
**LRX/31/2006**

**LANDS TRIBUNAL ACT 1949**

***LANDLORD AND TENANT − service charges −lease permitted recovery from tenant of "actual cost" of building works in relevant years – interrelationship of dates for payment of interim certificates under building contract to relevant years − whether erroneously calculated demands for service charges were validly made - powers of Tribunal to correct errors - appeal allowed.***

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

**BETWEEN** **ELAINE BARRINGTON** **Appellant**

**and**

**SLOANE PROPERTIES LIMITED** **Respondent**

**Re: Ground Floor Flat**
**10 Kensington Park Gardens**
**London**
**W11 3HD**

**Before: His Honour Judge Gilbart QC**

**Sitting at: Procession House**
**On 26th February 2007**

*Charles Scott*, instructed by Windsor and Co, Solicitors of Tottenham for the Appellant
*Michael Pryor,* instructed by Payne Hicks Beach, Solicitors of Lincolns Inn, for the Respondent

The following cases are referred to in this decision:

*Henry Boot Construction Ltd v Alstom Combined Cycles Ltd* [2005] EWCA Civ 1814
*Marenco v Jacramel Ltd*[1964] EG Digest 349
*Jones v Sherwood Computer Services PLC* [1992] 1WLR 277 (CA)
*Nikko Hotels Ltd v MEPC* [1991] 1 EGLR 1
*National Grid Company Plc v M25 Group Ltd* [1998] EWCA Civ 1968 [1999] 08 EG 169

The following additional cases were cited in the skeleton arguments

*Benedictus v Jaralam* [ 1989] 1 EGLR 251
*Re Davstone's Estates Ltd's Lease* [1969] 2 Ch 378
*Troop v Gibson* [ 1986] 1 EGLR 1

The following works were cited in the skeleton arguments

*Snell's Equity(31st Ed 2005) p 259-260*
*Woodfall's Law of Landlord andTenant 2007 Volume 1 paragraph 7.180*

## DECISION

### (as perfected after submissions from Counsel)

1. This decision relates to an appeal by Ms Elaine Barrington, the tenant of the ground floor flat at 10 Kensington Park Gardens, against the decision of 22nd November 2005 of the Leasehold Valuation Tribunal for the London Rent Assessment Panel. In that decision the LVT determined that the tenant was liable to pay her landlords, Sloane Properties Limited, of Bank Lane, PO Box N-8188, Nassau, Bahamas, service charges for the years ending 31st October 2000, 2001 and 2002 and totalling £45,658.29, made up as follows

| | | |
|---|---|---|
| (i) | 31st October 2000 | £13,406.76 |
| (ii) | 31st October 2001 | £ 1,117.64 |
| (iii) | 31st October 2002 | £31,133.89 |

2. Although she appealed against a number of aspects of that decision, she received permission to appeal from the LVT on one ground only, namely

> "The Tribunal grants leave to appeal on the issue of certification as this issue is complex and may have significant implications in this and other cases. Apart from the issue of construction of the lease the main issue is whether the Tribunal can allow the amounts claimed for building works even if the year in which they were certified is different from the year in which they were claimed."

Permission to appeal on other grounds was refused by both the LVT on 1st February 2006 and by the Lands Tribunal (HH Judge Rich QC) on 27th March 2006.

3. The Respondent had not given formal notice of its intention to appear in the proceedings before this Tribunal under Rule 7, and applied for permission to file a Respondent's Reply, which was served on 15th February 2007. As Mr Scott properly conceded, the presence of the landlord was expected, and none of the Reply took him by surprise. Acting under Rules 7 and 8 I granted permission for the Respondent to file the Reply and to appear.

4. I provided my decision to the parties on 2nd March 2007, but invited submissions on the mathematics contained in the decision. Both parties have made submissions on that topic, for which I am grateful. Those for the Appellant also sought to persuade me to open up other issues for determination, upon which I had reached a decision having heard argument, and had issued that decision. I shall not address such submissions, which were not invited by myself. I have no intention of reconsidering my published decision on such issues. Those for the Respondent asked the Tribunal to deal with the service charges for the years ending 1st November 2003 and 2004. Those service charges were not the subject of any appeal before me, and I received no evidence or submissions about them save insofar as they related to the years whose service charges I was considering. I decline to express any views about them, although of course the principles which I have set out about calculation may assist the parties in resolving any disputes between them. I also resist the Respondent's invitation to endorse its form of the drafting of the service charge certificates. This decision differs from the version of 2nd March 2007 in one minor and one significant respect:

a. the final certified sum under the Phase 1 contract is now given as the net figure before VAT (£532.03 instead of £625.14). The correct figure had in fact been used by me in the calculations thereafter. I reject all other recalculations suggested by either party;

b. a typographical error appeared in the calculation of the Phase II works for the year ending 1st November 2002. I have amended that error, which makes a difference of £4,400 in the charge for that year, but which still remains less than the Respondent had claimed.

I have also corrected some minor infelicities in my typing, punctuation, syntax and computer formatting. Subsequent paragraphs have also been renumbered because of the insertion of this paragraph.

**The facts**

5. I heard no evidence, but heard legal submissions from Counsel. Before me, the issues related to the legal implications of the facts, not to any disputes over the facts. The flat is held by the tenant on the terms of a lease made on 4th November 1964, for 99 years running from 24th June 1964. Although the lease was subsequently varied on 17th April 1974, both landlord Respondent and Appellant tenant agreed before me that the relevant provisions were those of the 1964 lease. It appeared that both parties have conducted themselves on the basis that the 1964 lease is the relevant one.

