UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2010] UKUT 136 (LC)
LT Case Number: LRX/103/2008

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

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

LANDLORD AND TENANT – service charges – whether the cost of roof recovering works reasonably incurred and reasonable in amount – no evidence to support LVT decision as to cost of repairs – LVT failed to properly consider merits of a major contract compared with separate smaller contracts – Landlord and Tenant Act 1985 s. 19.

BETWEEN

THE LORD MAYOR AND CITIZENS OF THE CITY OF WESTMINSTER — **Appellant**

and

CLIVE FLEURY AND OTHERS — **Respondent**

Re: Farnham House and Lascelles House,
Blandford Estate,
Harewood Avenue,
London NW1 6NS

Before: Her Honour Judge Alice Robinson

Sitting at: 43-45 Bedford Square, London WC1B 3AS
on 5 May 2010

Alistair Redpath-Stevens instructed by Judge & Priestley for the Appellant
There was no appearance on behalf of the Respondents

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The following cases are referred to in this decision:

Forcelux v Sweetman [2001] 2 EGLR 173
Veena SA v Cheong [2003] 1 EGLR 175
A2 Housing Group v Spencer Taylor LRX/36/2006

DECISION

1. The Appellant appeals to the Lands Tribunal, with permission, from a decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel (hereafter "the LVT") dated 25 March 2008 whereby the LVT decided that works to recover the roofs of Farnham House and Lascelles House, Blandford Estate, Harewood Street, London NW1 (hereafter "the Two Blocks") were not reasonably incurred as required by section 19 of the Landlord and Tenant Act 1985 (hereafter "the 1985 Act").

2. The Respondents are the lessees of flats in the Two Blocks pursuant to leases granted on various dates for a term of 125 years of which the Appellant is lessor. The Two Blocks were constructed in 1972 with flat roofs and form part of the Blandford Estate which altogether comprises 4 similar blocks. The Appellant owns many other blocks of flats across Marylebone, Paddington and Bayswater.

3. In late 2006, early 2007 the Appellant carried out works to recover the roofs of the Two Blocks as part of a major works project which included many other blocks of flats though not the other two blocks in the Blandford Estate. On 4th March 2007 the Respondents applied to the LVT challenging their liability to pay and the reasonableness of interim service charges in respect of the roof works. On 25 March 2008 the LVT decided that (1) there had been proper consultation pursuant to section 20 of the 1985 Act prior to the execution of the roof works, (2) the roof works were works of repair not improvement and fell within the ordinary wording of the repairing covenants in the leases (3) the cost of the roof works was not reasonably incurred because the method of repair i.e. recovering rather than patch repairs, was unreasonable and the total cost was too high. The LVT determined that a reasonable cost for recovering each of the Two Blocks would be £80,915.18 as compared with the Appellant's figures of £223,837.17 and £227,097.54 for Farnham House and Lascelles House respectively.

4. The Appellant submitted that the LVT's decision was wrong in law, failed to have proper regard to the evidence and gave inadequate reasons on a number of grounds which may be summarised as follows:

> (1) the LVT accepted the evidence of the Respondents' expert that it was open to a reasonable surveyor to form the view that the roofs needed to be recovered, though this was at the very far or extreme range of opinions properly open to a reasonable surveyor; in the light of this the LVT should have held that, subject to quantum, the cost of recovering the roofs was reasonably incurred and the first limb of the test in *Forcelux v Sweetman* [2001] 2 EGLR 173 was satisfied.
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> (2) as to quantum, when concluding that only a significantly reduced sum was reasonable the LVT failed to compare like with like and failed to have regard to the evidence as to the Appellant's procurement process; in addition, as a result of this a number of costs were wrongly omitted.

5. The appeal was unopposed. In fact by the time of the hearing the Appellant and Respondents had settled the dispute as to service charges for the roof works. However, the appeal was not academic because one Respondent, Simon Lascelles of 22 Farnham House, had not agreed to the settlement and the Tribunal's decision will therefore affect his obligation to pay service charges.

