17 and others

Decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel dated 26 July 2008

DECISION ON AN APPLICATION TO RENEW AN APPLICATION FOR PERMISSION TO APPEAL FROM A LEASEHOLD VALUATION TRIBUNAL

1. On 8 April 2009 I refused the applicant permission to appeal to the Lands Tribunal under section 175 of the Commonhold and Leasehold Reform Act 2002 from a decision of the Leasehold Valuation Tribunal for the London Rent Assessment Committee. The application for permission to appeal had advanced five grounds, and in my decision I dealt shortly with each of these, stating that there was no reasonable prospect of success on any of them. On 12 May 2009 the applicant's solicitors wrote to the Lands Tribunal saying that in the case of two of the five grounds they believed that the applicant's case might have been misunderstood and explaining why. They asked that I review the basis on which I had assessed the application and that I reconsider it. They asked for an oral hearing. Having considered the request it seemed to me appropriate that a hearing should be held at which I could determine whether, as the applicant contended, the Tribunal had power to review a decision made by it refusing permission to appeal from an LVT and whether, if it had such power, permission to appeal should now be granted. I heard full argument by counsel on each of these matters on 3 September 2009.

2. A potentially complicating factor on the first question – whether there is power to review a refusal of permission to appeal – is that on 1 June 2009 the Lands Tribunal was abolished and its jurisdictions were transferred to the Upper Tribunal, to be exercised by the newly-created Lands Chamber of the Upper Tribunal. This was effected by the Transfer of Tribunal Functions (Lands Tribunal and Miscellaneous Amendments) Order 2009 and the First-tier Tribunal and Upper Tribunal Chambers (Amendment No.2) Order 2009. As a temporary measure the Lands Tribunal Rules 1996, which governed procedure in the Lands Tribunal, were re-made with necessary amendments as the rules governing procedure in the Lands Chamber, and the Practice Directions, previously non-statutory, were re-issued with amendments by the Senior President of Tribunals under powers contained in the Tribunals, Courts and Enforcement Act 2007.

3. At the date of transfer there were in existence the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Upper Tribunal Rules"), designed to deal with procedure in Administrative Appeals Chamber and amended, so as to deal adequately also with procedure in the Finance and Tax Chamber (now the Tax and Chancery Chamber) by the Tribunal Procedure (Amendment) Rules 2009. Rule 1(2) of the Upper Tribunal Rules provided for the rules to "apply to proceedings before the Upper Tribunal". Now, under the Tribunal Procedure (Amendment No.2) Rules, which came into force on 1 September 2009, the words "except proceedings in the Lands Chamber" are added at the end of this provision. Thus the Upper Tribunal Rules have no application for present purposes.

4. Schedule 5 to the Transfer Order contains transitional and saving provisions. Paragraph 1 provides:

> "Any proceedings before the Lands Tribunal which are pending immediately before 1 June 20089 shall continue on and after 1 June 2009 as proceedings before the Upper Tribunal."

Paragraph 2 provides:

> "(1) The following subparagraphs apply where proceedings are continued in the Upper Tribunal by virtue of paragraph 1 …
>
> (3) The Upper Tribunal may give any direction to ensure that proceedings are dealt with fairly and, in particular, may –
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> (a) apply any provision in procedural rules which applied to the proceedings before 1 June 2009; or
>
> (b) disapply provisions of the Tribunal Procedure Rules.
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> (4) In sub-paragraph (3) 'procedural rules' means provision (whether called rules or not) regulating practice or procedure before a tribunal.
>
> (5) Any direction or order given or made in proceedings which is in force immediately before 1 June 2009 remains in force on and after that date as if it were a direction or order of the Upper Tribunal.

Paragraph 6 provides:

> "A decision made by the Lands Tribunal before 1 June 2009 is to be treated as a decision of the Upper Tribunal on or after 1 June 2009."

5. The application that the Tribunal should review the decision refusing permission to appeal would appear to constitute "proceedings before the Lands Tribunal" for the purposes of paragraph 1, since the application was made before 1 June 2009 unless, as the respondents contend, the Tribunal became functus officio when permission was refused. If it is functus officio, that is an end of the matter. The procedural provisions before 1 June 2009 were the Lands Tribunal Rules in their then form and the non-statutory Practice Directions and from 1 June 2009 those rules in their modified form and the Practice Directions and Guidance Note. The decision refusing permission to appeal is, by force of paragraph 6, to be treated as a decision of the Upper Tribunal.