6. The lease contains provision for the payment of a very modest ground rent, rising from £75 pa for the first 40 years of the term, and then rising to £150 and £275 for the next 30 and last 29 years respectively. It also requires payment of a further annual sum:

> "an annual sum of money equal to an eight-thirty-three of the actual cost to the Landlord of providing (…) insurance repairs painting decoration lighting furnishing and carpeting and also the landlord's general administration expenses including (but without prejudice to the generality of the foregoing) ……the fees of the landlord's managing agents for the general management of the Building and the fees of architects surveyors accountants solicitors and other professional persons for services rendered for the benefit of the building as a whole or of the tenant and other tenants as a class …….such sum to be certified by the accountant for the time being of the landlord (whose certificate in writing shall be conclusive) in respect of each year (calculated from the First of November) or the sum of One hundred and sixty pounds in any year when this shall be greater than the sum so certified (……) on the quarterly day for payment next ensuing after the date of such certificate."

It was agreed that an " eight-thirty-three" (or in fraction terms 8/33) amounts to 24.24%.

7. Between 2000 and 2003, building works were carried out to the property by a builder called Thames and Newcastle Limited. The work was supervised by Finch Associates, who are chartered architects and surveyors. The work was divided into two contracts, which I shall call Phase 1 and Phase 2. Both were typical building contracts, whereby

(i) The supervising architect would value the work done from time to time and issue an interim certificate, which was due for payment by the landlord to the contractor after 14 days of issue of the contractor's invoice

(ii) The certificate would represent the value of work done, less the amount(s) already paid, and less 5% or 2.5% retention depending on the certificate

(iii) As the work proceeded there would be omissions from the works specified in the original contract documents, or items of work added to them. Those omissions and additions would be valued also, and taken account of in the certification procedure.

(iv) At the conclusion of the work, a final certificate would be issued and the retention monies released to the contractor.

8. At every certificate date before the final certificate, the retention applied. Thus, as at August 2000 (Phase 1 contract certificate 2) the amount of work done was £25,674 (plus VAT) but the amount payable was 95% of that less the amount already paid (£9125.70). That calculation was therefore ((£25,674 x 95%) – £9125,70) = £15,264.60.

9. In addition, the supervising architects submitted claims for their own work. They were paid 10% of the contract value plus disbursements, plus VAT on that combined figure.

10. The Phase 1 contract was for works of repair to the rear elevation. The original contract sum was £41,533. By March 2001, the contract value was calculated as £59,711. At the final certificate in September 2001, it fell back slightly to £58,116.50. The history of that contract was as follows. The heavier borders within the table shows where the year end of 31st October falls.

| Item | Architect's Certificate | Invoice from Contractor | Date payment due | Date of payment, if known | Amount payable after retention | Amount certified for payment £ |
|---|---|---|---|---|---|---|
| Interim payment (1) | 13 Jun 2000 | 14 Jun 2000 | 28 Jun 2000 | 7 Jul 2000 | £ 9,125.70 | £ 9125.70 |
| Interim payment (2) | 29 Aug 2000 | 31 Aug 2000 | 13 Jun 2000 | 19 Jun 2000 | £ 24,390.30 | £ 15,264.60 |
| Interim payment (3) | 27 Oct 2000 | 27 Oct 2000 | 10 Nov 2000 | 20 Nov 2000 | £ 45,515.45 | £ 21,125.15 |
| Interim payment (4) | 13 Mar 2001 | 19 Mar 2001 | 2 Apr 2001 | 24th May 2001 | £ 57,584.47 | £ 12,069.02 |
| Final cert | 28 Sep 2001 | 28 Sep 2001 | 12 Oct 2001 | | £ 58,116.50 | £ 532.03 |

11. In the case of Phase 2, that related to the front and flank elevations. The original contract sum was £104,110.24, which had grown to £146,714.25 by the final certificate. Its history was as follows. The heavier border within the table shows where the year end of 31st October falls.

| Item | Architect's Certificate | Invoice from Contractor | Date payment due | Date of payment, if known | Amount payable after retention | Amount certified for payment |
|---|---|---|---|---|---|---|
| Interim payment (1) | 18th Feb 2002 | 26th Feb 2002 | 12th Mar 2002 | 3rd Apr 2002 | £ 18,955.69 | £ 18,955.69 |
| Interim payment (2) | 19th Mar 2002 | 22nd Mar 2002 | 5th Apr 2002 | 27th Mar 2002 | £ 30,668.79 | £ 11, 713.10 |
| Interim payment (3) | 29th Apr 2002 | 30th Apr 2002 | 13th May 2002 | 22nd May 2002 | £ 54,952.69 | £ 30,668.79 |
| Interim payment (4) | 27th May 2002 | 28th May 2002 | 12th Jun 2002 | 15th Jul 2002 | £ 81,617.44 | £ 26,664.75 |
| Interim payment (5) | 2nd Jul 2002 | 5th Jul 2002 | 19th Jul 2002 | 26th Jul 2002 | £ 94,158.17 | £12,540.73 |
| Interim payment (6) | 31st Jul 2002 | 31st Jul 2002 | 13th Aug 2002 | 7th Sep 2002 | £ 120,877.97 | £ 26,719.80 |
| Interim payment (7) | 27thAug 2002 | 29th Aug 2002 | 13th Sep 2002 | 18th Nov 2002 | £ 123,994.27 | £ 3116.30 |
| Interim payment (8) | 5th Nov 2002 | 8th Nov 2002 | 2nd Dec 2002 | 6th Dec 2002 | £ 141,697.28 | £ 17,703.01 |
| Final certificate | 24th Mar 2004 | Not known | Not known | Not known | £ 146,714.25 | £ 5016.97 |

