UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – Service Charges – single-glazed metal windows requiring re-decoration and minor repairs to timber sub-frames – some leaseholders electing to pay for replacement double-glazed windows in metal sub-frames – cost of glazing units recharged to participating leaseholders – whether replacement of sub-frames a repair chargeable to service charge – apportionment of costs – whether costs of management incurred under QLTA – appeal allowed in part

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

(1) TEDWORTH NORTH MANAGEMENT LIMITED
(2) TEDWORTH SQUARE NORTH LIMITED

Appellants

and

(1) MR L MILLER
(2) MRS S OGORODNOV
(3) MRS T OGORODNOV

Respondents

Re: Flats 6 and 7,
Tedworth Square,
London SW3

Martin Rodger QC, Deputy Chamber President
on
16 November 2016
Royal Courts of Justice

Piers Harrison, instructed by Pemberton Greenish LLP, for the appellants
Philip Rainey QC and *Rebecca Cattermole,* instructed by Brethertons LLP, for the respondents

The following cases are referred to in this decision:

Holding & Management Ltd v Property Holding & Investment Trust Ltd [1990] 1 All ER 938

Irvine v Moran [1990] 24 HLR 1

Minja v Cussins [1998] 2 EGLR 52

Proudfoot v Hart (1890) 25 QBD 42

Reston Ltd v Hudson [1990] 2 EGLR 51

Wandsworth v Griffin [2000] 2 EGLR 105

Introduction

1. This appeal concerns some windows in Chelsea. On 1 December 2015, after a hearing lasting three days, the First-tier Tribunal (Property Chamber) ("FTT") decided that the respondent leaseholders, Mrs Miller and Mr and Mrs Ogorodnov, were not obliged to contribute towards costs incurred by the appellants in supplying and fitting metal sub-frames as part of a programme of replacement of the windows in 28 of the 49 flats in their building at Tedworth Square. The basis of the decision was that the former timber sub-frames which surrounded the original metal windows, and those windows themselves, had not been in a state which justified their replacement at all so that no part of the cost of the work fell within the scope of the appellants' repairing covenant or the leaseholders' obligation to contribute to it through the service charge.

2. On 10 March 2016 the FTT gave permission to appeal on the basis that it was arguable that there was inconsistency between its conclusion that the repairing covenant was not engaged by the window replacement programme and its allowance of the costs of work to rectify some minor items of disrepair and general redecoration of the window frames and sub-frames which had been retained. The FTT refused permission to appeal on one other point concerning the apportionment of the costs of the works but on 20 May 2016 this Tribunal gave permission to appeal on that issue and on a third issue concerning the status of an agreement under which the services of a managing agent were procured.

3. The appeal was conducted as a review of the FTT's decision. Mr Piers Harrison appeared on behalf of the appellants and Mr Philip Rainey QC and Miss Rebecca Cattermole represented the respondents. Mr Harrison and Miss Cattermole had also appeared before the FTT. I am grateful to counsel for their assistance.

The facts

4. Tedworth Square is the name of a purpose-built block of 49 flats, mostly on four floors, constructed in about 1981 and forming the whole of the north side of the square of the same name. It was originally built with single glazed metal Crittall windows set in hardwood timber sub-frames.

5. The second appellant is the freehold owner of Tedworth Square, having acquired it as nominee purchaser on behalf of the participating tenants of flats in the building in a collective enfranchisement completed on 28 July 2004. The first appellant ("the Company") is a block management company and a party to the long leases of each of the flats in the building; it ia responsible for the provisions of services to the building.

6. The first respondent, Mrs Miller, is the leaseholder of flat 6. The second and third respondents, Mr and Mrs Ogorodnov, are the joint leaseholders of flat 7.

7. Each of the flats in the building is occupied under a standard form of long lease, the terms of which oblige the leaseholder to contribute through a service charge to costs incurred

by the Company in carrying out its obligations. In the case of flat 6 the required contribution is 4.1% of the total service charge expenditure and in the case of flat 7 it is 4%.

8. By paragraph 4 of the Fourth Schedule to the leases the Company's obligations include a covenant for repair and decoration in the following terms:

> "In each year deemed necessary by the Company to wash and paint in appropriate colours and in a workmanlike manner …. all the outside wood iron and cement work of the Building usually painted … and also at all times during the said term to keep the interior and exterior walls and ceilings and floors of the Building (other than those included in this or any other demise) and the roof structure and the foundations and main drains thereof in good and substantial repair and condition."

