

UPPER TRIBUNAL (LANDS CHAMBER)



UT Neutral citation number: [2012] UKUT 323 (LC)

UTLC Case Number: LRX/54/2011

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – jurisdiction to determine issues not raised by the application – held there was none – Landlord and Tenant Act 1927 s27A – appeal allowed

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

BETWEEN:

BIRMINGHAM CITY COUNCIL

Appellant

and

(1) MR R KEDDIE

Respondents

(2) MR G HILL

**Re: Flat 56 Galton Tower,
Civic Close,
Birmingham,
West Midlands B1 2NW**

Before: His Honour Judge Nigel Gerald

**Sitting at: Birmingham Employment Tribunal, 103 Newhall Street,
Birmingham, B3 3NH**

The Appellant appearing by Mr Bates of counsel instructed by Mrs Kiteley of Birmingham City Council Legal Services

The Respondents appearing in person, Mr Keddle appearing for himself and Mr Hill

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The following cases are referred to in this decision:

Regent Management Limited v Jones [2012] UKUT 369 (LC), LRX/14/2009

DECISION

1. The Appellant local authority landlord appeals against the 25th March 2011 decision (the “Decision”) of the Leasehold Valuation Tribunal (“the LVT”) disallowing recovery of the £5,909.57 cost of window replacement and balcony works because it was not reasonable to replace the old ones.

2. In 2006/07 the Appellant undertook window replacement and balcony works to the Respondent tenants’ flat 56 at Galton Tower, Civic close, Birmingham as part of a programme of major works to the block. The Respondents purchased the flat after those works had been completed, and therefore had no knowledge of the condition of the old windows which had been replaced.

3. The Appellant sought to recover the £5,909.57 costs of the works *via* the service charge. The Respondents applied to the LVT for a determination that the amount claimed was not reasonable under sections 27A and 19(1) of the Landlord and Tenant Act 1985 (“the 1985 Act”). The material part of the application form stated that the question they wanted the LVT to determine was:

“whether or not [the Appellant] should offer us a) compensation or b) a significant discount owing to the fact payment is being demanded for the windows, yet on-going repairs are still needed 3 years on?”

Further details of the windows’ problems were provided from which it was clear that the only complaint was the standard of workmanship, not the old windows did not need to be replaced or that it was not reasonable to replace them.

4. Having inspected the flat on 15th November 2010, the LVT issued is on 25th March 2011 (the “Decision”) the kernel of which is to be found in the following paragraphs (*italics supplied*).

“34. The Applicants have not raised the issue of whether the replacement of the windows can comprise a repair (and thus maintenance) or whether the windows to the property were in such a condition in 2007 that they actually needed to be replaced. However, in meeting the allegation raised by the application, the Respondent dealt with the point in its submissions to the Tribunal dated 8 October 2010. the Respondent is clearly of the view that the implied and express covenants and the sixth schedule of the lease are sufficient to allow the Respondent to recover these sums as repairs or maintenance, *there still must have been grounds for replacing the windows, those grounds must be based on evidence and it must be within the reasonable responses available to the Respondent to conclude that those grounds justified the replacement of the windows at the time and in the manner of the works they undertook*.

“35. In the circumstances, it is with considerable surprise that we note from paragraph 14 of the Respondent’s statement that the window replacement works were carried out under the Decent Homes Standard initiative and that properties were not selected for inclusion in this programme on an individual basis. *From which we conclude that, before carrying out the window replacement works, the Respondent did not consider whether or not such works amounted to a repair or maintenance at all or even whether the existing windows were still*

serviceable without replacement. Therefore, we conclude that the Respondent did not have such grounds for replacing windows, because no evidence has been presented to use to arrive at such a decision. Accordingly the Respondent did not act reasonably in concluding that the window replacement works should be carried out. Therefore on the evidence available to us, we find that the cost of the window replacement of £6,909.52 was not reasonably incurred.”

5. On 13th April 2011 the Appellant applied to the LVT for permission to appeal the Decision on the basis that the LVT had breached natural justice by reaching a decision on grounds not raised in the application without giving the Appellant an opportunity to make submissions thereon and in any event that the decision was perverse, there being no evidence before it about the condition of the old windows which were replaced.

6. On 21st April 2011 the LVT refused permission to appeal because it was “patently obvious” that the question of whether it was reasonable to replace the windows at all was in issue and the LVT’s jurisdiction under section 27A of the 1985 Act is “to determine the entire service charge not only the matters in dispute, pleaded or otherwise specifically identified in the Service Charge application” (the “Refusal Decision”).

