UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2010] UKUT 47 (LC)
LT Case Number: LRX/2/2009

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – whether landlord's source of funding relevant to leaseholders' liabilities – whether "blanket policy" against discretionary relief relevant to whether service charge payable – whether replacement windows were repairs or improvements – appeal dismissed – sections 19, 20A and 27A Landlord and Tenant Act 1985 – section 219 Housing Act 1996 – The Social Landlords Discretionary reduction of Service Charges (England) Directions 1997

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

BETWEEN **MISS ALISON CRAIGHEAD AND OTHERS** **Appellants**

and

(1) HOMES FOR ISLINGTON LIMITED
(2) THE LONDON BOROUGH OF ISLINGTON **Respondents**

Re: Flats at Spa Green Estate,
Rosebery Avenue,
Islington,
London, EC1R 4TS

Before: A J Trott FRICS

Sitting at 43-45 Bedford Square, London WC1B 3AS
on 3 November 2009

Justin Bates, instructed by Anthony Gold, solicitors, for the Appellants
Ranjit Bhose, instructed by London Borough of Islington Legal Services Department, for the Respondents

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The following cases are referred to in this decision:

Continental Property Ventures v White [2006] 1 EGLR 85 (LT)
Haringey Borough Council v Ball (2004) unreported
Ruddy v Oakfern Properties Limited [2007] Ch 335
R (on the application of Burkett) v Hammersmith and Fulham LBC (No.1) [2002] 1 WLR 1593
R v Secretary of State for the Home Department ex parte Venables [1998] AC 407
Canary Riverside PTE Limited v Schilling (2005) (LT, LRX/65/2005, unreported)
Rapid Results College Limited v Angell and Others [1986] 1EGLR 53
Gilje v Charlesgrove Securities Limited [2002] 1 EGLR 41
Holding and Management Limited v Property Holding and Investment Trust plc [1990] 1 All ER 938
Post Office v Aquarius Properties Limited [1985] 2 EGLR 105
Brew Bros Limited v Snax (Ross) Limited [1970] 1 All ER 587
Postel Properties Limited v Boots The Chemist Limited [1996] 2 All ER 60.
Minja Properties Limited v Cussins Property Group plc [1998] 2 EGLR 52

The following cases were referred to in argument:

Stent v Monmouth District Council [1987] 1 EGLR 59
McDougall v Easington District Council [1989] 1 EGLR 93
Wates v Rowland [1952] 2 QB 12, CA
Schilling v Canary Riverside PTE Limited (2008) (LT, LRX/41/2007, unreported)

DECISION

Introduction

1. This is an appeal, which the parties agreed should be by way of review, against a decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel dated 20 October 2008. The application to the LVT was made under Section 27A of the Landlord and Tenant Act 1985 on 17 July 2006 seeking a determination as to liability for service charges in the years 2006 to 2008 in respect of the Spa Green Estate, Rosebery Avenue, London EC1R 4TS. The disputed items related to "external repairs & decoration, window/roof renewal", with an estimated value of approximately £5.62m and a final cost in excess of £5.7m. The LVT said that the individual charges to the 21 appellant leaseholders were very substantial, ranging from £30,000 to £40,000 each. The LVT granted leave to appeal, without limitation or conditions, on 2 December 2008.

Facts

2. The Spa Green Estate comprises three blocks of 129 residential flats known as Tunbridge House (48 flats), Wells House (48 flats) and Sadler House (33 flats). They were constructed between 1938 and 1950 and were listed as grade II* in 1998.

3. The appellants all hold flats in the premises under long leases granted under the "right to buy" provisions as consolidated in Part V of the Housing Act 1985 (as amended). All of the leases impose repairing obligations upon the lessor and service charge obligations upon the lessees. There are three different forms of lease but the repairing provisions are substantially the same except in one material respect. Two of the forms of lease include as service charges expenses incurred in "the repair maintenance and renewal and improvement" of the premises. The third, earlier, form of lease, which is held by four of the appellants, does not include the words "and improvement".

4. The first respondent, Homes for Islington Limited (HFI) is an Arms Length Management Organisation (ALMO) created and wholly owned by the second respondent, the London Borough of Islington (the council). The creation of the ALMO was in response to the Government's Decent Homes Programme, a national strategy for the renewal of local authority housing introduced in 2000. The council successfully applied to the office of the Deputy Prime Minister (whose responsibilities passed to the Department of Communities and Local Government (DCLG) with effect from 5 May 2006) to establish the ALMO in January in 2004 and since 1 April 2004 HFI has been responsible for the management of the entirety of the council's housing stock. However, the council remains the freeholder of the Spa Green Estate and the lessor of all the appellants' flats.

5. DCLG provides financial support for local authorities with qualifying ALMOs in two ways. Firstly, by capital funding through Supported Borrowing (which replaced

Supplementary Credit Approvals after 2004/04); and, secondly, through an ALMO Allowance which is an element of Housing Revenue Account Subsidy paid to local authorities by DCLG that covers the interest payments and any compulsory repayment of capital that a local authority must make on the supported borrowing.