6. Under section 3 of the Lands Tribunal Act 1949 appeal against a decision of the Lands Tribunal lay to the Court of Appeal on a point of law. A decision refusing permission to appeal was not a decision for the purpose of this provision, so that challenge had to be by judicial review: see *R (Sinclair Investments (Kensington) Ltd v Lands Tribunal* [2006] HLR 11. Under section 13(1) of the 2007 Act there is a right of appeal to the Court of Appeal on any point of law arising from a decision of the Upper Tribunal other than an excluded decision. Among the categories of excluded decision is any decision of the Upper Tribunal on an application under section 11(4)(b) for permission to appeal from a decision of the First-tier Tribunal. The right of appeal against a decision of the First-tier Tribunal is given by section 11(2), subject to permission (subsection (3)). The appeal for which permission is sought in the present case is not from the First-Tier Tribunal under section 11 of the 2007 Act but from an LVT under section 175 of the 2002 Act. That section confers a right of appeal to the Lands Tribunal (now, of course, the Upper Tribunal) subject to the grant of permission by the LVT or the Lands Tribunal. Although there would be power for the Lord Chancellor under section 11(5)(f) to make a decision on an application for permission to appeal under section 175 an excluded decision this has not so far been done. It would appear, therefore, that since 1 June 2009 there has been a right of appeal to the Court of Appeal from the decision refusing permission, subject to the requirement of permission and to the relevant time limits. In view of the exclusion under section 11(4)(b) this right of appeal is clearly anomalous.

7. Under section 10(1) of the 2007 Act the Upper Tribunal may review a decision that it has made, other than an excluded decision. Under Part 8A of the Lands Tribunal Rules, however, a review may only be undertaken where application for permission to appeal has been made (rule 60(1)), and only if, when making the decision, the Tribunal overlooked a legislative provision or binding authority which could have had a material effect on the decision of if, since the decision, a court has made a decision that is binding on the Tribunal and could have had a material effect on the decision (rule 59(1)).

8. The applicant has not sought to appeal under section 13 of the 2007 Act, but Mr Timothy Fancourt QC, who appeared for it with Mr Alastair Redpath-Stevens, suggested that I had power to review the decision to refuse permission to appeal under section 10. That is clearly

not the case, since no application for permission to appeal has been made; and in any event the limitations imposed by rule 59(1) are not met.

9. Any right to require the Tribunal to review its decision must therefore be sought in the Lands Tribunal Rules. Part IIA deals with applications for permission to appeal. Rule 5C(1) provides that an application may only be made if an application has previously been made to the LVT and it has been refused; paragraph (2) imposes a time limit of 14 days from the LVT decision; and the other paragraphs set out what the application must contain and the steps to be taken by the Registrar on receipt of it. Rule 5D provides:

> "(1) The Tribunal shall determine an application for permission without a hearing unless it considers that there are special circumstances which make a hearing necessary or desirable.
>
> (2) The registrar shall serve on the applicant and each respondent a notice recording the decision of the Tribunal on the application for permission."

10. The contention advanced by the applicant is that it is open to the Tribunal to review a decision that it has made under this rule. (It is contended in the alternative that there is no reason why an applicant should not make more than one application after the LVT has refused leave, provided that the Lands Tribunal extends the time limited for appealing. This is in my view patently not the case. The provisions clearly contemplate a single application only.) It is said that authority shows that where a mishap or irregularity occurs in a decision-making process that undermines the propriety of the decision, or the decision is subsequently shown to have been unfounded the decision-maker has implied power to re-open the decision in order to do justice.

11. Reliance is placed on *R v Kensington and Chelsea Rent Tribunal ex p McFarlane* [1974] 1 WLR 1486, in which Lord Widgery CJ, presiding over a divisional court, held that a Rent Tribunal had power to re-open a case that it had decided where the applicant had not been notified of the hearing date; on *Porteous v West Dorset DC* [2004] HLR 30, in which the Court of Appeal held that the council had been entitled to revisit and rescind its decision that it owed the applicant a duty as a homeless person, where this had been based on a fundamental mistake of fact; and on dicta by Cranston J in a recent case, *R(Jenkinson) v Nursing and Midwifery Council* [2009] EWHC 111 (Admin).

12. There is clearly no general power to re-open a decision. I accept that such power may arise in the case of substantial procedural injustice (such as the failure, through error, to hear a party), and indeed it is to be noted that rule 43 of the Upper Tribunal Rules makes provision for this. I am not sure that every tribunal has power to set aside a decision based on a fundamental mistake of fact. The particular decision-taking process and the subject matter in *Porteous* were far removed from the ones I am concerned with. In any event the contention is that in refusing permission I misunderstood one aspect of the applicable statutory provisions. There is no suggestion of any procedural irregularity or any fundamental mistakes of fact. My conclusion is, therefore, that I do not have power to review my decision refusing permission on the basis advanced by the applicant.