Although this combined covenant for repair and decoration does not specifically mention window frames or sub-frames, it is common ground that the repair and redecoration of those building elements is the responsibility of the Company.

9. It appears that the possibility of replacing the single glazed windows in the flats has been under consideration by the appellants for some time. A major programme of external works was first considered in 2005 but no work was then carried out. In 2009 the benefits of replacing the original windows were discussed again and it was resolved to proceed with the work. Evidence was given to the FTT by a director of the freeholder that a major factor in the decision to replace the windows was the wish of some leaseholders to have double-glazed units.

10. At least one leaseholder, the first respondent, Mrs Miller, did not wait for a collective decision and proceeded to replace the windows in her flat with modern double glazed units at her own expense.

11. In 2010 a building survey undertaken by Tuckerman Management Ltd found that the windows in the building were generally in good condition and had been well maintained with no reports of failed locks or rusted hinges. Perhaps because that report did not disclose any need for significant repairs, or perhaps because what was under consideration was the improvement of the building by the replacement of single-glazed with double-glazed units, concern was expressed over whether the cost of replacing the windows could properly be included in the service charge. Leaseholders who had already replaced their own windows at their own expense were perhaps understandably concerned that they might additionally have to contribute to the improvement of their neighbours' flats.

12. In September 2013 the appellants resolved to embark on a programme of repairs and redecoration which would include the replacement of only those windows in flats belonging to leaseholders who agreed personally to meet the cost of providing and installing the new double-glazed units. 28 leaseholders wished to replace their windows on that basis, while the remaining 18 did not. Among those who did not wish her windows to be replaced was Mrs Miller, whose flat already had new powder-coated, double-glazed units which did not require either repair or decoration.

13. The major works were put out to tender by reference to a specification for which the successful contractor tendered £472,933 plus VAT. That sum did not include the cost of supplying and installing the replacement Crittall windows to the 28 leaseholders who had elected for replacement (a sum of £291,581 which was charged to those leaseholders separately). It did include a sum of £112,485 as the cost of supplying and installing new Crittall sub-frames (in place of the original timber sub-frames) to receive the new windows, and of making good internal plaster and decorations and external brickwork which might be disturbed by the installation of the sub-frames. The replacement windows and sub-frames did not require decoration as they were supplied with a powder-coated finish.

14. The only comprehensive inspection of the windows undertaken before the major works was the 2010 Tuckerman survey which had found no serious problems other than a need for redecoration. The specification of work therefore included only four items relating to the retained windows and their timber sub-frames, namely: the completion of any repairs found to be required to individual windows over and above decorative filling and painting; the raking out and replacement of all existing mastics and sealants around the perimeter of windows, doors and sub-frames; the completion of any repairs found to be required to timber sub-frames using a proprietary resin filler for which a provisional sum of £5,000 was specified; and the preparation and redecoration of the remaining windows and sub-frames. The tendered cost of all work to the retained windows and sub-frames was £50,064 plus VAT.

15. Work began in October 2014 and was completed in June 2015. The final cost of the works was a little over £405,000, rather less than the successful tender. This sum included just over £82,000 for scaffolding, and £1,266 for resin repairs to 32 timber sub-frames. No systematic record of these repairs was kept, but it is apparent from the final cost that they must have been relatively minor.

16. The appellants initially paid for the works by drawing on two sources of funds: the contributions of the leaseholders who had elected for replacement windows, and the building's reserve fund, which they then sought to replenish through the 2014-15 service charge. The sum to be recovered included the cost of supplying and installing the new Crittal sub-frames, the making good of consequential damage, the contractor's overheads and profit on the replacement windows and the full cost of scaffolding and other preliminaries. The total contributions towards the works claimed were £5,381.24, from Mrs Miller and £5,250 from Mr and Mrs Ogorodnov.

17. On 27 November 2014 the respondents applied to the FTT under section 27A, Landlord and Tenant Act 1985 for a determination of the extent of their liability to contribute towards the works.

The application and the FTT's decision

18. The appellants' case before the FTT was that the windows in the building had been in a state of widespread disrepair and that the replacement of the original frames and sub-frames was the most economical method of remedying that state. The high cost of providing the modern units would be offset by long term savings because they would not require

redecoration in future thus avoiding the need for expensive scaffolding of the building at five yearly intervals.