6. The funding of ALMOs therefore operates as a permission to borrow with the interest on the money borrowed being fully covered by Government subsidy. There is no cost to the council or HFI. The sum borrowed is not repaid unless the housing stock is transferred to a housing association but remains as a long-term liability in the council's Housing Revenue Account. In its "Guidance on Arms Length Management of Local Authority Housing, 2004 edition" the Government explained that "ALMO funds are principally available as a contribution towards the minimum necessary cost of reducing the number of non decent homes" (paragraph 4.3). That means tenanted homes and not properties that have been sold on long leases under the right to buy provisions.

7. In its January 2004 application to transfer management functions to a proposed ALMO the council estimated that it would cost some £615m to deliver "decent homes". The council's own resources were estimated at £336m to 2010/11, giving a shortfall of £279m. This was reduced to £178m (due to other PFI strategies) and subsequently to £157m, which was the figure included in the ALMO bid (covering the years 2004/05 to 2010/11). The ALMO bid of £157m represented the shortfall (approximately 25% of the total) between the estimated expenditure of £615m and the council's own resources.

Issues

8. At the hearing the parties agreed three issues that required determination by the Tribunal:

(i) *Funding*

Whether the LVT erred in its conclusion that the sources from which the respondents obtained the funds to carry out the works was irrelevant to the appellants' service charge liabilities.

(ii) *Discretionary relief*

Whether the LVT erred in its treatment of the Social Landlords Discretionary Reduction of Service Charges (England) Directions 1997.

(iii) *Replacement windows*

Whether the LVT was right to conclude that the replacement of the single glazed Crittall windows with modern, double glazed Crittall windows was a "repair" or a "renewal" rather than an "improvement", with the result that the costs were recoverable from all the leaseholders, and not just from those whose leases provide that expenses incurred in improvements are within the scope of the service charge.

The LVT's decision

9. The LVT said the following about the three identified issues.

(i) *Funding*

"22. In principle, the source from which a lessor obtains the funds to meet costs incurred in supplying services or undertaking works in accordance with the lease is irrelevant to a lessee's service charge liability. It is even less relevant if, as here, the funds have been borrowed and must be repaid. The circumstances in the case cited in support of her submissions by Miss Osler [for the applicants] are so different as to render it of no assistance for present purposes.

23. Accordingly, the Tribunal entirely accepts Mr Bhose's submissions and rejects the applicants' argument that part of the £157m received by Respondent (1) should be treated as reducing their service charge liabilities."

(ii) *Discretionary relief*

"26. In contrast, for the Applicants, Miss Osler expressed the argument or issue in terms purporting to be within s.19 of the Landlord and Tenant Act 1985 instead of as a matter of public law (at paras 35 and 35 (sic) of her Closing Submissions):

> 'The applicants, however, adopt a much simpler argument; the local authority by application of the Discretionary Directions, were able to reduce or waive the costs of the works to leaseholders. In circumstances where – on the basis of Mr Radzin's evidence these charges are 'unusually high' to the tune of £25,000 in excess of more regular service charge bills – it would plainly have been reasonable for Islington to reduce the costs to the leaseholders by way of the Discretionary Directions.
>
> Not to do the works at no or a reduced cost to the leaseholders, it is submitted, leads to the inevitable conclusion that those costs were not reasonably incurred.'

She again cited in support a decision in *Continental Property Ventures Inc v White* [2006] 16 EG 148, where a lessor could have had works carried out under a guarantee at no charge so incurring costs was unreasonable.

27. Unfortunately for the Applicants, the Tribunal does not consider Miss Osler's submission soundly based. The crucial circumstances in the case she cited were that works could have been carried without the lessor incurring any costs. Here the Respondents could not avoid incurring costs themselves in undertaking works which it was reasonable and mostly necessary for them to undertake. Under the terms of the Applicants' leases, these costs are recoverable by way of service charges. Ordinarily, any private lessor may, in his discretion, choose to waive service charges which lessees regard as too high

or for any other reason but the existence of this choice will not, in itself, mean that his costs had been unreasonably incurred: that is a separate question. Although it might be argued that it was unreasonable of a lessor to incur costs on works of a higher quality or standard than the lessees could reasonably be expected to pay for, that has not been the argument here. Public lessors like the Respondents need a statutory discretion to waive service charges lawfully but non-exercise of the discretion does not mean that costs have been unreasonably incurred. Whether or not the blanket policy adopted by the Respondents of not operating the discretion at all (ie without considering the circumstance of individual lessees as stipulated by the criteria set out in the directions, especially hardship) is lawful would not be a question within the jurisdiction of the Tribunal.

28. Accordingly, the applicants' argument derived from the Discretionary Reduction Directions must also be rejected."

(iii) *Replacement windows*

"38. The Tribunal considers that the submissions made by Mr Bhose are more than sufficiently supported by the legal authorities to which he has referred and should, therefore, be accepted and applied. Essentially, the argument of behalf of the four affected Applicants, who have objected to paying a contribution towards the installation of double glazed windows because they constitute 'improvements' outside their leases, addressed the wrong question. In the view of the Tribunal, 'improvements' and 'repairs' cannot properly be regarded as mutually exclusive. Accordingly, the right question was whether or not replacing single glazed windows in disrepair with new double glazed windows amounted to 'repairs' (or 'renewal') within their leases. The fact that there will also, necessarily, be an element of improvement does not, in the opinion of the Tribunal, alter its affirmative answer. Indeed, having seen the new windows during the inspection of the Premises, the Tribunal would have felt unable to find that they constituted 'improvements' in the sense required by landlord and tenant law of significantly altering the premises as demised. Therefore, the determination of the Tribunal is that the cost of installing the modern Crittall double glazed windows was incurred in effecting repairs and, consequently, was correctly included in the service charge payable proportionately by all the Applicants.