13. That conclusion is sufficient to dispose of the application. But the applicant has also applied to the High Court to challenge my refusal of permission by judicial review. Since I heard submissions on the merits, both Mr Fancourt and Mr Christopher Mann, who appeared for one of the leaseholders, Mr Stephen Edwards and also for some other unidentified leaseholders, suggested that the disposal of the judicial review proceedings might be assisted if I were to say how, in the light of these submissions, I would now decide the application for permission to appeal if, contrary to my conclusion, I had power to reconsider it.

14. The subject-matter of the LVT decision that the applicant seeks to appeal is the failure of the applicant, which owns the housing stock of the London Borough of Waltham Forest, including the 1,800 or so properties acquired by leaseholders under the right to buy legislation, to comply with the consultation requirements imposed pursuant to section 20 of the Landlord and Tenant Act 1985 in respect of major works and the LVT's refusal to grant dispensation from those requirements under section 20ZA. The consultation requirements are contained in the Service Charges (Consultation Requirements) (England) Regulations 2003. Failure to comply with the requirements has the result that the landlord can only recover £250 from each leaseholder for the cost of the works. Schedule 2, the relevant schedule in the present case, contains the consultation requirements for qualifying long term agreements for which public notice is required, and it is to be noted that Schedule 3 sets out the consultation requirements for qualifying works. In 2004 the applicant proposed to enter into a number of long term agreements with building and mechanical and engineering contractors and, in accordance with Schedule 2, it gave notice of its intention to do so.

15. The next stage in the consultation process is the preparation of proposals, and the Schedule provides for this as follows:

> Preparation of landlord's proposals
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> 4. (1) The landlord shall prepare, in accordance with the following provisions of this paragraph, a proposal in respect of the proposed agreement.
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> (2) The proposal shall contain a statement –
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> (a) of the name and address of every party to the proposed agreement (other than the landlord); and
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> (b) of any connection (apart from the proposed agreement) between the landlord and the other party.
>
> …
>
> (4) Where, as regards each tenant's unit of occupation, it is reasonably practicable for the landlord to estimate the relevant contribution to be incurred by the tenant attributable to the relevant matters to which the proposed agreement relates, the proposal shall contain a statement of that contribution.
>
> (5) Where –

(a) it is not reasonably practicable for the landlord to make the estimate mentioned in sub-paragraph (4); and

(b) it is reasonably practicable for the landlord to estimate, as regards the building or other premises to which the proposed agreement relates, the total amount of his expenditure under the proposed agreement,

The proposal shall contain a statement of the amount of that estimated expenditure.

(6) Where –

(a) it is not reasonably practicable for the landlord to make the estimate mentioned in sub-paragraph (4) or 5(b); and

(b) it is reasonably practicable for the landlord to ascertain the current unit cost or hourly or daily rate applicable to the relevant matters to which the agreement relates,

the proposal shall contain a statement of that cost or rate.

(7) Where it is not reasonably practicable for the landlord to make the estimate mentioned in sub-paragraph 6(b), the proposal shall contain a statement of the reasons why he cannot comply and the date by which he expects to be able to provide an estimate, cost or rate.

…

(9) Each proposal shall contain a statement of the intended duration of the proposed agreement

(10) Where the landlord has received observations to which (in accordance with paragraph 3) he is required to have regard, the proposal shall contain a statement summarising the observations and setting out the landlord's response to them.

Notification of landlord's proposal

5. (1) The landlord shall give notice in writing of the proposal prepared under paragraph 4 –

(a) to each tenant …

(2) The notice shall –

(a) be accompanied by a copy of the proposal or specify the place and hours at which the proposal may be inspected …

(b) invite the making, in writing, of observations in relation to the proposal …

(3) Paragraph 2 shall apply to a proposal made available for inspection under this paragraph as it applies to a description made available for inspection under that paragraph.

6. Where, within the relevant period, observations are made in relation to the landlord's proposal by any tenant or recognised tenant's association, the landlord shall have regard to those observations.

16. The applicant served notices of proposals on all tenants under paragraph 5, on 18 November 2004 in respect of proposed long term agreements with building contractors. On 23 November 2005 further notices were served in respect of proposed long term agreements with electrical and mechanical contractors. Each notice was accompanied by a letter that stated that the applicant had prepared proposals for long term agreements. The notices appear to have contained all that they were required to. They were not accompanied by copies of any proposals, but they specified the time and place at which the proposals might be inspected and said "Please telephone 0800 3899125 to arrange an appointment." I am not wholly sure that the requirement to telephone to make an appointment was within the scope of the regulations, but this is not a matter that has been raised. The matter of fundamental significance is that there were simply no proposals. Contrary to what leaseholders were being told, none had been prepared as required by regulation 4, and the notices, served on each tenant, thus related to non-existent proposals.