7. On 7th July 2011 His Honour Judge Huskinson on the Appellant’s renewed application granted permission to appeal to be by way of review with a view to a re-hearing stating *inter alia*:

“The grounds of appeal raise reasonable arguments to the effect that the LVT erred as there alleged by reason of reaching a conclusion that the windows did not need to be replaced in 2007 when, as the [Appellant] alleges, this was no part of the Respondent’s case and was a point that had never been raised with the [Appellant].”

8. In its Statement of Case dated 8th August 2011 the Appellant stated *inter alia* that “nowhere in either the application form or the detailed evidence that was provided, was it suggested that it had been unnecessary to install new windows. The entire focus of the evidence is on the allegedly poor quality of the workmanship and the manner in which Birmingham have conducted themselves in connection with this matter”.

9. In their lengthy response dated 8th September 2011 the Respondents agreed. They said “What isn’t being argued throughout this appeal (what is really the crux of the matter and the reason why applied to the LVT in the first instance) is that the installation of our UPVC windows to our property is simply not of a reasonable and acceptable standard.” Later on: “we had not raised the issue with the LVT of ‘whether the windows to the property were in such a condition in 2007 that they actually needed to be replaced’ – “if the works had been completed satisfactorily in the first instance, then there would be no need for us to take out a case against Birmingham City Council”.

10. The hearing of the appeal took place on 12th September 2012 in Birmingham. Mr Keddie, who was representing himself and also his co-Respondent Mr Hill who was unable to attend through ill-health, frankly said that he was surprised that the LVT had made the decision it did because only the

standard of work was being challenged not that the old windows needed to be replaced, that as far as he was concerned the LVT had misconstrued his argument which only related to the standard of work and finally that he felt that the LVT by their Decision had put Mr Hill and himself in an “unfair position”.

11. Mr Keddie was therefore content for the appeal to be allowed, the parties leaving me to give written judgment as to why the appeal should be allowed. That left the question of how much the £5,909.57 should be reduced by, the Appellant not appealing that part of the Decision which found that the work had not been carried out to a reasonable standard. It is of course unfortunate that the LVT did not answer the key question it had been asked to.

12. I rose to give the parties an opportunity to reach agreement as to the sum reasonably recoverable, which they did. They also agreed that an order under section 20C of the 1985 Act should be made to disallow the Appellant from recovering the costs of the appeal *via* the service charge, the Appellant most reasonably accepting that it would be unfair to visit those costs on the Respondents when it was through no fault of their own that the LVT reached the decision it did.

13. It is regrettable that it appears to be a developing practice within some leasehold valuation tribunals to take it upon itself to identify issues which are of no concern to the parties and then reach a decision on issues they have not been asked to which then results in an appeal and all the waste of time and money and attendant general aggravation. It may therefore be helpful to set out the legislative framework and general principles applicable.

14. The jurisdiction of the LVT is founded in section 27A of the 1985 Act the material parts of which are:

“(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 would be payable and

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

“(4) No application under sub-paragraph (1) or (3) may be made in respect of a matter which-

“(a) has been agreed or admitted by the tenant...

“(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)”.

15. Applications are commenced by landlord or tenant issuing a *pro forma* application form prescribed by the Residential Property Tribunal Service which requires that details of the questions relating to service charge expenditure requiring resolution by the LVT be set out. If they are not sufficiently set out, as is often the case, the LVT will at the pre-trial review order that the applicant serve a statement of case giving full particulars of precisely what is in issue and why. The respondent will be ordered to serve a statement of case setting out its case to which the applicant will usually be given an opportunity to respond if he so wishes by serving a statement of case in reply.

16. Those documents, whether they be described as pleadings or statements of case or whatever, set out the nature and scope of the issues in dispute. They operate to limit the issues in respect of which the parties must adduce evidence in support of their respective cases. They also operate to define the issues in respect of which they seek resolution by the LVT. They therefore serve five functions. First, to identify the issues. Secondly, to enable the parties to know what issues they must address their evidence to. Thirdly, to vest the LVT with jurisdiction, and focus the LVT’s attention on what needs to be resolved. Fourthly, setting the parameters of, and providing the tools within which, the LVT may case manage the application. Fifthly, by confining the issues requiring resolution to what is actually (as distinct from what might theoretically be) in dispute between the parties they will be assured economical and expeditious disposal of their dispute whilst also promoting efficient and economical use of judicial resources at first instance and appellate levels.

17. In this respect, it is important to bear in mind not just that the jurisdiction of the LVT is a creature of statute but that it is also a function of what the applicant and, by his response, the respondent wish the LVT to resolve. It is the jurisdiction and function of the LVT to resolve issues which it is asked to resolve, provided they are within its statutory jurisdiction. It is not the function of the LVT to resolve issues which it has not been asked to resolve, in respect of which it will have no jurisdiction. Neither is it its function to embark upon its own inquisitorial process and identify issues for resolution which neither party has asked it to resolve, and neither does it have the jurisdiction to do so. To do so would be inimical to the party-and-party nature of applications to the LVT and would greatly increase the costs (frequently recoverable from the tenant through the service charge) and difficulties attendant to service charge disputes which by their nature are frequently fractious, involving relatively small sums within a complex matrix of divers items of expenditure.