19. The appellants relied on the evidence of Mr Shaun Harris, a chartered building surveyor. Mr Harris had inspected the building from ground level in 2013 and found the windows and sub-frames to be in a poor decorative condition. At that time he considered there was a risk of rot in the sub-frame timber but on closer inspection at a later date he concluded that the windows and sub-frames were "in a maintainable condition" and accepted in cross examination that the window frames could be attended to by routine maintenance and that such rot as there was in the sub-frames could satisfactorily be repaired using a resin filler. Mr Harris nevertheless thought that the appellants had acted reasonably in deciding to replace the timber sub-frames in those flats where new windows were being installed and that the approach to the whole programme of works had been reasonable. He also gave evidence on the comparative costs of replacement and retention of windows which was broadly accepted by the FTT.

20. While the work was being undertaken the respondents instructed Mr John Byers, a chartered building surveyor and director of LBB Chartered Surveyors, to inspect the property on five separate occasions and to advise on the condition of the original windows and sub-frames and what, if any, repair was required. In Mr Byers' opinion all of the metal windows themselves were in satisfactory condition and the only defects he detected were a few loose handles and some casements needing to be adjusted to avoid sticking. In his view the timber sub-frames were also in satisfactory condition. Mr Byers also undertook an assessment of the comparative cost of repair and replacement, but he accepted in cross examination that over the longer term replacement of the windows was cheaper than cyclical maintenance and redecoration.

21. In due course the FTT preferred Mr Byers' evidence on the condition of the windows to the more pessimistic assessment of Mr Harris. Having reached that conclusion the FTT next asked itself whether the cost of the work was recoverable under the service charge. After analysing a large number of authorities relied on by the parties the tribunal reached the following conclusion:

> "91. … we are not persuaded on the balance of probabilities that many of the frames and sub-frames were in disrepair or that many of the frames and sub-frames were in poor condition. We accept that the frames and sub-frames would not all have needed to be in disrepair or poor condition for the covenants to have been engaged generally … however a few isolated and generally minor problems would not suffice to engage the covenant generally in relation to all the frames and sub-frames.
>
> 92. If there had been persuasive evidence of disrepair or poor condition in relation to many of the frames and sub-frames then the analysis in *Wandsworth LBC v Griffin* would in our view have been of assistance to the respondents. Given that we accept that their financial model held up quite well to the challenges made by the applicants, we could well have concluded that their chosen option was a reasonable one and fell within the landlord's repairing obligations and the tenants' service charge payment obligations if the evidence had supported their claim that the disrepair was more widespread. Ultimately, though, we are not persuaded that there is sufficient evidence of

disrepair/poor condition in relation to the window frames and sub-frames such that the relevant covenant is engaged, and that the evidence indicates that such isolated problems as were identified were either decorative or could be dealt with by rubbing down of mould spores, adjusting casements, tightening handles or other minor maintenance action."

22. The FTT emphasised that despite its conclusion it did not wish to imply that the appellants had acted in bad faith in organising the works and claiming the costs through the service charge and it understood why they considered it to be a sensible course of action to replace the windows and sub-frames.

Issue 1: Was the repairing covenant engaged?

23. The FTT was persuaded to give permission to appeal on the basis that it was arguable that it had not been entitled to find that the window replacement programme was outside the scope of the repairing covenant once a need for some repair had been identified.

24. Mr Harrison's main submission on behalf of the appellants was that once the FTT had accepted the long term financial case for replacement of the windows it was necessary for the appellants to show only that *some* work of repair was required to entitle them to adopt their preferred approach of replacing the original frames and sub-frames. There was no challenge to the FTT's assessment of the extent of disrepair but this included a need for decoration of all frames and sub-frames (except where they had already been replaced) and a small amount of other work to some of the sub-frames. That requirement was sufficient to "engage" the covenant and give the appellants access to all reasonable approaches to meeting the requirement of redecoration and repair. Mr Harrison was prepared, if necessary, to submit that a proven need for exterior redecoration alone would have been sufficient to engage the covenant to repair and to justify a decision to replace all of the windows and sub-frames in the building at the expense of the service charge. In the alternative, if the replacement of the windows was not repair, it was within the covenant to put the building in good condition.