39. In the result, for the reasons given, the Tribunal have also rejected the applicants' argument as to '*Windows: Repairs or Improvements?*'"

Statutory provisions

10. The relevant provisions of the Landlord and Tenant Act 1985 (the 1985 Act) for the purposes of this appeal are as follows:

“18. Meaning of “service charge” and “relevant costs”

(1) In the following provisions of this Act “service charge” means an amount payable by a tenant of a dwelling as part of or in addition to the rent –

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord’s costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose –

(a) “costs” includes overheads, and

(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

19. Limitation of service charges: reasonableness

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period –

(a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

…

20A Limitation of service charges: grant-aided works

(1) Where relevant costs are incurred or to be incurred on the carrying out of works in respect of which a grant has been or is to be paid under section 523 of the Housing Act 1985 (assistance for provision of separate service pipe for water supply) or any provision of Part I of the Housing Grants, Construction and Regeneration Act 1996 (grants, & for renewal of private section housing) or any corresponding earlier enactment or article 3 of the Regulatory Reform (Housing Assistance) (England and Wales) Order 2002 (power of local housing authorities to provide assistance), the

amount of the grant shall be deducted from the costs and the amount of the service charge payable shall be reduced accordingly.

…

27A Liability to pay service charges: jurisdiction

(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to –

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to –

(a) the person by whom it would be payable,

(b) the person to whom it would be payable,

(c) the amount which would be payable,

(d) the date at or by which it would be payable, and

(e) the manner in which it would be payable.

(4) No application under section (1) or (3) may be made in respect of a matter which –

(a) has been agreed or admitted by the tenant,

(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(c) has been the subject of determination by a court, or

(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination –

(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject of an application under subsection (1) or (3).

(7) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter."

11. Section 219 of the Housing Act 1996 states:

"**219 Directions as to certain charges by social landlords**

(1) The Secretary of State may give directions to social landlords about the making of service charges in respect of works of repair, maintenance or improvement –

(a) requiring or permitting the waiver or reduction of charges where relevant assistance is given by the Secretary of State, and

(b) permitting the waiver or reduction of charges in such other circumstances as may be specified in the directions.

…

(4) For the purposes of this section "social landlord" means –

(a) an authority or body within section 80(1) of the Housing Act 1985 (the landlord condition for secure tenancies), other than a housing co-operative, or

…"

Section 80(1) of the Housing Act 1985 includes a local authority.

12. The Secretary of State made two sets of directions under section 219 in 1997; mandatory directions (which do not apply in this appeal) and discretionary directions under The Social Landlords Discretionary Reduction of Service Charges (England) Directions 1997. These state:

"**Application**

3 These Directions shall apply to social landlords making a service charge which is payable by a lessee in respect of a dwelling in England.

…

> **Discretion to Reduce Service Charges Exceeding £10,000 in any Period of Five Years**
>
> 5. Subject to paragraph 6 [criteria to which the social landlord is to have regard], where service charges (whether paid or payable) exceed a total sum of £10,000 in respect of the same dwelling in any period of five years, a social landlord may waive or reduce such charges by any amount except that such charges shall not be waived or reduced to less than £10,000 in respect of the same dwelling in the same period of five years."

Paragraph 7 sets out the criteria to which the social landlord is to have regard in applications involving exceptional hardship.

Issue (i): Funding

13. Mr Bates submitted, firstly, that the sources of funding were relevant to whether the costs had been reasonably incurred (section 19(1)(a) of the 1985 Act) and, secondly, that the LVT had not paid sufficient regard to the terms of the loan.

14. If a landlord had two possible sources of funding, for instance a claim under a guarantee policy or from the leaseholders as a service charge, then any monies demanded as a service charge would not be reasonably incurred. In *Continental Property Ventures v White* [2006] 1 EGLR 85 (LT) Judge Rich QC, sitting as a Member of the Lands Tribunal, said at 86 J:

> "The LVT held, as a matter of fact, that the landlord could have had the guarantee works carried out under the guarantee at no charge. It concluded, therefore, that to carry out those works at a cost was to incur the cost other than reasonably. Unless there was evidence of some disadvantage or good reason to reject the availability of the works without cost in favour of incurring a cost, this seems to me to be incontrovertible."

15. Another example was that of landlord of a house converted into flats who claimed on an insurance policy when the roof leaked. If the landlord kept the insurance money but signed a contract with a builder to undertake repair works and then reclaimed the cost under a service charge, those costs would not be reasonably incurred under section 19 because there would otherwise be double recovery.

16. In this appeal the appellants did not say the respondents had not incurred costs but they argued that those costs were not reasonably incurred against them because of the means by which they were funded. The source of the monies must be relevant in at least some cases otherwise double recovery would be possible.

17. Mr Bates then considered the source of funding in this appeal. The £157m of principal borrowing did not have to be repaid unless the council transferred its housing stock to a

housing association. There was no interest to pay because this was met by the Government. The £157m was used to commission works to the Spa Green Estate. It was those works which were source of the dispute, not the basis on which the £157m was calculated, ie by reference only to tenanted dwellings. The respondents had to give credit for the monies received.