18. It follows from the above that the LVT does not have jurisdiction under section 27A “to determine the entire service charge not only the matters in dispute, pleaded or otherwise specifically identified in the Service Charge application” as stated in the Refusal Decision. It is not an inquisitorial tribunal. It is there to resolve issues it is asked to resolve, not uncover ones which do not exist or which the parties are not concerned about.

19. That said, there may of course be rare cases in which it is appropriate or necessary for the LVT to raise issues not expressly raised by the parties but which fall within the broad scope of the application in order to properly determine the issues expressly in dispute. But even then, the issues must fall within the scope of the application, not something which arises outside of it. This no doubt is what His Honour Judge Mole QC had in mind when he said in *Regent Management Limited v Jones* [2012] UKUT 369 (LC), LRX/14/2009 that:

“29. The LVT is perfectly entitled, as an expert tribunal, to raise matters of its own volition. Indeed it is an honourable part of its function, given that part of the purpose of the legislation is to protect tenants from unreasonable charges and the tenants, who may not be experts, may have no more than a vague and unfocussed feeling that they have been charged too much. But it must do so fairly, so that if it is a new point which the tribunal raise, which the respondent has not mentioned, the applicant must have a fair opportunity to deal with it.”

20. In those rare cases where an LVT does feel compelled of its own volition to raise an issue not raised by the application or the parties, it must as a matter of natural justice first give both parties an opportunity of making submission and if appropriate adducing further evidence in respect of the new issue before reaching its decision. Failure to do so is not only unfair, but may give the unfortunate impression that the LVT has descended into the fray and adopted a partisan position which may well serve to undermine the confidence of the parties in the impartiality of the LVT.

21. Applying those principles to this case, it is in my judgment plain that the LVT had no jurisdiction to determine whether it was reasonable to replace the old windows because it had not been asked to do so. Far from being “patently obvious” that this was in issue, it was clear from and implicit within the application that the Respondents agreed or at any rate accepted that it was reasonable to replace the old windows, which they have since confirmed during the appellate process.

Indeed, it is clear from paragraph 34 of the Decision that the LVT itself recognised that the Respondents had not challenged the reasonableness of replacing the old windows. It is therefore difficult to understand how, in its Refusal Decision, it could have reached the conclusion that it was “patently obvious” that this matter was in issue within the application.

22. In any event, by failing to notify *either* party of this novel point the LVT acted in breach of natural justice. Had it consulted the parties, it would have learned or at any rate confirmed that it was not in issue so that the LVT need not trouble itself with this issue: it would then have applied itself and its resources to resolving that which it had been asked to resolve, namely, the reasonableness of the cost of the window replacement and balcony works.

23. As it is, this has led to the unfortunate result that the parties have not had resolution of what they asked the LVT to resolve. Both are dissatisfied not only with the result (or lack of it) but just as importantly with the process. Both have had to expend further time, money and trouble in attending to the appeal which could and should have been avoided had the LVT confined itself to the issue it was asked to resolve. Both have expressed their feeling at having been treated unfairly by the LVT, Mr Keddie saying with some justification that the LVT has put himself and Mr Hill in an unfair position. Fortunately for the Respondents, the Appellant has taken the reasonable approach of not seeking to recover its costs of the appeal from the Respondents *via* the service charge. Instead, those costs will have to be borne by the council tax payers of Birmingham.

24. I am bound to observe that it appears clear from the Decision and also from the Refusal Decision that the LVT decided to take this issue when it inspected the premises and found the old windows still *in situ* in the balcony, which had been encased with new windows. The LVT then concluded that those windows were in fair condition, from which they concluded that the other windows which had been removed from the other parts of the flat and replaced (so were no longer in evidence) must have been in the same condition and therefore did not need replacement, so that the Appellant had acted unreasonably in its decision to replace at all rather than repair. The Respondents could have but did not take this position. It was wrong of the LVT to do so. By doing so, the LVT descended into the fray and virtually became a party to the dispute, pitting itself against the common position of applicant and respondent.

25. I therefore allow the appeal. For the reasons already stated, is it not necessary for me to resolve the residuary question of what would be a reasonable sum to charge for the window and balcony works. The Appellant has consented to a section 20C order being made preventing it from recovering the costs of the appeal *via* the service charge which I hereby make.

Dated 25 September 2012

His Honour Judge Gerald