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LON/00AW/LSC/2009/0540

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON APPLICATION UNDER SECTION 27A OF THE LANDLORD & TENANT ACT 1985

Address:	Garden Flat, 55 Elgin Crescent, London, W11 2JU
Applicant:	Ms P. Lawton
Respondent:	55 Elgin Crescent Ltd
Application:	18 August 2009
Inspection:	Not applicable
Hearing:	1 February 2010

Appearances:

Tenant

Ms P. Lawton	Leaseholder
	For the Applicant

Landlord

Miss Lee	Counsel
Miss S. Wright	Solicitor from the firm of Maddersons
Mr C. Cohen	Managing agent
	For the Respondent

Members of the Tribunal
Mr I Mohabir LLB (Hons)
Mr D. Edge FRICS

IN THE LEASEHOLD VALUATION TRIBUNAL

LON/00AW/LSC/2009/0540

IN THE MATTER OF SECTION 27A OF THE LANDLORD & TENANT ACT 1985

AND IN THE MATTER OF GARDEN FLAT, 55 ELGIN CRESCENT, LONDON, W11 2JU

BETWEEN:

PAULINE LAWTON

Applicant

-and-

55 ELGIN CRESCENT LIMITED

Respondent

THE TRIBUNAL'S DECISION

Introduction

1. By application dated 18 August 2009, the Applicant sought a determination under section 27A of the Landlord and Tenant Act 1985 (as amended) ("the Act") of her liability to pay and/or the reasonableness of a service charge relating to major works carried out in 2002 and 2003 and demanded by the Respondent in the service charge year ending March 2004.

2. A pre-trial review was held on 23 September 2009 at which the Respondent raised two jurisdictional issues, namely:

   (a) whether the application was time-barred under the Limitation Acts; and

(b) whether the Applicant was estopped from making all part of her application due to her previous conduct in relation to the items now in dispute.

3. Directions were issued by the Tribunal to enable the jurisdictional points taken by the Respondent to be decided as preliminary issues. This hearing took place on 30 November 2009 but was adjourned for the reasons set out in paragraph 6 of the Directions issued by the Tribunal on that occasion.

Decision

4. The adjourned hearing to determine the preliminary jurisdictional issues was heard by this Tribunal on 1 February 2010. The Applicant appeared in person. The Respondent was represented by Miss Lee of Counsel. The Tribunal dealt with this matter on the basis of the oral and written submissions made by the parties.

5. It was common ground that the Applicant had paid a service charge contribution of £13,705.52 on 25 June 2002 in relation to the major works. The submissions made by Miss Lee, on behalf of the Respondent, were these. Firstly, she relied on the earlier Tribunal decision of ***Royal Borough of Kensington and Chelsea v Mezziani*** (LON/00AW/LSC/2009/0246) as authority for the proposition that the Applicant's cause of action is to be regarded as a restitutionary reclaim and, as such, is subject to a limitation period of six years (see paragraphs 22-24 and 29).

6. The Tribunal did not consider that this submission was essentially correct. The Tribunal in ***Mezziani***, at paragraph 24, held that the Tribunal's sole function was to determine the amount which a tenant was obliged to pay in any particular service charge year. If that determination then gave rise to a cause of action for a restitutionary claim against a landlord, any such claim had to be brought in the County Court when any limitation point could properly be taken. In

other words, any such limitation point could not be strictly taken to prevent a Tribunal from making a determination under section 27A of the Act. Limitation was only relevant to the extent that, in the event that a tenant was statute barred, any determination made by a Tribunal would be academic and the application would amount to an abuse of process and subject to be dismissed as such.

7. As to whether or not the present application was academic, the Tribunal decided, on balance, that it was not. Although it was not expressly argued by the Applicant, she appeared to submit, for example, that the payment of her service charge contribution in 2002 may have been a mistake in law because the Respondent had failed to properly consult the lessees in accordance with section 20 of the Act. The Tribunal heard no evidence and made no finding as to when any such mistake may have occurred. However, it is arguable that any such mistake would have the effect of extending the limitation period under section 32 of the Limitation Act 1980.

8. Secondly, Miss Lee submitted that the payment of the service charge contribution by the Applicant in 2002 for the major works meant that the Tribunal had no jurisdiction to entertain this application under section 27A(4) of the Act because the service charges were deemed to have been agreed or admitted by her.

9. The Tribunal determined that this submission did not succeed for the following reasons. Section 27A(5) of the Act provides that a tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment. Mere silence or inactivity on the part of a tenant, having made payment, does not in itself prevent a subsequent challenge being made. There was *prima facie* evidence before the Tribunal that, as long ago as 10 May 2002, the Applicant had put the Respondent on notice that she would reclaim any element of the service charge contribution that was not legally recoverable. It is clear that the only thing agreed by the Applicant was the necessity for

the major works to be carried out. It seems, therefore, that payment by the Applicant was not unconditional or unqualified and she is afforded the statutory protection of section 27A(5).