18. Section 20A of the 1985 Act was interpreted by Judge Cooke, sitting in Central London County Court, in *Haringey Borough Council v Ball* (2004) unreported at paragraph 27:

> "… what it [section 20A] shows (and this is the whole point) is that, absent a special provision, grants (or to my mind any other type of outside funding) are not regarded for the purpose of this part of the law as affecting what the leaseholder is charged by way of service charge."

Mr Bates said that if that decision was correct and the landlord only gave credit where Parliament directed then, in his example, there would be nothing to stop the landlord retaining the insurance monies when the cost of repairs to the leaking roof had been recovered under a service charge. He submitted that under these circumstances section 19 would protect the leaseholder's position because the costs, whilst incurred, would not have been reasonably incurred.

19. In the event of a transfer of the housing stock to a housing association the council would have to repay some or all of the capital sum. If it believed that such money was properly recoverable as a service charge then the council could protect its position by serving a notice on the appellants under section 20B of the Landlord and Tenant Act 1985.

20. Mr Bhose submitted that the LVT was correct in law in finding that the lessor's source of funding to meet the costs incurred in meeting its obligations under the lease was irrelevant to a lessee's service charge liability.

21. The £157m of ALMO monies amounted to a quarter of the total investment proposed by the council and made up the shortfall between the council's own resources and the planned investment. It represented an average investment, borough wide, of £6,828 per tenanted flat. The monies were, in effect, a loan that was repayable in defined circumstances, but they were not necessarily borrowed to enable the council to undertake the specific works to the Spa Green Estate. They were borrowed to meet an overall shortfall in funding. The LVT found as a fact that the £157m was calculated by reference only to "tenanted dwellings" and "was not based on, nor was later approved by reference to, leasehold units". Leaseholders were excluded because it was anticipated by the respondents that the cost of works to leasehold flats would be covered by the service charge and would therefore be cost neutral.

22. The appellants had put it to this Tribunal, but not below, that the council had not incurred any costs or, alternatively had not reasonably incurred those costs. But there was no dispute about the need for the works. The respondents were contractually bound to pay for them. Nor was there any evidence that any of the ALMO monies were in fact used on the works to the Spa Green Estate. The appellants had assumed that there had been a pro rata apportionment of

those monies across all of the council's properties. But the source of funding was irrelevant to the question of whether costs had been incurred and they clearly had been for the purposes of section 19 of the 1985 Act. The council had entered into a binding contract with the contractor and was bound to pay the contract sum. Section 20A of the 1985 Act made it clear that costs are nevertheless "incurred" for the purposes of that Act even where they are grant aided as Judge Cooke said in *Haringey LBC v Ball* (see paragraph 18 above).

23. It was then necessary to see whether the costs were reasonably incurred. Mr Bhose submitted that the source of the funds was also irrelevant when considering this question. Mr Bates's reference to guarantees and insurance claims did not help the appellants. Both examples were predicated on the fact that there would be double counting, allowing the landlord to carry out the works without spending any money but recovering it in any event through a service charge. In *Continental Property Ventures* work was undertaken to a damp proof membrane that was covered by a guarantee. The cost of those works was contributed to in the service charge. It was therefore unfair of the landlord not to have called in the guarantee when the membrane failed but instead to incur costs again. The insurance example was simplistic as it depended upon the terms of the lease in each case, which party had the obligation to insure, in whose name and how the insurance monies were to be used. But where the lessee had paid for insurance the landlord could not then reasonably incur further monies on repair.

24. The £157m of ALMO monies was a loan, repayable in the event of specific circumstances. The logic of the appellants' argument was that the council was not entitled to charge them a penny now but, if it transferred its stock to a registered social landlord at some future date and had to repay the loan that was "simply too bad". Mr Bhose submitted that that could not be correct.

25. Mr Bates's suggestion that the council could protect its position by serving a notice under section 20B(2) of the 1985 Act was untenable. Such a notice had to specify the relevant costs which had been incurred and which the tenant would subsequently be required under the terms of his lease to contribute by way of a service charge. It was impossible to say in advance how much of those relevant costs were ALMO funded and would need to be repaid upon a possible future transfer at an unknown future date.

26. The ALMO monies represented only 25% of the council's proposed investment and did not "fund" the works to the estate. Even if (which was denied) Mr Bates was correct in his contention that the landlord could not recover anything if it was not spent from the authority's own capital resources, the result would be, at most, a reduction in the appellants' liabilities.

Issue (i): Conclusions

27. The key features of the ALMO funding are:

(i) It was not a grant but was supported borrowing under which the capital borrowed became repayable under specified (albeit unlikely) circumstances.

(ii) It was not specifically allocated to the Spa Green Estate or indeed to any particular properties owned by the council.

(iii) It did not cover the entirety of the anticipated costs of meeting the "Decent Homes" standard but made up the shortfall between that amount and the council's own resources.

(iv) It was calculated by reference to, and applied towards, the council's tenanted property. It did not apply to leasehold property that had been sold under the "Right to Buy" legislation and which was liable to a service charge.