17. In due course substantial work was carried out by the contractors and further work is likely in future. On 7 November 2007 application was made to the LVT for dispensation. After a two-day hearing, at which the applicant called several witnesses, the LVT refused to grant dispensation and gave its reasons for doing so. It said, correctly, that its duty was to establish that it was reasonable in all the circumstances to grant dispensation. It said that it had to weigh up what the likely prejudice was to either party. It said that it was disturbed to see that 12 months after the consultation provisions had come into force the landlord appeared to be confused as to their application. The size of the contracts and the major financial consequences for the individual leaseholders made it all the more important that the landlord gave careful and professional attention to the duty to consult. The LVT concluded that the landlord had not been able to comply with subparagraphs (4) and (5) of paragraph 4, but it did not accept that it was not reasonably practicable for it to ascertain the current applicable unit cost or hourly or daily rates (under subparagraph (6)). Alternatively the applicant could have stated (under subparagraph (7)) when it expected to be able to provide such matters. The LVT rejected the contention that the leaseholders had suffered no prejudice because, as the applicant contended, they had the opportunity under section 19 of the 1985 Act to challenge the reasonableness of the charges. It noted the inadequacy of the witnesses called at the hearing and it expressed its surprise that it had taken two years for the landlord to seek dispensation. It concluded that it should not exercise its discretion to grant dispensation.

18. In its application to the Lands Tribunal for permission to appeal the applicant advanced five grounds, each of which I dealt with in my decision refusing permission. It is in respect of grounds 4 and 5 that the applicant, in seeking a review of this decision, said that I was in error. Ground 4 asserted that the failure to produce a proposal had had no causative effect because no tenant asked to inspect the proposal or made written observation. Ground 5 asserted that the Qualifying Long Term Agreements did not identify or fix any prices for work, so that these would have been the subject of later consultation under Schedule 3. In rejecting these contentions I said:

"4. The contention that the failure to produce a formal proposal had no causative effect because no tenant asked to inspect the proposal or made written observations on them is unsustainable. It is not possible to infer from this what would have happened if the tenants had been provided with the information that they were entitled to receive.

5. I can see nothing that would suggest that the LVT failed to consider the Qualifying Long Term Agreements or that they misunderstood them. It may be that the consultation requirements in Schedule 3 were not irrelevant to a consideration of all the factual circumstances, but it seems to me improbable that if the LVT had had regard to this it would have come to any different conclusion."

19. In seeking a review of my decision the applicant said that I was in error in ground 4 in suggesting that the tenants had been entitled to be provided with information. It was sufficient, it is said, that they were told where they could inspect the non-existent proposals. None of the tenants had asked to inspect the proposals and none had made any observations on them. I note that the LVT decision does not make a finding that no tenant had asked to inspect the proposals. It appears that one witness, Mr Lambert, said: "In so far as I can recollect there were no requests to inspect any of the documents during the period in which notices were sent out." I was told that this statement was not challenged by Mr Mann, who appeared at the LVT hearing for Mr Edwards. It seems to me, however, that such evidence is insufficient to exclude the possibility that one or more tenants among the 1,800 or so may have sought to inspect the documents. The evidence said nothing about the persons responsible for receiving calls for the eight hours of each of the days over the consultation period or what, if any, system for recording them there was. Mr Lambert's "In so far as I can recollect" evidence, otherwise unexplained, is clearly insufficient to establish that no leaseholder sought to inspect the documents. Thus, although the applicant is correct in saying that there was no duty to provide each leaseholder with a copy of the proposals, I do not think that the assertion that no leaseholder suffered as the result of the failure to prepare proposals is made out.

20. In relation to ground 5 I do not think that the requirement to follow the Schedule 3 procedure meant that there could be no prejudice where the Qualifying Long Term Agreements did not specify prices or rates. The LVT found that the applicant could have made proposals containing these matters. The opportunity to comment on them and related matters is part of the statutory scheme, and I do not think that the Schedule 3 requirements (any more than section 9, which the LVT did expressly consider) renders compliance with the Schedule 2 requirements effectively unnecessary if it is proposed that the agreements should be unspecific on prices and rates. Indeed it may be, for instance, that a consultee under Schedule 2 would wish to contend that the agreements should specify these matters, and here the LVT found that it would have been possible for the proposals to do this.

21. It is, in my view, clear that the LVT, in whose discretion the decision on dispensation was, was understandably exercised by the gross failure on the part of the applicant to follow, or even properly to understand, the procedures that it was required to follow under Schedule 2. It found that the leaseholders had been prejudiced by this failure, and in my view it was justified

in so finding. I do not think that there is a probability that the Lands Tribunal on appeal would say that it had exercised its discretion wrongly.

Dated 8 September 2009

George Bartlett QC, President