* Certificate 8: when paid, this was paid with an extra sum of £ 3159.83 to reflect a works value increased to £144.857.11 after retention at 2.5%

12. Before the costs were passed on to the tenants, some adjustments were required, as some of the work did not relate to matters which were the subject of the payment provisions in the lease. Thus, in the Phase 1 contract, £46,669 (78%) of a total contract value of £59,711 (figure given at April 2001) was said to be recoverable, and in the Phase 2 contract, £46,155.38 was considered to relate to improvements which lay outside the scope of the works for which recoupment could be made from the tenants. That latter amount represented 68.93% of the total value.

13. It will be noted from the above that the Phase 1 contract straddled the 31st October year end in 2000. In Phase 1, the value of works was certified by the architect as at 22nd October 2000 as £47,911.00. After allowing for retention of 5%, the amount payable was £ 45,515.45, which after allowing for past certificates produced a net amount for payment of £ 21,125.15 plus VAT. There was a further certificate in March 2001 (value £59,061/retention 2.5%/net amount payable £12,069.02 plus VAT). By 5th April 2001 the work done had risen to a value of £59,711, of which £800 was to be paid by neighbours of the property. (The final contract sum in the final certificate on 28th September 2001 was £58,116.50).

14. In Phase 2, which also straddled a year end, the certificate for Phase 8 valued the work done on 31st October 2002, but was not issued until 5th November 2002. The previous certificate of 27th August 2002 had certified that work to a value of £130.520.29 had been carried out. After retention and allowing for earlier certificates, £3,116.30 (plus VAT) was the net amount for payment. The payment was due before 31st October but was not made until

after November 1st 2002. The work was valued again on 31st October 2002, and a certificate issued on 5th November 2002. It valued the work done at £145,330.55, which after retention produced a payable figure of £141,697.28, which after deduction of earlier certificates produced a net amount for payment of £17,703.01. (The retention percentage for that certificate was 2.5% as opposed to 5% on earlier certificates). In the case of the final payment in Phase 2, it was sought and paid in the year ending 31st October 2004.

15. It is necessary to take note also of the way in which the value of the contract for Phase 2 was stated. The original contract sum was always stated as £104,110.24. By certificate 8, which was valued on 31st October 2002 and sent out on 5th November 2002, the value of work done had risen to £145,330.55, and the certificate for the net amount payable after retention of 2.5% was for £17,703.01 (plus VAT). However, the invoice from the contractor of the 8th November 2002 (described as a "final account") gave the value "to date" as £148,571.39. A handwritten note appears on certificate 8, which records that there was an agreement on 6th December 2002 to increase the payment to £24,513.84, which had the effect of increasing the total value to £148,571.39. However while the final certificate shows a value of £146,714.25, and takes no account of the additional sum paid in December 2002, a final account which was provided to then tenant in 2004 does reconcile the two figures. No point was taken on this by Mr Scott.

16. The landlord sought payments from the tenant as follows. On 6th June 2001 what was said to be a "Final Account" was provided certified by a concern called Volaw Trust and Corporate Services Limited ("Volaw"), whom the LVT concluded were an accountant for the purposes of the lease. It set out the contract value (before VAT and without regard to any retention), then stated the amount recoverable from tenants, and then attributed 90% of the amount to the period up to 1st November 2000 (£42,002.10). It then applied a factor of 0.2424 (the decimal expression of the fraction in the lease) to arrive at a figure of £10.181.31. It then added VAT (£1781.72). It then sought a contribution to the Finch Associates fees. It did so by applying 10% to the total of £10,181.31 + £1781.72, which it calculated as £1,196.30, and 24.24% of the disbursements and of the Planning Supervisor Fees which had been incurred. The "Total Due" was stated to be £13,406.76.

17. In (condensed) form it read

| | | |
|---|---|---|
| Final Account (before VAT) | £ 59,711.00 | |
| Less paid for by neighbour | | £ (800.00) |
| Less works not relevant to recovery | | £ (12,242.00) |
| (Total deduction) | | £ (13,042.00) |
| Balance | £ 46,669.00 | |
| Amount completed by 1st Nov 2000 (90%) | £ 42,002.10 | |
| Barrington %age (24.24) | £ 10,181.31 | |
| Vat @17.5% | £ 1,781.72 | |
| Fees @10% incl VAT | £ 1,196.30 | |
| 24.24% of disbursements (£368.74) | £ 105.02 | |
| 24.24% of planning supervisor fees (£ 500) | £ 142.41 | |
| TOTAL | £ 13,406.76 | |

18. On 27th November 2001 the landlord issued proceedings in the Central London County Court against the tenant for £14,868.90 which it now asserted was the figure sought by the Notice of 6th June 2001. The tenant later filed a Defence which, inter alia, referred to the fact that the actual account sent had been for £13,406.76.