28. In the light of these features I do not accept the appellants' argument that "the £157m was used to commission works to these properties". There is no evidence to suggest that the total costs of the work to the Spa Green Estate of £5.7m was funded from the ALMO monies and there is no reason why this should be so. Had this been the case I would have seen merit in the Mr Bates's argument that, by seeking to recover a service charge from the leaseholders as well, there would be double counting.

29. The ALMO funding amounted to some 25% of the costs of delivering "Decent Homes" or an average of £6,890 per tenanted dwelling. From the evidence it seems that the cost of the works at the Spa Green Estate was probably above average. The total cost of the works was £5.7m or, on average, £44,186 per flat. The average cost per dwelling of works required to bring the whole of the council's tenanted housing up to a Decent Homes standard would appear to be approximately £27,500 (4 x £6,890, rounded). This suggests that the ALMO funding for each tenanted flat at the Spa Green Estate was just over £11,000. But there is no double counting since the ALMO monies were only used to support the funding of works to the tenanted dwellings at the Spa Green Estate and not the leasehold dwellings.

30. In my opinion that is the key point. The council's ALMO funding calculations will depend upon the cost neutrality of the contribution of its leaseholders through a service charge; the council recouping what it spends on leasehold units according to the terms of each lease and the 1985 Act. I can see no grounds for saying that there has been double recovery of expenditure and I would distinguish the current appeal from the examples given by Mr Bates of the ability to recover under a guarantee or an insurance policy. I therefore uphold the LVT's decision on this issue.

Issue 2: Discretionary relief

31. Mr Bates said that the question before this Tribunal was whether the LVT had jurisdiction to hear a public law challenge to a demand for service charges made by a public authority landlord. The LVT found that the council operated a:

> "blanket policy … of not operating the discretion at all [under the Social Landlords Discretionary Reduction of Service Charges (England) Directions 1997] (ie without considering the circumstances of individual lessees as stipulated by the criteria set out in the directions, especially hardship) …"

The LVT held that such an argument could only be raised as a public law challenge, by way of judicial review, and was outside its jurisdiction. Mr Bates submitted that this was wrong and that the LVT should have dealt with the public law challenge.

32. Mr Bates submitted that there was no statutory prohibition or restriction on the LVT's jurisdiction (other than on the grounds set out in section 27A(4) which did not apply in this appeal) and the words in section 27A of the 1985 Act were very broad. The jurisdiction was to consider whether or not a service charge was "payable". In *Ruddy v Oakfern Properties Limited* [2007] Ch 335 Jonathan Parker LJ said at 352:

> "82. In my judgment there is no justification for implying any restriction in the entirely general words of section 27A of the 1985 Act."

33. This decision was entirely in keeping with the broad approach to section 27A taken by this Tribunal in *Continental Property Ventures* where Judge Rich QC said at 88, paragraph 45:

> "I can see no basis, however, for saying that the LVT lacks jurisdiction to determine any issue not expressly the subject of some other tribunal's exclusive jurisdiction, if determination of that issue is essential to determining whether 'a service charge is payable'. That is the issue which section 27A gives the LVT jurisdiction to determine. That must include any issue necessary for or incidental to such determination. "

34. Furthermore it was settled law that judicial review in the High Court was a remedy of last resort: see *R (on the application of Burkett) v Hammersmith and Fulham LBC (No.1)* [2002] 1 WLR 1593 at [42].

35. The LVT should have gone on to find that, as a matter of law, the council's blanket policy against exercising discretionary relief was unlawful. In *R v Secretary of State for the Home Department ex parte Venables* [1998] AC 407 Lord Browne-Wilkinson said at 496H:

> "When Parliament confers a discretionary power exercisable from time to time over a period, such power must be exercised on each occasion in the light of the circumstances at that time. In consequence, the person on whom the power is conferred cannot fetter the future exercise of his discretion by committing himself now as to the way in which he will exercise his power in the future… if the policy adopted is such as to preclude … [the decision maker] from departing from the policy or from taking into account circumstances which are relevant to the particular case … such an inflexible and invariable policy … and the decisions taken pursuant to it will be unlawful."

36. The LVT should have gone on to assess the proper level of charge payable by each leaseholder "applying its typical robust commonsense". Mr Bates said that in *Continental Property Ventures* Judge Rich QC was wrong to say that the LVT had an inherent jurisdiction to adjourn some or all of an appeal to the Court. If jurisdiction existed, as it did here under section 27A, then that was an end of the matter. The LVT had jurisdiction to consider a public law argument and it should have heard that argument and determined what service charge was payable.

37. Mr Bhose submitted that the LVT was right to hold that it did not have jurisdiction to determine any issue concerned with the discretionary directions. He noted that the appellants had changed their approach on this issue from that adopted before the LVT where they advanced the argument that costs were not reasonably incurred. Now they raised a public law defence against the council's non-operation of a discretionary policy.

38. The Secretary of State had made both mandatory and discretionary directions under section 219 of the Housing Act 1996. The mandatory directions did not apply to works carried out following successful ALMO bidding. If the Secretary of State had intended a local authority not to charge long lessees where they benefited from works carried out to buildings funded in part, for tenanted units, by monies borrowed after a successful ALMO bid, he would have said so. The criteria for exercising discretionary relief were based around "exceptional hardship" and were to be applied by considering individual circumstances following individual applications. None of the appellants had ever sought to make an application for waiver or reduction of the service charge under the discretionary directions. Nor did any of the 16 witness statements before the LVT touch on any of the matters in paragraphs 6 and 7 of those directions. The appellants had not put before the LVT the very evidence that it would have needed had it accepted the correctness of their legal submissions. It was impossible to see how the LVT had erred in law by not exercising a jurisdiction that the appellants did not ask it to exercise.