6. The leases provide for the lessee to pay an estimated service charge and a due proportion of the total monies properly and reasonably expended by the lessor in carrying out its obligations under the lease and the covenants in the Ninth Schedule. Paragraph 1 of the Ninth Schedule contains the following covenant by the lessor:

> "To keep in good repair and condition (and whenever necessary rebuild and reinstate and renew and replace all worn or damaged parts) (i) the main structure of the property… including all roofs and chimneys and every part of the property above the level of the top floor ceilings."

The leases of 4 flats (including 22 Farnham House – Simon Lascelles) are different in that they require the lessee to pay for the carrying out of improvements. Clause 3C of those leases contains a covenant by the lessee to pay:

> "…such annual sum as may be notified… as representing a fair and reasonable proportion of the reasonably estimated amount required to cover the costs and expenses incurred or to be incurred by the Lessor in carrying out any improvements or providing any additional services to the Reserved Property or to the Estate as the Lessor may in its absolute discretion from time to time… consider necessary and which are for the benefit of the Demised Premises or the Lessee and in carrying out the obligations or functions contained in or referred to in this Clause and Clauses 4 and 6 hereof and in performing the covenants set out in the Ninth Schedule hereto…"

7. In their Response to the Appellant's submissions in support of the application for permission to appeal the Respondents argue a fresh point not raised before. As the LVT concluded that recovering the roofs was not 'necessary' (LVT's reasons for refusing permission to appeal, paragraph 8), the works did not fall within the repairing covenant in the leases. The Respondents did not take part in the appeal to support that argument. In my judgment the answer to it is that the LVT found that the roofs were in disrepair and that the works constituted a repair to modern standards, paragraph 55. Accordingly, they are works of 'repair' within the meaning of paragraph 1 of the Ninth Schedule to the leases and it is not necessary to go on to consider whether they also fall within the words "renew or replace" which are qualified by the words "whenever necessary."

8. Section 19(1) of the 1985 Act provides:

> "Relevant costs shall be taken into account in determining the amount of a service charge payable for a period–
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> (a) only to the extent to which 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."

9. The correct approach towards determining whether service charges have been reasonably incurred for the purposes of section 19(1)(a) has been considered in a number of previous decisions of the Tribunal. In *Forcelux v Sweetman* the Tribunal (Mr P R Francis FRICS) stated:

> "39. In determining the issues regarding the insurance premiums and the cost of major works and their related consultancy and management charges I consider firstly Mr. Gallagher's submissions as to the interpretation of s.19(2A) of the 1985 Act and specifically his argument that the section is not concerned with whether costs are *'reasonable'*, but whether they are '*reasonably incurred'*. In my judgment his interpretation is correct, and is supported by the authorities quoted. The question I have to answer is not whether the expenditure for any particular service charge item was necessarily the cheapest available, but whether the charge that was made was reasonably incurred.
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> 40. But to answer that question, there are, in my judgment, two distinctly separate matters I have to consider. Firstly the evidence, and from that whether the landlord's actions were appropriate, and properly effected in accordance with the requirements of the lease, the RICS Code and the 1985 Act. Secondly, whether the amount charged was reasonable in the light of that evidence. This second point is particularly important as, if that did not have to be considered, it would be open to any landlord to plead justification for any particular figure, on the grounds that the steps it took justified the expense, without properly testing the market.
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> 41. It has to be a question of degree, and whilst the appellant has submitted a well reasoned and, as I have said, in my view a correct interpretation of 'reasonably incurred', that cannot be a licence to charge a figure that is out of line with the market norm."

This was considered in *Veena SA v Cheong* [2003] 1 EGLR 175 where the Tribunal (Mr P H Clarke FRICS) said this at paragraph 103:

> "…The question is not solely whether costs are 'reasonable' but whether they were 'reasonably incurred', that is to say whether the action taken in incurring the costs and the amount of those costs were both reasonable. The question in this part of the appeal is whether Veena acted reasonably in employing a full-time porter and a part-time cleaner and, if so, whether the amounts charged for those services were reasonable. Both parts of the question must be answered affirmatively for Veena to succeed."