19. On 25th February 2003 the landlord served 2 sets of accounts, certified by Volaw. As will become apparent, it no longer relies on them. The first account was described as "final accounts and cost apportionment between lessees for the work carried out……under the first contract due from your clients on 24th June 2001". It applied the same method as the statement of 6th June 2001, except that it made no attempt to allocate expenditure to years, and thus contained no 90% discount. It was otherwise based on precisely the same figures. It too made no allowance for any retention. It attached a final account of the building works, omissions and additions. It reached a "Total Due" of £14,868.90, which is of course the same figure as had been erroneously pleaded in the civil proceedings.

20. The second account referred to the works carried out under the second contract. It was accompanied by a final account of the building works, omissions and additions. It sought £33,130.70 by the next quarter day (25th March 2003) and was calculated thus

| | |
|---|---|
| Final Account (before VAT) | £148,571.39 |
| Less improvements/additions | (£ 46,155.38) |
| Balance | £102,416.01 |
| Barrington %age (24.24) | £ 24,825.64 |
| Vat @17.5% | £ 4,344.49 |
| Fees @10% incl VAT | £ 3,427.48 |
| 24.24% of disbursements | £ 347.96 |
| 24.24% of planning supervisor fees | £ 185.13 |
| TOTAL | £ 33,130.70 |

21. It will be noted that it was not expressed to relate to a particular year, and included works not invoiced during the year ending 31st October 2002, and included claims for percentages of fees calculated by reference to such sums. It also included sums invoiced but not paid for during that year. It is also relevant to note that the figures used at that time for the amount of the work relevant to the apportionment (£102,416.01 out of £148,571.39) represented a percentage of 68.93%.

22. On 24th September 2003 the landlord served further accounts, again certified by Volaw. It also stated that it now accepted that the certificate relating to the building works in year ending 31st October 2000 was for £13,406.76 and not as previously claimed in the court proceedings. It served an account for the year ending 31st October 2001, in which it took the same base figures as used for the 2000 account, but now claimed the 10% remainder not claimed in the 2000 account. That produced a claim for £1,117.64 for the year ending 31st October 2001. The landlord also served an account for the year ending 31st October 2002. It is necessary to set out parts of it (edited by omitting matters which are not relevant to the decision)

"10 KENSINGTON PARK GARDENS W 11

COST APPORTIONMENT BETWEEN LESSEES

Year ending 31.10.02

| | |
|---|---|
| Final Account Contract no 2 | £ 148,571.39 |
| "Proportion of final account on which E Barrington percentage to be based (refer to cost apportionment dated 31.10.02)" | £ 102,416.01 |
| "Amount to be certified at 31.10.02 (cert 08)" | £ 141,697.28 |
| At 68.93% | £ 97,671.93 |
| At 24.24% | £ 23,675.67 |
| VAT @17.5% | £ 4,143.24 |
| Total | £ 27,818.91 |
| Fees @10% plus VAT on £ 23,675.67 | £ 2,781.89 |
| 24.24% of Finch Assocs disbursements | £ 347.96 |
| 24.24% of Planning Supervisors Fees | £ 185.13 |
| Total due from E Barrington for year ending 31.10.02 | £ 31,133.89 |

23. It will be noted that certificate 8, which was valued at 31st October 2002, but not issued until 5th November 2002, was used to determine the amount of work certified as at 31st October 2002. However the statement was accompanied by a "Cost apportionment between lessees" which bore the words "Refer to final account breakdown 31.10.02." That apportioned the works exactly as had been done when the February 2003 demand had been sent – i.e. it took the contract value as £148,571.39 and the apportionable amount as £102,416.01. It was also accompanied by a Final Account for the second contract which bore the date " 31.10.02" but gave the total value as £148,571.39. Given the matters set out above, that document must have been drawn up at a date later than 5th November 2002, but not necessarily more than a few days later. However the figure used by the landlords for the 2002 demand (£141,697.28) is an interesting one. It is not the value of the works as at 31st October 2002, but is the value used in certificate number 8 *after application of the retention.* The account from the landlord is therefore based on at least two inconsistent sources of financial data.

24. It follows from the above that

a. The accounts certified by the accountant calculate the architect's fees (other than the disbursements) by reference to the sum calculated for the value of the contract. It follows that any alteration in the calculation of the contract value attributed to any given year will also alter the level of architects' fees in the calculation.

b. At 31st Oct 2000, £47,911 of work had been carried out on Phase 1, and had been certified under the building contract. Of that figure, £24,390.30 plus VAT (totalling £28,658.61) had been due to be paid by the landlord in the year ending 1st November 2000. It had been so paid. Another £21,125.15 plus VAT (totalling £24,822.05) had been certified before 1st November 2000, but was not due for payment, nor paid, until after 1st November 2000. Of the

final certified sum (£58,116.50) the amount paid before 1st November 2000 represented just under 42 %. The amount of work done by that date and certified for payment (£45,515.45) amounted to just over 78 % of the eventual certified final sum of £58,116.50. Even the amount of work done without deducting for retention only amounted to £47,911, or 82% of the final contract sum (and 80% of the figure of £59,711 relied on in the accountant's certificates). Thus the amount claimed in respect of the contract works for the year ending 1st November 2000, which is based on an assumption that no less than 90% of £59,711 had been paid (£53,739.90) exceeds the amounts certified for payment by the architect to a very substantial degree, and exceeds the amounts which were payable within that year, whether one takes the retention into account or not, or whether one treats the work certified on 27th October 2000 as reckonable or not for that year's account.