39. Section 27A(1) of the 1985 Act did not give the LVT jurisdiction to consider whether a local authority had erred in the exercise of its discretion to waive or reduce service charges and, if it had so erred, to determine what amount that authority would (or should) have waived or reduced had it properly exercised its discretion. The appellants suggested in their statement of case that the council had:

> "charged themselves a significantly lower figure [than that charged to the leaseholders] (believed to be £6,800 per flat). The correct decision would have been to charge leaseholders the same as the secure tenants".

Mr Bhose submitted that this confirmed their fundamental misunderstanding of how the works had been financed.

40. The appellants' submission if correct would give the LVT far greater powers than were available to the High Court on a judicial review. The court could not step into the local authority's shoes and determine each of the appellant's entitlement to discretionary relief and it was wrong to suggest that the LVT could do so.

41. The evidence before the LVT was that the council did not operate any policy of waiving or reducing service charges but that was not to say that the council would never consider doing so upon an application; it simply meant that it did not have a positive policy for considering such applications. The reason it did not do so was that it had no funding. Any discretionary relief would have to be financed from within the Housing Revenue Account which would be affected adversely, either by increasing the rent of secure tenants or by reducing the level of services provided to them. Seen in this context the council's position was unremarkable and, in any event, it did operate a number of other schemes to alleviate the financial burden to lessees. But as none of the appellants ever made an application under the discretionary directions to the council it was never put to making a decision on whether to make an exception to its policy. It was not issue raised before the LVT because it was not relevant to the case as presented to it. The appellants' had disavowed any public law challenge before the LVT since Ms Osler (counsel for the applicants) expressed the argument in terms purporting to be within section 19, ie that, because the council had not operated a discretionary policy of relief, the costs could not have been reasonably incurred under section 19(1)(a) of the 1985 Act. Mr Bhose, before the LVT, said that the discretion under the discretionary directions was one for the council, subject only to public law challenge, and that was not a matter for the LVT.

42. The LVT should have declined any jurisdiction it had and left the appellant to other remedies such as judicial review by the High Court. The court was clearly the more appropriate forum for determining the legality of the council's approach to a public law discretion as per Judge Rich QC in *Canary Riverside PTE Limited v Schilling* (2005) (LT, LRX/65/2005, unreported) at paragraphs 42-45. The LVT could have not have exercised any discretion itself because it was not given such discretion and had no evidence upon which to do so in any event.

43. If the Tribunal decided that the LVT had jurisdiction and should have exercised it Mr Bhose said that it was entitled (on this question alone) to have regard to the current position. On 21 of May 2009 the council agreed a policy for considering capping lessee's bills for those suffering hardship and the appellants could apply under this policy, although none had done so to date.

Issue (ii): Conclusions

44. Mr Bates argued that what had to be determined was whether the LVT had erred in law when it said that it was not within its jurisdiction to consider whether it was lawful for the council to operate a policy of not exercising its discretion under the discretionary directions. That jurisdiction is derived from section 27A of the 1985 Act which states that an application may be made to an LVT "for a determination whether a service charge is payable". There are specific limitations on making an application under subsection (4), but these do not apply in this appeal.

45. The LVT's jurisdiction is wide (as per *Oakfern* and *Continental Property Ventures*) but in every case what falls to be determined is whether a service charge is payable. The

discretionary directions made under section 219 of the Housing Act 1996 "shall apply to social landlords making a service charge *which is payable by a lessee* and in respect of a dwelling in England" (my emphasis).

46. I do not accept that the council's "blanket policy" against exercising discretionary relief under the directions can have any bearing on the question of whether the service charge is payable in the first place. The directions can only apply after the LVT has exercised its jurisdiction; their application is not part of that jurisdiction. A lessee cannot obtain relief under the directions unless he pays the service charge or is unsuccessful in challenging whether it is payable before the LVT. Unless and until that question is decided I consider that the directions are not relevant or applicable. Mr Bhose relied upon this argument, inter alia, in his closing submissions.

47. In any event the discretion under the 1996 Act and the discretionary directions is that of the council. It is for them to determine whether service charges should be waived or reduced and not the LVT. If the council had determined, for instance, that there should be a 50% reduction it clearly would not be open to the LVT to determine that it should rather have been 75%. So even if the conclusion was that the council had failed to exercise its discretion, there was nothing that the LVT could do about it in determining the amount of service charge that was reasonable and the amount that was payable. It could not reduce the amount otherwise payable by itself granting a reduction.

48. Furthermore the public law defence was not argued by the appellants before the LVT and it was not asked to accept jurisdiction for such a challenge. Even if it had accepted such jurisdiction there was no evidence to enable it to consider the point. I accept Mr Bhose's submission that it is impossible to see how the LVT failed in law by not exercising a jurisdiction it was never asked by the appellants to exercise. The respondents did not respond to the public law challenge because it was not put to them. I acknowledge that the LVT did not limit its permission to appeal on this point but the appeal is agreed by the parties to be by way of a review and it is therefore concerned with whether the LVT erred in law on the evidence that was before it.