10. The effect of the Appellant's first submission is that, provided the decision to undertake particular works lies within the range of works which might be recommended by a reasonable surveyor, the cost of them is reasonably incurred, wherever they fall within that range. In my judgment that places an unwarranted gloss on the wording of section 19(1). The statute does not formulate the test in this way nor do the authorities suggest that it is the correct test. The question is whether the decision to recover the roofs was a reasonable one

in all the circumstances, even if other reasonable decisions could also be taken. The fact there is evidence a reasonable surveyor might recommend the roof be recovered is no doubt an important factor in answering that question, but it cannot be determinative. Further, the weight to be attached to such evidence may depend upon where in the range of reasonableness the recommendation lies.

11. The LVT were clearly alive to the relevance and importance of the concession by the Respondents' expert Mr Miller that "another opinion could be formed [that the roofs needed to be replaced], but it was at the very far end of the range," see paragraphs 80 and 86-88. However, the evidence of the Respondents' expert remained that the roofs could be repaired at moderate cost and it would be unreasonable to recover the roofs completely and the LVT considered that this strong prima facie case was not rebutted by the totality of the Appellant's evidence. No complaint is made about the application of the legal test in paragraph 89 of the decision.

12. In my judgment the LVT was entitled to place more weight on the Respondents' expert who had actually seen the roofs in disrepair. Further, not only had the Appellant's expert not seen the roofs until they had been recovered but the Appellant failed to produce any survey evidence of the condition of the roofs other than that carried out by the very company whose waterproofing system was to be used for the works. Subject to one matter mentioned below, in determining whether the decision to recover the roofs was reasonable the LVT was also entitled to compare the huge cost of recovering the roofs with the cost of further 'patch' repairs. In the light of all the evidence I consider the LVT was entitled to take the view that the fact that a surveyor acting at the extreme edge of the range of what might be considered reasonable could recommend recovering the roofs as opposed to repairing them did not of itself mean the costs of recovering were reasonably incurred. Put another way, it is not necessary to go so far as to show that no reasonable surveyor could have recommended recovering the roof for the LVT to find that the cost of such work was not reasonably incurred.

13. However, it was clearly a critical factor in the LVT's weighing of the 'fine balance' that the cost of recovering the roof was "astronomically high as compared with the annual cost of patch repairs" (paragraph 87). While in principle this was a perfectly legitimate consideration to take into account, in doing so I consider the LVT have acted on no evidence. The only reference in the decision to the cost of patch repairs is paragraph 43 where the cost of repairs to all 4 blocks in the Blandford Estate is given for the period 2002 to 2006. The total costs for each block for that 4 year period range from £4,399.14 to £830.47. In its reasons for refusing permission to appeal to the Lands tribunal the LVT stated that "the annual cost of patch repairs to each of the blocks in question was under £1,000 per block." These figures refer to historic costs not likely future costs. While it might be said that these could provide a reliable guide as to future cost without further evidence, that is not the case here. In paragraph 70 of the decision the LVT record the Respondents' expert's evidence that "***if*** the roofs had been repaired properly" (emphasis added) they would have a life of 15 years. He clearly considered that the repairs to date were inadequate, stating that "it would be necessary to cut out existing patch repairs and replace them with proper asphalt covering" (paragraph 68) and that 20% of the roof was now in disrepair (paragraph 81). Therefore it cannot be said that past costs are a reliable guide to future costs.

14. Moreover, it could be said that it was inappropriate of the LVT to compare the cost of future patch repairs with the actual cost of the recovering works when the LVT only allowed £80,915.18 per block as the reasonable cost of such work. A proper comparison between reasonable future repair costs with reasonable recovering costs could have resulted in a significantly reduced differential. Taken together with the Respondents' expert's evidence that it was open to a reasonable surveyor to form the view that the roofs needed to be recovered, though that this was at the very far or extreme range of proper opinion, the LVT may have reached a different conclusion as to whether the decision to recover the roofs was a reasonable one.

15. I did initially consider that the LVT's decision that the cost of recovering the roofs was not reasonably incurred was also wrong on the grounds that building regulations required the whole roofs to be recovered, see paragraphs 81 and 82 of the decision. However, while the parapets are clearly a "wall, floor or roof" they do not separate "the internal conditioned space from the external environment" and I consider that the LVT was correct to conclude that less than 25% of the roof required recovering for these purposes.