25. Mr Harrison placed reliance on *Proudfoot v Hart* (1890) 25 QBD 42, 56 in support of the submission that a distinction can be drawn between painting which is required for decorative purposes only and painting which is required to prevent deterioration in the subject matter of a covenant. Mere redecoration would not be required by a covenant to repair, but preventative redecoration would; redecoration was "part and parcel of the process of keeping the exterior … in repair" (*Irvine v Moran* [1990] 24 HLR 1, 7). Thus, Mr Harrison submitted, where the exterior of a building needs to be painted to protect it against the elements, a contractual obligation to keep the building in repair and good condition would be engaged.

26. The relevant legal principles were not in dispute.

27. Mr Rainey QC for the respondents accepted that, when considering whether work is within a repairing covenant, the correct approach is to ask whether, looked at as a matter of fact and degree, the work in question could fairly be called "repair" within the meaning of the covenant. In addressing that question it is necessary to have regard to the factors identified by

Nicholls LJ in *Holding & Management Ltd v Property Holding & Investment Trust Ltd* [1990] 1 All ER 938 at 945:

> "… the exercise involves considering the context in which the word 'repair' appears in the 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 lifespan; the effect of the works on such value and lifespan; current building practice; the likelihood of a recurrence if one remedy rather than another is adopted; and the 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."

28. It was also agreed that whether it was appropriate to look at the windows as a whole, or to consider how the covenant applied to individual windows, was a question of common sense having regard to the facts of each individual case (Dowding & Reynolds, Dilapidations: The Modern Law and Practice, 5th ed., para 8-09).

29. Where there is an obligation to repair but a choice between different methods of repair, provided it behaves reasonably, the covenanting party may choose which method to adopt and the paying party is not entitled to insist on the more limited or cheaper works being preferred.

30. Mr Harrison submitted that the entirety of the windows had been in need of repair, in that all the frames and sub-frames required to be painted or repaired or (at the option of the leaseholder) replaced. When initial costs and future costs were taken into account the partial replacement of windows (funded by individual leaseholders) and sub-frames was the cheaper option. The leases in the building were for 999 years so the leaseholders would experience the full benefit of the costs savings achieved by the replacement programme. The new windows were a replacement of an original building element taking advantage of modern powder coating techniques which obviated the need for regular cyclical painting, and while the FTT had recognised the long term cost savings it was not clear that it had properly taken them into account. Thus, taking all these factors into account, while it may not have been necessary to replace the windows and sub-frames, the appellants had been entitled to conclude that it was both permissible and preferable.

31. On behalf of the respondents Mr Rainey QC submitted that the FTT had been right to hold that the covenant to repair had not been engaged and that it was not reasonable to carry out wholesale replacement of windows and sub-frames. The cost of so doing was not recoverable because the only defect in most of the windows was a requirement that they be painted, which engaged only the covenant to decorate. The fact that a very small number of windows or sub-frames were found to have minor disrepair did not permit reliance on the repairing covenant to justify the elective replacement of all of the windows in 28 of the flats. The fact that the only windows and sub-frames to be replaced were those selected by the individual leaseholders themselves demonstrated that the windows as a whole were not in need of replacement.

32. I do not accept the appellants' central submission that the presence of any amount of disrepair, including simply a need for routine periodic redecoration and maintenance, was enough to bring a programme of wholesale window and sub-frame replacement within the repairing covenant. That approach pays little attention to the physical condition of the building components under consideration and relies on too legalistic an analysis of what should be a practical assessment. As the authors of Dilapidations: The Modern Law and Practice explain at paragraph 8-09, in a passage relied on by both parties, an obligation to keep a structure in repair will only come into operation if there has been damage to the structure which requires to be made good. Only those parts of the structure which are in disrepair are relevant to the consideration of whether there is a requirement for remedial action.

33. A common-sense approach is required when considering what remedial work is appropriate to remedy a state of disrepair. If the greater part of a roof is in a deteriorated condition, the fact that some areas are undamaged would not of itself prevent complete replacement from being repair; on the other hand, if the only deterioration was localised to a small area and can adequately be dealt with by a localised repair, the whole roof could not be said to be in disrepair such as to require or justify its complete replacement.

34. In this case such deterioration as existed in the timber sub-frames which remained was remedied at a cost of only £1,266. There was no evidence that the sub-frames which had been replaced were in need of any more extensive repair. It is therefore obvious that the decision to replace the frames and sub-frames was not motivated by their condition, but by the availability of a modern alternative which would provide better insulation against noise and heat loss and lower bills in future because it would not require frequent redecoration. Replacement may therefore have been justified on economic grounds, especially as a large part of the cost would be met by individual leaseholders, but it was not justified on the grounds that either individually or collectively the windows were in a state of disrepair requiring remedial work.