49. Having considered all of the parties' arguments I do not consider that it did so err. In my opinion the LVT correctly rejected the appellants' argument that the failure of the council to do the works at no, or a reduced, cost to lessees meant that those costs were not reasonably incurred. For the reasons given above I also consider that it was correct in deciding that the question of the legality of the council's approach to the application of the discretionary directions was not within its jurisdiction. The appellants' remedy in that respect lies with a judicial review in the High Court.

Issue (iii): Repairs or improvements

50. The issue is whether the replacement of single glazed Crittall windows with modern double glazed Crittall windows amounts to a "repair" or a "renewal", in which case the costs

are recoverable from the leaseholders, or amount to an "improvement" in which case it is not so recoverable in the case of four of the appellants' leases.

51. Mr Bates submitted that what constituted a repair, renewal or improvement was a matter of fact in each case. The evidence of the appellants' expert, Mr Miller, before the LVT was that the works to the windows were improvements. The windows were not like for like replacements in a number of respects, particularly the fact that the new windows were double rather than single glazed. He concluded that:

> "The window type and range selected go beyond repair and are a significant improvement over the original and/or their modern equivalent."

Mr Easton, the respondents' expert, did not demur from this conclusion, saying that:

> "[T]he installation of double glazing may well be construed as an improvement being a matter for the Tribunal, but their replacement was necessary."

The LVT said that Mr Easton's evidence in particular suggested that the cost would have been significantly reduced if modern single glazed Crittall windows had been installed.

52. The LVT had made an error by assuming that because the council was obliged to installed double glazed windows under the Building Regulations 2000, the whole cost of those works must be recoverable from the leaseholders. That was a non sequitur. There was no rule of law that a landlord must always recover all of its expenditure (per Dillon LJ in *Rapid Results College Limited v Angell and Others* [1986] 1 EGLR 53 at 55 C-D). Mr Bates said that the Courts took a cautious and restrictive approach when construing leases and would need to be satisfied that there were clear terms in the contractual provisions of the lease to enable the landlord to recover monies from the tenant. The lease was drafted or proffered by landlord and fell to be construed contra proferentem, per Laws LJ in *Gilje v Charlesgrove Securities Limited* [2002] 1 EGLR 41 at [27].

53. There was no factual disagreement between the parties' experts about the replacement windows being improvements. Consequently the LVT had erred in law by not being consistent with the evidence and finding that those works constituted repairs or renewals. Mr Bates submitted that the parties should be invited agree the difference between the costs of single and double glazing. If they could not do so then the Tribunal could determine the matter.

54. Mr Bhose said that the LVT had heard the evidence and had inspected the Spa Green Estate. It had compared the new windows with photographs of the original ones. Its approach had been unimpeachable and its conclusion, that the replacement double glazed windows was a matter of "repair" or "renewal", could not be faulted. This was an appeal on a point of law only, it was not an appeal on fact. The LVT was entitled to reach the conclusion that it did.

55. It was common ground between the experts that the replacement of the windows with double glazed units was the only lawful way of effecting the works because of the

requirements of the Building Regulations 2000. English Heritage could have insisted upon replacement of the windows with single glazing because the buildings were listed as grade II* but it chose not to do so. It must have been contemplated by the parties to the lease that the landlord, having covenanted to keep in repair a building element, would effect repairs lawfully, even if that meant an improvement to that element as a matter of fact. In this appeal if the replacement of the windows was not considered a repair because of the enhanced specification then the council would be legally unable to comply with its repairing covenant. Mr Bhose submitted that if, in order to effect remedial measures, a landlord was required by the Building Regulations to enhance or improve a building element, it still remained a work of repair.

56. The council had been consistent on this issue. It had always accepted that remedial works against disrepair could encompass an improvement as a matter of fact (in the sense of providing more modern or higher specification products) and yet remain works of repair under the covenants of the lease. Whether or not the works were within such covenants was a mixed question of fact and law to be decided by the LVT. The experts only talked to the facts and they both accepted that it was a matter for the LVT to decide as to the law.

Issue (iii): Conclusions

57. It was common ground between the experts that, as a matter of fact, the replacement of the life expired single glazed Crittall windows by double glazed Crittall windows was an improvement. The issue is whether or not they were improvements in law and whether the installation of double glazing amounted to repair or renewal within the meaning of the provisions in the leases of the four affected appellants.

58. The question of what constitutes a "repair" was considered in *Holding and Management Limited v Property Holding and Investment Trust plc* [1990] 1 All ER 938 where Nicholls LJ said at 945a-f:

> "… It was common ground that in para 2 [of the leases] 'repair' bears the meaning which it normally bears in leases. In such cases, the question is whether, having regard to all the relevant circumstances, the proposed works can fairly be regarded as 'repair' in the context of the particular lease. As Hoffman J said in *Post Office v Aquarius Properties Limited* [1985] 2 EGLR 105 at 107:
>
> > "In the end … the question is whether the ordinary speaker of English would consider that the word 'repair' as used in the covenant was appropriate to describe the work which has to be done."
>
> Likewise, in the oft-quoted words of Sachs LJ in *Brew Bros Limited v Snax (Ross) Limited* [1970] 1 All ER 587 at 602-603, [1970] 1 QB 612 at 640:
>
> > "It seems to me that the correct approach is to look at the particular building, look at the state which it is in *at the date of the lease*, to look at the precise terms of the lease, and then come to a conclusion whether, on a fair interpretation of those terms in relation to that state, the requisite work can

fairly be termed repair. However large the covenant it must not be looked at in vacuo. Quite clearly this approach involves in every instance the question of degree …" (Sachs LJ's emphasis).