10. The third and final submission made by Miss Lee was that the Applicant was now *estopped* from asserting that the Respondent had failed to consult the lessees in accordance with section 20 of the Act either generally or in relation to the major works or any particular item that comprised part of the major works. In the alternative, it was submitted that the equitable principle of laches applied because of the delay on the part of the Applicant in bringing this application.

11. It was submitted that both estoppel by representation and promissory estoppel applied in this case as a consequence of the Applicants conduct. It was contended that the Applicant, at all material times, was informed of proposals for major works and given a full specification together with an estimated budget in or around June 2001. Moreover, the Applicant was invited by the Respondent to a leaseholders meeting to discuss the works in September 2001 and was subsequently sent details and results of the tender process. Thereafter, she was invited again by the Respondent to attend a further leaseholders meeting to discuss the tender results in January 2002, which she also declined. It was not until August 2009 that the Applicant took any point regarding the validity of the consultation process generally or in relation to any particular item of work. It was submitted, therefore, that the Applicant was now estopped from doing so because in reliance on the Applicant words and/or conduct the Respondent had acted to its detriment.

12. Alternatively, Miss Lee submitted that the Applicant was time-barred by reason of the equitable principle of laches because she had not instituted proceedings either promptly or expeditiously and is now deemed to have acquiesced or assented to the continuance of the alleged wrong. Factors to be considered were the period of delay and

the extent to which the Respondent had been prejudiced by the delay. Miss Lee submitted that the prejudice to the Respondent was significant because most of the relevant evidence has now been lost given the passage of time and, for the reasons set out above, no reasonable explanation had been given by the Applicant for the delay in bringing this application.

13. In reply, the Applicant told that the Tribunal that she had not been in a position to bring this application until such time as the Respondent had given disclosure of the documents sought by her. She had made written requests for specific disclosure of various documents since July 2004. Indeed, on 25 November 2004 she demanded a refund of £2,651.80 from the total service charge contribution for the major works. As the Respondent made piecemeal disclosure, it gave rise to further issues in respect of which she sought additional disclosure. Through this process she only became aware of the substantial variations in the specification and the inadequate standard of work in relation to some items. This remained her position until 2008 when the Respondent issued proceedings in the County Court to recover service charge arrears from her. The Applicant maintained that she had not wanted to commence proceedings in relation to the major works without proper documentation. She believed that litigation might have been avoided by the parties reaching a compromise.

14. The Tribunal considered the equitable principles of the estoppel and laches together because the Respondent essentially relied on the same conduct on the part of the Applicant in relation to both. It was clear from the documentary evidence before the Tribunal that at no stage did the Applicant put the Respondent on notice that she would pursue a challenge in relation to the major works based on its failure to validly consult with the lessees in accordance with section 20 of the Act. That point was only raised when this application was issued on 18 August 2009 despite, it seems, the Applicant being kept fully informed of the scope and estimated cost of the major works. As a

consequence, the Respondent had, undoubtedly, acted to its detriment. Had the Applicant taken the point in relation to consultation at an early stage, the Respondent would have had an opportunity to consider its position and thereby prevent any further irrecoverable costs from being incurred. Accordingly, the Applicant is estopped from challenging the failure on the part of the Respondent to consult the lessees generally in relation to the major works or any particular item comprising those works.

15. The Tribunal considered the equitable principle of laches and the delay on the part of the Applicant in bringing this application. It was the Applicant's case that she was unable to bring the application until such time as the Respondent had made disclosure of relevant documents. The Tribunal rejected this argument. It is clear from the extensive *inter partes* correspondence that the managing agent had made reasonable attempts to respond to the Applicant's numerous requests for specific disclosure and information over several years. It is clear that, inevitably, any response from the managing agent would generate a further request from the Applicant seeking further information or documents and to possibly advance a different challenge from her initial one. The consequence of this is that the managing agent was engaged in a disproportionate and unnecessary exercise. If the Applicant's assertion that she was unable to particularise her claim until such time as the Respondent had made full disclosure is correct, then it seems that this should have been a greater reason for issuing the application sooner rather than later. The disclosure sought by the Applicant could have been obtained in the course of the proceedings. Furthermore, despite the disclosure given to the Applicant, she failed to particularise her claim in this application in any material way. The application, as pleaded, makes three general challenges, two in relation to consultation under section 20 of the Act and a further general challenge as to the reasonableness of "various contract items". In the Tribunal's view, those very same challenges could have been brought by the Applicant some time ago and were not materially

dependent on a disclosure sought or obtained by her. In other words, there was unreasonable delay on the part of the Applicant in asserting or enforcing a right to challenge the major works. Therefore, the Tribunal accepted the Respondent's submission that the delay on the part of the Applicant in bringing this application had resulted in significant prejudice to it because it was not now in a position to properly respond evidentially to the application[1]. Accordingly, the Tribunal found that the application was now time-barred by reason of the equitable defence of laches.

Dated the 18 day of March 2010

CHAIRMAN.....
Mr I Mohabir LLB (Hons)

[1] see *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221; *Nelson v Rye* [1996] 2 AER 186