16. Turning to the issue of quantum, the LVT considered this under three heads: scaffolding, roof works and fees etc. I propose to deal with the Appellant's argument that the amount allowed for scaffolding failed to include overheads etc under the third head. However, the Appellant's evidence was that the cost of scaffolding was in fact £30,176.19 not the £21,487 allowed by the LVT. The difference of £8,689.19 is accounted for by risk items, in effect additional contingency costs that were in fact incurred. In paragraph 98 the LVT appear to allow all the scaffolding costs actually incurred, overlooking the £8,689.19 figure. In doing so the LVT have failed to have regard to the evidence as to the actual cost and/or have failed to give reasons for rejecting the risk items.

17. As to the cost of the roof works, the LVT refers to the evidence of Appleyard and Trew, independent quantity surveyors instructed by the Appellant to compare the quotation obtained by the Appellant for the works broken down for the Two Blocks against a quotation based on the same specification by a contractor instructed on behalf of the lessees, LHC Roofing (paragraphs 101 to 103). The essential difference was that the actual works formed part of a much larger project including works to lots of blocks of flats whereas the LHC Roofing quotation was for only the Two Blocks. The former had a more expensive project cost because of the need for higher overheads and fixed costs, whereas if the Appellant had to manage lots of smaller projects the management costs would be higher which would be passed onto the lessees as service charges. Appleyard and Trew's conclusion was that the Appellant's approach offered best overall value (paragraph 28).

18. The LVT rejected the evidence of Appleyard and Trew for a number of reasons. First, it stated that the report did not appear to be wholly independent or objective. No reason is given for that conclusion which on the face of it is surprising. In my judgment, if the LVT cast aspersions on the independence of apparently independent evidence it is incumbent on it to give reasons for doing so, such as in paragraph 41 when considering the Langley surveys.

19. Second, the LVT stated it was considering only separate contracts for the Two Blocks, not lots of separate contracts for the rest of the major project works. However, in doing so the LVT has failed to consider the question whether, if in principle separate contracts are more appropriate for the Two Blocks, why are they not appropriate for the other blocks of flats as well? Underlying this is a failure to grapple with the Appellant's evidence in the Appleyard and Trew report that a major contract was a better overall approach than lots of smaller contracts. In this respect I accept the Appellant's submissions that the LVT failed to consider properly or at all the Appellant's position as a local authority owning many blocks of flats and its procurement process. Only when and if it rejected the major contract approach as an unreasonable one could the LVT compare the costs of smaller individual contracts for the purpose of deciding whether the cost of the works themselves was reasonable, see for example *A2 Housing Group v Spencer Taylor* LRX/36/2006. Instead the LVT has not compared like with like in terms of costs by comparing the actual cost of works on a major project but broken down per block with the LHC Roofing quote for just the Two Blocks and a hypothetical book exercise costing for the Two Blocks.

20. Criticism was made of the hypothetical book exercise costing even if separate contracts were the correct approach, but the evidence which was before the LVT to support these points was not put before the Tribunal.

21. As to the third head of fees etc, the LVT allowed professional fees of 5.74% and a management cost of 4.46%. However, it did not allow site or head office overheads, partnering insurance or incentive saving figures. The main reason given for this was that they related to the major contract and it was unfair for the Respondents to have to pay a share of a larger whole (paragraph 111). In my judgment the LVT's conclusion on this point is affected by its flawed approach to the issue as to whether it was reasonable to enter into a major contract rather than smaller separate contracts. If the major contract approach was reasonable then, subject to more detailed points such as poor site supervision (paragraph 109), a fair proportion of the major contract sums should be allowed. On the other hand, if smaller separate contracts was the correct approach then consideration should be given to higher management fees. It is fair to say there is no evidence that the Appellant put forward any figures as to what the higher management fees should be in this event. However, that does not alter the fact that the LVT's decision to disallow major contract costs is tainted by its flawed rejection of the major contract approach.

22. The decision will be remitted to the LVT for re-hearing as to whether the cost of the roof works was reasonably incurred i.e. as to whether the decision to recover the roofs was a reasonable one and whether the overall costs of the roof works are reasonable in the light of this decision.

23. There was no application for costs.

Dated 12 May 2010

Her Honour Judge Alice Robinson