Thus the exercise involves considering the context in which the word 'repair' appears in a particular lease and also the defect and remedial works proposed. Accordingly, the circumstances to be taken into account in a particular case under one or other of these heads will include some or all of the following: the nature of the building; the terms of the lease; the state of the building at the date of the lease; the nature and extent of the defect sought to be remedied; the nature, extent and cost of the proposed remedial works; at whose expense the proposed remedial works are to be done; the value of the building and its expected life span; the effect of the works on such value and life span; current building practice; the likelihood of a recurrence if one remedy rather than another is adopted; and a comparative cost of alternative remedial works and their impact on the use and enjoyment of the building by the occupants. The weight to be attached to these circumstances will vary from case to case.

This is not a comprehensive list. In some cases there will be other matters properly to be taken into account."

59. The LVT concluded, and I agree, that the list of circumstances given by Nicholls LJ appeared to involve the overall effect of the works in question on the demised premises. It included reference to the comparative cost of alternative remedial works. The LVT concluded from the evidence that the extra cost of the double glazing was £107,000 or 13% of the total cost of window replacement.

60. Current building practice was a relevant factor and one which was considered in *Postel Properties Limited v Boots The Chemist Limited* [1996] 2 All ER 60. In that case the landlord replaced 25mm insulating fibreboard with 50mm polyurethane board. Fibreboard was still available but, at the time of replacement, was no longer considered suitable. The leaseholders argued that a 35mm depth of polyurethane board would have sufficed and that the extra 15mm of insulation cost too much for too little benefit. The 35mm board did not quite achieve the insulation standard which applied at the time when the replacement was begun, whereas 50mm board did achieve it. However, the replacement of a roof covering was not a notifiable event under the regulations and so the insulating standard was not enforceable. Ian Kennedy J said at 62L:

"… The [building] regulations requirements are generally assumed to represent good practice. Mr Lindley [who 'assisted' one of the expert witnesses] said that he would recommend to a client that the insulation should be brought up to regulations standard.

… I believe that I can take into account that there would be some countervailing advantages to the occupiers of the building in terms of lower heating charges… there is something to be said for having complied with the accepted standards when the opportunity offered."

The cost of the replacement insulating board was held to be recoverable by way of service charges in accordance with the lessor's repairing covenants.

61. In the subject appeal there is more than "something to be said" for complying with accepted standards. The use of double glazing, in the absence of intervention by English Heritage, was the only lawful way of effecting remedial works in accordance with the building regulations that applied.

62. The facts in *Minja Properties Limited v Cussins Property Group plc* [1998] 2 EGLR 52 are similar to those of the present appeal. The tenants in that case objected that the replacement of the existing single glazed windows by double glazed units went beyond the meaning of "repair" in the landlord's repairing covenant. Harman J said at 55H:

> "The matter then turns upon the question: is the repair proposed so radical and extravagant as to amount to creating a new thing in place of what was there and not a mere replacement, such as a new pipe or a new window or a new slate would be, for the former window that was there? The objection made is that what is proposed is aluminium framed double glazed windows. Using such common sense and such knowledge of the world as I possess, I am reasonably confident that these are frames with two channels in them to take two panes of glass with a fixed gap between them, which gap would provide a certain degree, depending upon the gap, of insulation. Such a form of frame does not on the evidence seem to be very substantially different from the former single glazed steel frame that was there before."

He concluded at 55M that:

> "There is ample evidence for me to be convinced here that the additional cost of using frames that will take double glazing and, in due course, of installing two panes of glass where there was one before, since it will fall to the landlord who has damaged the glass to replace it with new glass, is of a comparatively trivial amount, a question of purely of degree and quite incapable of being an alteration of a kind so as to constitute a renewal and not within the covenant of repair.
>
> Thus I conclude that the landlord has demonstrated that the works he proposes are within the covenant, are necessary to be performed and are of a reasonable and proper method of carrying out its covenant to repair. …."

63. These cases, as the LVT found, support Mr Bhose's argument which I consider to be persuasive. The council was under an obligation to repair, inter alia, the windows at the Spa Green Estate. The necessity to carry out such works is not disputed, nor is the standard to which they were carried out. The council could only lawfully do the works by using double glazing. This cost an extra 13% but did not significantly alter the premises in any way. In my opinion this extra expenditure was necessarily incurred and whilst as a matter of fact the double glazing was an improvement in terms of its functional efficiency compared with the single glazing previously in situ, I agree with the LVT that the cost of the double glazing work was incurred in effecting repairs and was properly and proportionately included within the

service charge of all the appellants. I conclude that it was open to the LVT on the evidence to conclude that the double glazing works were works of repair.

Determination

64. I have concluded in favour of the council on all three issues and it therefore follows that I dismiss the appeal.

Dated 24 February 2010

A J Trott FRICS