35. The windows clearly required redecoration, but it was not submitted by Mr Harrison that the replacement programme was triggered by the obligation to paint in appropriate colours and in a workmanlike manner all the outside wood iron and cement work of the building usually painted. His submission was that the redecoration required was itself work of repair, and the need for redecoration could be satisfied not by painting the original units, but by replacing them with new units which did not require to be painted. The FTT did not accept that submission and I am satisfied that it was entitled to reject it. Amongst the factors to which it had regard were the nature, extent and cost of the proposed remedial works and it was open to it to conclude that those works were not an appropriate response to the need for redecoration.

36. The general principle is that the work which the landlord is obliged or entitled to carry out is limited to that which is reasonably required to remedy the defect. This may include ancillary work rendered necessary by the carrying out of repairs. The FTT's decision was based on an expert evaluation of the condition of the windows, and the range of available responses to that condition having regard to the expense which would be incurred or avoided in future depending on the choice made. It is clear from paragraph 92 of its decision that it

accepted that window replacement could be an appropriate response to deterioration of any significance, but found that the work required in this case was too trivial to confer on the appellants the right to replace the sub-frames at the collective expense of the leaseholders. In making that evaluation the FTT did not ask the wrong question or misdirect itself, and it is not for this Tribunal to substitute its own view.

37. I therefore dismiss the appeal on the first issue.

Issue 2: apportionment of costs

38. The FTT decided that 49.6% of the total cost of the programme of works was irrecoverable because it was attributable to the replacement of the sub-frames, to overheads and profit on the replacement of the window units themselves, and to a contribution to the contractor's scaffolding costs and other preliminaries. The tribunal stated in paragraph 94 of its decision that the appellant had not argued with the figures on which the apportionment was based, or the approach, and it therefore assumed that they were not disputed.

39. The appellants sought permission to appeal on the grounds that the evidence of Mr Harris and its written case had included a different approach to apportionment, which the FTT had overlooked. The FTT refused to review its decision and explained that it preferred the approach taken by Mr Byers to apportionment, describing it as "a credible argument as to how such items are apportioned in practice". The application for permission to appeal was renewed to this Tribunal, which granted permission.

40. Mr Harrison submitted that the proper approach to apportionment was to compare the costs actually incurred with the costs which would have been incurred if all of the windows had been repaired and redecorated, and none had been replaced. Only additional costs incurred as a result of the decision to replace some of the windows (such as the need to provide a hoist) should be regarded as falling outside the service charge.

41. The evidence of Mr Harris had been that the scaffolding costs and contract preliminaries would have been much the same in either case and therefore there was no need to apportion those costs. Mr Harris also suggested that had the original timber sub-frames been retained and repaired and redecorated there would have been additional costs of £68,000; this figure assumed that the original metal windows would have been removed (causing some damage to the sub-frames) before new metal windows were installed in the original sub-frames, and that this would have extended the time necessary to complete the works.

42. The evidence of Mr Byers for the respondents, which the FTT accepted, was that when dealing with different phases of a large contract it was conventional and appropriate to apportion the cost of scaffolding and preliminaries between phases by reference to the value of different parts of the contract, unless specific expenses (such as the hoist) were related exclusively to one part of the work.

43. The task for the FTT was to determine the sum which could be charged by the appellants to the service charge. That required it to consider how much the work falling within the appellant's covenant had actually cost. As that work was carried out as part of a single contract which also included other work which the appellants had not covenanted to carry out, and which could not be added to the service charge, it was necessary for the total cost of the contract to be apportioned between recoverable and irrecoverable elements. It seems to me to be wrong in principle to carry out that apportionment by considering what the costs would have been if some different set of works had been undertaken, all of which were recoverable. In my judgment the FTT was entitled to carry out a conventional apportionment exercise and to accept Mr Byers' evidence when determining how much the service charge works had cost.

44. Mr Harrison suggested that the decision of the Lands Tribunal (Mr Norman J Rose FRICS) in *Wandsworth v Griffin* [2000] 2 EGLR 105 at 111 C-D, was supportive of his submission that an apportionment by reference to different works was justified. That case was not about apportionment at all. It decided that a landlord's decision to renew the windows of a building using uPVC double-glazed units was reasonable and that the full cost could be added in full to the service charge as having been carried out pursuant to a repairing covenant. In case that conclusion was wrong the Tribunal decided that there could nevertheless be added to the service charge a sum representing the notional cost of overhauling and redecorating the windows, rather than replacing them. It appears to have been agreed between the parties that the notional cost of a different scheme of works could be taken into account as a service charge item in principle and the only question considered by the Tribunal was how that notional cost should be ascertained. The decision is not authority for any approach to apportionment applicable to this case.