c. Any excess in the year ending 31st October 2000 of the kind described above will go hand in hand with an equivalent understatement of the amount of costs certified under the building contract or paid for the year ending 31st October 2001.

d. As to the year ending 31st October 2002, by 23rd August 2002 work on Phase 2 to a value of £130.520.29 had been carried out, which after retention of 5% and deduction of earlier payments resulted in a certificate that £3,116.30 was payable. The time for payment of the difference (£3,116.30 or £3661.65 incl VAT) had elapsed before 31st October 2002. By 31st October 2002, work had been carried out under the Phase 2 contract to a value of £145,330.55, of which £ 141,697.28 was payable after retention of 2.5%. The relevant certificate was issued after 1st November 2002.

e. In the account relating to Phase 2 presented in September 2003, while the overall contract figure used was the gross value of £148,571.39, the liability was calculated based on the value of the amount certified at 31st October 2002. The amounts which were used to calculate the tenant's contribution were based on a figure of £141,697.28 (£166,494.30 incl VAT) and thus exceed the amounts either certified for payment or paid during the relevant year, but do not exceed the value of the work done once retention is allowed for. As appears below, there is an issue on how the amounts valued on 31st October 2002 are to be treated.

f. The internal alterations and assumptions (the exclusion of items from the amount to be apportioned and the use of the percentage thus derived to the value of the Phase 2 works at stage 8, and thus before completion) are also affected by any changes in figures.

25. I should refer also to the related court proceedings, and to payment of the demands. As noted above, the landlords issued proceedings on 27th November 2001, claiming £14,868.90. It alleged (wrongly) that an account certified under the lease in the sum of £14,868.90 had been provided to the tenant in June 2001. As noted above, what had been provided was in fact an account for £13,406.76. The Defence resisted the claim on several other additional grounds, including the adequacy of notice of the intended works, delays in the works, the adequacy of

the certification of the accounts, the nature of the works in the context of what was chargeable under the lease, the reasonableness of the charges, and the standard of the works. There was also a set off and counterclaim whereby it was alleged that the execution of these and other woks had caused damage to the tenant's flat, possessions and had obstructed the common parts.

26. On 8th January 2004, further proceedings were issued by the landlord for £45,658.29, being the sum of £13,406.76 (2000), £1,117.64 (2001) and £31,133.89 (2002). The claim alleged that the amended certificate for 2000 had been served on 25th February 2003, so that it became payable on 25th March 2003. It contended that the other two certificates had been served on 24th September 2003, and in what was surely a typographical error, asserted that that account had been payable from 29th September 2002. In fact, the certificate for the year 2000 served in February 2003 was wrongly calculated, as the landlord accepted before this Tribunal. The tenant again resisted the claim on similar grounds to its predecessor.

27. On 8th June 2004, District Judge Hasan sitting in the Central London County Court made an order by consent whereby the Counterclaim was discontinued, and all remaining issues be transferred to the Leasehold Valuation Tribunal (the LVT). Questions of costs were reserved. The LVT rejected all the challenges made to the accounts, save for one minor matter. It determined that the tenant was liable for all the items except for £344 for a conservatory in the phase 2 works, but held that £45,314.29 was payable.

28. It was a matter of agreement before this Tribunal that the tenant had now paid the sums claimed by the landlord.

**Cases for the Parties**

29. Mr Scott, counsel for the tenant, stated that his client had now paid the claimed sum as adjusted by the LVT. However he submitted that it was important to establish the principle of the validity of the certificates because it would affect the costs issues which had been reserved by the County Court. He argued that, on its true interpretation the lease required that any expense claimed had both fallen due for payment, and had been paid in the year in question. He submitted, in reliance on *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd* [2005] EWCA Civ 1814 that the landlord's liability to pay the contractor only arose on the date after a certificate had been issued, and then after 14 days had elapsed. He relied on *Marenco v Jacramel Ltd* [1964] EG Digest 349 to say that only sums paid could be taken into account. Any certified account which was not based on actual costs incurred and paid in the year would not be a valid certificate. He emphasised that the wording of the lease required the ascertainment of actual costs within the relevant year, which required one to take dates of payment as the relevant dates. He contended that the actual sums expended in the years were

| Year ending | Contract works (incl VAT) | Fees etc (incl VAT) | Total (incl VAT) |
|---|---|---|---|
| 31stOct 2000 | £ 28,685.61 | £2,563.69 | £ 31,222.30 |
| 31st Oct 2001 | Phase 1: £ 625.14 Phase 2: £ 39,003.15 | Phase 1: £5377.31 Phase 2: £ 6,241.75 | Phase 1: £ 6002.45 Phase 2: £ 45,244.90 |
| 31st Oct 2002 | £142,031.62 | £ 0 | £142,031.62 |
| 31st Oct 2003 | £ 28,175.49 | £ 10,140.02 | £ 38,315.69 |
| 31st Oct 2004 | £ 1,857.14 | £ 0 | £ 1,857.14 |

30. He contended that the certificates here did not comply with what was required under the lease because

> a. The accounts for the year ending 2001 were not based on the amounts actually paid in that year. The amount actually paid was £31,222.30, whereas the apportionment took the figure as 90% of £59,711 less deductions.
>
> b. In the case of the Finch Associates percentage fees, the fees used in the accounts were not based on actual fees paid by reference to dates of payment, but took a percentage approach.
>
> c. The percentage assumptions made (90% in the case of the split of Phase 1 between years ending 2000 and 2001, and 68.93% as the amount of the Phase 2 contract which could be passed on to tenants) should not have been made, but the actual costs should have been ascertained.
>
> d. In the case of the year ending 31st October 2002, the amount paid under the contract was £120,877.97 plus VAT (£ £142,031.62 in total) whereas the amount used in the accounts was £141,697.28 plus VAT. Even if the delay in paying £3,116.30 plus VAT (£3,661.65 in total) does not take that payment outside the relevant year, the inclusion of sums certified on 5th November, and not due for payment until 14 days thereafter, was contrary to the clear words of the contract.

