Backdated lease variation

The recent case of *Brickfield Properties Limited v Paul Botten* [2013] UKUT 0133 (LC) addresses a simple but important point.

In this case the Upper Tribunal (His Honour Judge Huskinson) confirmed that, where a lease is varied pursuant to section 38 of the Landlord and Tenant Act 1987 ("the 1987 Act"), the effective date of variation can pre-date the decision ordering variation.

Factual background

The landlord owned seven blocks, each block containing eight flats. The landlord had granted long leases of those flats to tenants.

The leases contained an obligation by the landlord to undertake repair and maintenance at the seven blocks and a corresponding obligation by each tenant to contribute a proportion of the total service charge. The leases were framed so as to ensure that when the individual service charge contributions were aggregated they came to 100% of the service charge generated in respect of the seven blocks.

In 2006 the qualifying tenants in one of the seven blocks exercised their right to collective enfranchisement. The freehold of that block was subsequently transferred to the nominee purchaser in November 2006.

The tenants in the enfranchised block had previously contributed 14.45% of the total service charge for the seven blocks. Since this percentage contribution could no longer be recovered following enfranchisement a shortfall in the total service charge arose.

From June 2007 the landlord sought the agreement of the tenants in the remaining six blocks to variation of their leases so as to remedy the percentage shortfall. Different methods of apportionment were proposed by the landlord. At the end of a consultation process only three tenants were prepared to enter into a proposed deed of variation.

In April 2011 the landlord applied to the LVT pursuant to section 35(2)(f) of the 1987 Act to vary the leases upon the basis that they failed to make satisfactory provision with respect to the computation of service charge. The landlord sought that the variation took effect from November 2006, being the date of the transfer of the enfranchised block to the nominee purchaser.

LVT decision

The LVT confirmed that the leases did not make satisfactory provision for the collection of 100% of the service charge. It was therefore prepared to order variation.

The significant issue, however, was the date from when the variation would be effective.

The LVT considered that:

(1) The leases were contractual documents under which the tenants were only obliged to contribute specified percentages.

(2) A "discrepancy in [the] terms" of the leases had been identified.

(3) Applying the *contra proferentem* principle, the leases should be construed against the landlord where there was such a discrepancy.

(4) There was no evidence providing a reason as to why the tenants should be required to make backdated contributions in excess of their contractual obligations.

(5) It had been open to the landlord to make an application to vary at any time since 2006 but it had chosen not to do so.

The LVT ruled that the effective date of variation would be the date of its decision.

Appeal

The landlord appealed the LVT decision.

There were two relevant questions for consideration:

(1) Whether the LVT had jurisdiction to order that a variation could take effect from a date prior to its decision; and

(2) If there was jurisdiction to order a variation from a date earlier than the date of its decision, whether such jurisdiction should have been exercised by the LVT.

The Upper Tribunal allowed the landlord's appeal.

Jurisdiction

The purpose of section 35 of the 1987 Act is to provide a mechanism whereby the LVT can cure a defect in a lease. Whilst some of the matters set out in section 35(2) are concerned with the future (for example satisfactory provision in respect of repair or maintenance) and may therefore be inappropriate for backdated variation, section 35(2)(f) deals with the consequences of a existing service charge shortfall. There is nothing in the statute to indicate an intention only to cure such a defect prospectively rather than deal with the defect from the time that it arises. To suggest otherwise would be always to impose upon a landlord the burden of the existing shortfall.

Since parties to a lease can enter into a deed allowing variation from a date prior to the date of the deed, the Upper Tribunal deemed that a variation ordered under the 1987 Act could have similar retrospective effect unless a contrary indication could be found in the statute.

A review of the statute revealed the width of the jurisdiction available to the LVT. The Upper Tribunal highlighted the wording of section 35(1) ("… in such manner as is specified in the application") and section 38(4) ("…may be either the variation specified in the relevant application… or such other variation as the tribunal thinks fit"). Further, a useful distinction could be drawn between the wording of section 39(5) and section 38. Section 39(5) (which concerns orders for the cancellation or modification of a variation) sets out a specific restriction upon the effective date of any such order ("shall take effect as from the date of the making of the order"). There is no equivalent restriction upon any order made under section 38. This was seen to confirm that the statutory draftsman had not intended a date restriction on an order under section 38.

Discretion

By implication it appears that the LVT had concluded (correctly) that it did have jurisdiction to backdate the variation order but had nonetheless chosen not to do so in the exercise of its discretion.

The Upper Tribunal reviewed the reasons that the LVT had advanced for not backdating the variation order. It deemed that the LVT had exercised its discretion inappropriately:

(1) The *contra proferentem* rule had not been relevant. The LVT was not being asked to construe the leases, rather construe the statute. The statute clearly permitted a variation to be backdated.

(2) Once the question arose as to whether the LVT should exercise its jurisdiction, it could not be a self-standing reason for refusing to exercise that jurisdiction that the landlord could have made the application earlier (since, unless the application was made on the very day that the defect arose, it could always have been made earlier).

(3) The tenants would obtain an unintended windfall if the variation was not backdated. The lessees had been properly notified from an early date of the defect and of the prospective application that would be made if a variation was not agreed. Lack of agreement had forced the landlord to make the application.

Conclusion

This Upper Tribunal decision confirms that the LVT has jurisdiction to backdate a variation.

This higher tribunal confirmation will give landlords some comfort that in principle they can recover sums arising out of an historic shortfall and indeed that they will have time in which to seek to negotiate a variation before being put to the expense of making an application to vary.

Landlords nonetheless should not forget the protection afforded to tenants by section 20B of the Landlord and Tenant Act 1985 and the requirement therein that service charge demands be sent within 18 months of the date that the relevant costs forming the service charge demanded are incurred. A landlord will therefore need to bear in mind the time it will take to make its application to vary and receive a decision from LVT before being able to demand the shortfall sum.

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