45. I therefore dismiss the appeal on the second issue.

Issue 3: Were the managing agents' fees incurred under a qualifying long term agreement?

46. The third and final issue concerns the professional fees of the appellant's managing agents for a single quarter from 24 March to 25 June 2015 totalling £4,200 plus VAT.

47. It was conceded by the appellants that the fees incurred under a management agreement dated 16th April 2013 were not recoverable because the contract was a qualifying long term agreement on which there had been no prior consultation and in respect of which there was no application for dispensation under section 20ZA, Landlord and Tenant Act 1985. In respect of the disputed quarter the appellants relied on a second contract dated 24th March 2015 which was said to have been entered into after the respondents had taken issue with the 2013 contract.

48. At paragraph 64 of its decision the FTT said that the appellant had been unable to provide a copy of a completed agreement relating to the period from 24th March 2015. The appellant was granted permission to appeal on the basis that the relevant agreement, signed and dated, had been exhibited to the witness statement of one of its witnesses which the FTT must have overlooked. The witness, Patricia Barham, had not claimed any personal involvement in the execution of the contract but the FTT had been wrong to suggest that there

was no evidence of the agreement. The FTT had also found that there was no evidence that the 2013 agreement had been terminated by written notice in accordance with its terms.

49. I am satisfied that the FTT was wrong in its conclusion on this one small aspect of the dispute. Its attention was not directed specifically to the document exhibited to the witness statement of Ms Barham, but it was formally in evidence and now that it has assumed greater prominence there is no reason to doubt that it is a genuine document. Mr Rainey did not seek to develop submissions made in writing that the document was not genuinely for less than a year because the relationship between the managing agents and the appellants was of long standing; nor did he rely on the absence of notice to terminate the previous agreement, recognising that the original terms would have come to an end on the signing of the agreement because that was clearly the parties' intention.

50. The first respondent, Mrs Miller, is liable to contribute 4.1% of the quarterly management charge (£172.20 plus VAT) while Mr and Mrs Ogorodnova are liable to contribute 4% (£168 plus VAT). I allow the appeal on the third issue and those sums are to be added to the service charge contributions of the respondents ascertained by the FTT.

Conclusion

51. For these reasons I dismiss the appeal on the first and second issues and allow it on the third issue.

52. I add two further observations.

53. First, the approach taken in this case (by the appellant and by the Tribunal) to the replacement of old metal windows with new double-glazed units, should not be allowed to cast doubt on the approach taken in other cases where windows have been found to be in disrepair (for example by this Tribunal in *Wandsworth v Griffin* or by the High Court in *Reston Ltd v Hudson* [1990] 2 EGLR 51 or *Minja v Cussins* [1998] 2 EGLR 52). Cases such as these are fact sensitive, and the applicable principles are clear.

54. Secondly, the fact that two issues in this appeal arose out of evidence which the FTT and the parties lost sight of, illustrates the risks which parties take when they over-complicate the presentation of an essentially straightforward case. The FTT hearing lasted three days, eight lever arch files of documents were deployed and the detailed submissions made by counsel were supported by a very large number of authorities. Even for the appeal it was felt necessary to produce more than 1000 pages of documents, only a handful of which were referred to. There is unlikely to have been any good reason why the documents provided to the FTT could not have been contained in a single file, for example by omitting hundreds of unnecessary pages of building contracts and duplicate leases and including only the material pages. Most of the citation of authority could probably have been eliminated in favour of reference to one of the standard practitioners' text books. Had preparation for the hearing been approached with greater forethought and restraint, both the parties and the tribunal would have been able to focus on the documents of significance and on well established legal principles. The FTT has sufficient case management powers to require that hearing bundles

contain only directly relevant documents or extracts from documents, to limit the number of such documents it will receive in evidence. In cases such as this where both parties are professionally represented and can be expected to cooperate with each other to a high degree, there is scope for those powers to be employed more ambitiously, to the benefit of all concerned.

Martin Rodger QC
Deputy Chamber President

25 November 2016