31. Mr Scott argued that accounts which did not address themselves to the issue of what the actual costs were in a given year were invalid. He contended at first that this Tribunal had no power to amend the terms of any certificates, and that if his points were correct the certificates must fall. He later argued, in response to Mr Pryor, that the Tribunal did have the power to say that the certificates were wrong, and determine the years in which the relevant items of expenditure fell.

32. Mr Pryor, for the landlord, submitted that as the certificates were issued long after the costs were incurred, no injustice had been caused to the tenant. He referred to section 27A(6) of the Landlord and Tenant Act 1985 and contended that while the LVT had the power to open up a certificate and consider whether the sums claimed were reasonable, and amend them, this Tribunal did not do so because permission to appeal had only been granted on the issue of certification, and that therefore these certificates must stand unless held to be invalid. He

submitted, in reliance on *Jones v Sherwood Computer Services PLC* [1992] 1WLR 277 (CA) (which was actually decided in 1989) and *Nikko Hotels Ltd v MEPC* [1991] 1 EGLR 1(Knox J) that a certificate of the kind in issue here would only be invalid if vitiated by fraud, or if the accountant had failed to comply with his instructions. It was not open to the court to disagree with the interpretation of the lease put upon it by the certifying accountant, unless vitiated in one of those two respects.

33. Mr Pryor argued that it was a reasonable interpretation of the phrase in the lease "actual cost" that it should include the value of work done within the year in question but not yet certificated for payment, or the value of a certificate which had been issued but not yet paid. He contended also that it was reasonable, and lay within the proper expertise of an accountant, to adopt methods of apportioning costs or professional fees between years when a contract phase straddled a year end. He submitted that to do otherwise would cause unnecessary complexity. Mr Pryor disavowed both the certificates issued in February 2003. He contended that for the year ending in September 2000, the original certificate was valid, and remained valid, notwithstanding the issue of a further certificate in February 2003. Mr Pryor accepted that the landlord was only liable to make payments to the contractor if a certificate had been issued.

34. Mr Scott responded to Mr Pryor's submissions on *Jones* and on *Nikko Hotels*. He relied on the judgment of Mummery LJ in *National Grid Company Plc v M25 Group Ltd* [1998] EWCA Civ 1968 [1999] 08 EG 169. He submitted that the certifying accountant was required to direct his mind towards the actual costs for the year, and the terms of the lease represented an essential and implicit part of his instructions. He submitted that in any event the grant of permission to appeal was broad enough to encompass corrections if this Tribunal considered that items had been attributed to the wrong year. Mr Pryor responded to Mr Scott's submissions on *National Grid* by submitting that the judgment turned on the particular and complex terms of the lease in that case.

**Conclusions**

35. In my judgment the starting point must be the lease. I consider that it does require that the actual cost must be ascertained. That can only represent that which the landlord has been required to pay. The lease is so drawn that the liability of the tenant is to be calculated at or after the end of the relevant year. The use of the word "actual" shows that this not a clause which permits estimates or prospective costs to be claimed. I am therefore of the view that costs not incurred within the relevant year cannot be claimed. But one must then go further and consider what is meant by the word "cost." Does it only include costs which have resulted from a liability to pay within that year, and have been paid (as the tenant argues) or can it cover unpaid liabilities or known future liabilities, as the landlord contends for?

36. Here, one must consider the nature of the liabilities. Both parties accept that the contractor only had a right to demand payment from the landlord once a certificate had been issued by the architect. That is of course a perfectly usual provision in a building contract. It gives a contractor the advantage of a continuing cash flow, and an employer the protection of only having to pay for work if certified, with a retention mechanism to provide further

protection. That being so, the term "actual cost" cannot include works which were the subject of certificates issued outside the year in question. Nor can that term refer to any part of the value of the works which has been retained in the certification process for payment at a later stage. I note also that at the LVT, when the Respondent landlord was seeking to resist arguments on limitation by arguing for a postponed date when a cost was incurred, it argued to the LVT, citing *Henry Boot Construction Ltd,* that a cost was only incurred when either the landlord paid the cost in question, or first became liable to pay it. Its case to the LVT was that liability arose at the end of the 14 day period, or on the date of payment. I am unwilling to allow the landlord to draw back from that proper concession.

37. I consider that once that certificate has been issued, and the 14 day period has expired, then the liability exists and is to be regarded as a cost. I do not consider that it is prevented from becoming a cost before it is actually paid. There is nothing in the very short digest of the decision in the *Marenco* case which persuades me otherwise, or which supports Mr Scott's contentions.

38. Observation of the principle that one must seek to apportion costs properly as between years in which they were incurred does not mean that it is always wrong to make assumptions when conducting the exercise of attribution. For example, in the case of the year ending on 31st October 2000 (which related to Contract 1) some method had to be found of ascertaining how much of the works was chargeable to the tenants. The items in question may have fallen into one year or the other, or straddled the year end. Unlike the dates of certificates, which is a straightforward matter, winnowing out which piece of work was done when could have been very complex. It seems to me that it was reasonable to look at the overall percentage over the whole contract, and then to apply it *pari passu* to the amount of works certified by the year end. I also consider that it was entirely reasonable of the landlord's accountant to adopt the same approach in Contract 2. I also consider that it was a sensible and straightforward approach to apply a simple percentage to the relevant value of works within the year so as to calculate the fee levels for Finch Associates. No issue arises on the disbursements or planning supervision fees.

39. It follows from the above that in my judgment, the certificate for the year ending 31st October 2000 is not consistent with the terms of the lease in that it treated the reckonable costs as 90% of £ 46,669, instead of looking at the levels of payments certified by then. Had it been consistent with the terms of the lease, but the accountants had used the other assumptions which I have found reasonable, the calculation would be

| | |
|---|---|
| Final Account (before VAT) | £ 59,711.00 |
| Less paid for by neighbour | £ (800.00) |
| Less works not relevant to recovery | £ (12,242.00) |
| (Total deduction) | £ (13,042.00) |
| Balance (78%) | £ 46,669.00 |
| 78% of amount certified and due for payment before 1st Nov 2000 (£24,390.30) | £ 19,024.43 |
| Barrington %age (24.24) | £ 4,611.52 |
| Vat @17.5% | £ 807.02 |
| Fees @10% incl VAT | £ 541.85 |

| | |
|---|---|
| 24.24% of disbursements (£368.74) | £ 105.02 |
| 24.24% of planning supervisor fees (£ 500) | £ 142.41 |
| TOTAL | £ 6,207.82 |

40. The certificate for the year ending 31st October 2001 is also inconsistent with the terms of the lease, but this time the corrections must be very much in the landlord's favour as a result of the reduction in the account for the previous year. Had it been consistent, but the accountants had used the other assumptions which I have found reasonable, the calculation would be:

| | |
|---|---|
| Final Account (before VAT) | £ 59,711.00 |
| Less paid for by neighbour | £ (800.00) |
| Less works not relevant to recovery | £ (12,242.00) |
| (Total deduction) | £ (13,042.00) |
| Balance (78%) | £ 46,669.00 |
| 78% of amount (£ 33,819.31) certified for payment after 1st Nov 2000 | £ 26,379.06 |
| Barrington %age (24.24) | £ 6,394.28 |
| Vat @17.5% | £ 1,119.00 |
| Fees @10% incl VAT | £ 751.33 |
| 24.24% of disbursements (£368.74) | £ 105.02 |
| 24.24% of planning supervisor fees (£ 500) | £ 142.41 |
| TOTAL | £ 8,512.04 |

(I have not adjusted the above calculations of the 78% figure for the very minor reduction in the overall contract value when the final certificate was issued in September 2001).

41. So far as the accounts for the year ending 31st October 2002 are concerned, one should apply the same principles. While I consider that the unpaid certificate number 7 of 27th August 2002 must be included, I reject the landlord's case that the payment certified on 5th November 2002 can be brought into account. One must also limit the costs to the amounts certified for payment, and not allow for reclaiming any part of the retention fund. The amount certified and made the subject of issued certificates for payment payable by 31st October 2002 was £123,994.27 plus VAT. The certified accounts took the amount of costs incurred in that year on the building contract as £141,697.28, which was the amount certified less 2.5% retention as at 31st October 2002, but which was not certified until after 1st November 2002. It follows that the certificate was not consistent with the terms of the lease. Had it been consistent, but the accountants had used the other assumptions which I have found reasonable, the calculation would be:

| | |
|---|---|
| Final Account Contract no 2 | £ 148,571.39 |
| Proportion of final account on which E Barrington percentage to be based £ 102, 416.01/£148,571.39 = 68.93% | |
| Amount to be certified and due for payment before 1st Nov 2002 | £ 123,994.27 |
| At 68.93% | £ 85,469.25 |

| | |
|---|---|
| At 24.24% | £ 20,717.75 |
| VAT @17.5% | £ 3,625.61 |
| Total | £ 24,343.36 |
| Fees @10% | £ 2,434.34 |
| 24.24% of Finch Assocs disbursements | £ 347.96 |
| 24.24% of Planning Supervisors Fees | £ 185.13 |
| Total due from E Barrington for year to 31.10.02 | £ 27,310.79 |

42. As to the residue of Phase 2, the amount under certificate 8 would then have fallen into the year ending 31st October 2003, whereas the final certificate payment of £1,857.14 would fall under the following year.

43. I therefore conclude that the certificates for the years ending 31st October 2000 and 2002 significantly overstated the amounts which were chargeable under the lease, whereas the certificate for the year ending 31st October 2001 understated it. It follows that in my judgment, the proper interpretation of the lease would have led to a reduction in the sum claimed in both sets of proceedings.

44. Having ascertained what the effect of the proper interpretation of the lease would have required so far as the treatment of the costs is concerned, I now turn to the issue of the powers of this Tribunal to alter the certificates. While I have concluded that these accounts and certificates were calculated in a manner which is inconsistent with the lease, it does not follow that they were therefore of no effect in law. They were not nullities, but had effect, subject (for example) to the right of the tenant to challenge them before the LVT. However in the case of the certificates of February 2003, they must be regarded as having been replaced by those of September 2003, and as now being regarded as of no effect.

45. It follows that I do not accept the arguments put before me by both Counsel as to validity. In my judgment, either a certified account of service charges is a nullity or it is a valid notice. A notice of no effect would be one which was not drafted to relate to a year, or was not certified as required, or set out no amount said to be due, or was otherwise defective on its face. The notices of June 2001 and September 2003 were not defective in that sense, whereas those of February 2003 (which were not related to any identified year) were defective on their face. The notices now relied on by the landlord were valid and effective notices, but the LVT (and this Tribunal on appeal) has the power to determine whether the amounts which they claimed are actually payable.

46. I reject Mr Pryor's argument that I am prevented from exercising the powers of the LVT under section 27A as to the merits of the charges. I also reject Mr Scott's original argument that all I should do is to declare that the demands were not validly made. The grant of permission to appeal by the LVT refers to the main issue being whether the LVT can allow amounts claimed for building works to be certified even if the year of certification is different from the year in which they are claimed. I have determined that the LVT was wrong to allow that to occur. That being so, I am now going to exercise the powers of the LVT (and therefore of this Tribunal under section 175(4) of the Commonhold and Leasehold Reform Act 2002 ) under section 27A of the Landlord and Tenant Act 1985 as amended.

47. I have set out above what the effect of a proper application of the law is to the calculation of these charges while accepting the other aspects of the accountants' approach. I therefore determine that, subject to any limitation arguments, the tenant was indebted to the landlord as follows in respect of the additional rent for the years ending 31st October 2000, 31st October 2001 and 31st October 2002:

| Year ending | Date of demand | Amount claimed | Amount determined by Lands Tribunal |
|---|---|---|---|
| 31st October 2000 | 6th June 2001 | £ 13,406.76 | £ 6,207.82 |
| 31st October 2001 | 24th Sept 2003 | £ 1,117.64 | £ 8,512.04 |
| 31st October 2002 | 24th Sept 2003 | £ 31,133.89 | £ 27,310.79 |
| Total | | | £ 42,030.65 |

48. No additional limitation arguments arise in favour of the tenant, as the effect of my decision has been to postpone liabilities to pay into later years.

49. It is therefore unnecessary for me to decide the arguments raised before me on the status of the accountant's certificate, which Mr Pryor accepted only arose if this Tribunal had no power under s 27A to determine the true figure. I shall however deal with them for completeness. If required to express a view, I do not accept the legal arguments of Mr Pryor for the landlord on the effect of *Jones* and *Nikko Hotels*.

50. Although neither of those cases were cited in *National Grid Co Plc v M25 Group*, the Court of Appeal considered the role of the expert appointed under a lease, and in which it followed the dissenting judgment of Hoffmann LJ in *Director General of Telecommunications -v- Mercury Communications Limited* (Transcript 22 July 1994) which was upheld in the House of Lords in [1996] 1 WLR 48. At page 32 of the Court of Appeal transcript Hoffmann LJ said

> "So in questions in which the parties have entrusted the power of decision to a valuer or other decision-maker, the courts will not interfere either before or after the decision. This is because the courts' views about the right answer to the question are irrelevant. On the other hand, the court will intervene if the decision-maker has gone outside the limits of his decision-making authority.
>
> One must be careful about what is meant by "the decision-making authority". By "decision-making authority" I mean the power to make the wrong decision, in the sense of a decision different to that which the court would have made. Where the decision-maker is asked to decide in accordance with certain principles, he must obviously inform himself of those principles and this may mean having, in a trivial sense, to "decide" what they mean. It does not follow that the question of what the principles mean is a matter within his decision- making authority in the sense that the parties have agreed to be bound by his views. Even if the language used by the parties is ambiguous, it must (unless void for uncertainty) have a meaning.
>
> Accordingly, if the decision-maker has acted upon what in the court's view was the wrong meaning, he has gone outside his decision-making authority."

51. In my judgment the central question is whether the certifying accountant in this case has formed a judgment on the meaning of "actual cost" which lies within the correct meaning of that phrase in the lease - i.e. the test of Hoffman LJ (as he then was) in *Mercury Communications*, which was subsequently endorsed by the House of Lords, and followed by Mummery LJ in *National Grid*. In my judgment the phrase "actual cost" prevents the accountant from certifying costs which cannot be described as an actual cost in the year in question. If one adopts the approach argued for by Mr Pryor based on *Nikko Hotels* one reaches the position that the court may entertain a challenge to the certificate of an expert who acts fraudulently or outwith his instructions, but not one who misinterprets a provision in the lease under which he is appointed. In my judgment such a provision is an implicit instruction with which he must comply.

52. I do not consider that this rent review clause ousts the power of the court (or this Tribunal) to accept a challenge to his interpretation of the lease. What this clause excluded from challenge were the results of his application of the correct interpretation. Thus, it was for him to collate the material and consider whether a cost is related to the specified purposes of expenditure in the clause. It gave him no power to treat as chargeable items which are incapable in law of falling within that description, nor does it exclude the power of the court to so determine.

**Formal decision**

53. This appeal is allowed, and this Tribunal makes a determination under section 27A of the Landlord And Tenant Act 1985 (as amended) that the amounts payable by the appellant to the Respondent were incorrectly stated in the certified accounts as set out at paragraph 46 hereof.

Dated: 12th April 2007

Signed: His Honour Judge Gilbart QC