UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2011] UKUT 218 (LC)
LT Case Number: LRX/96/2010

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charge – whether proposed replacement of roofing tiles reasonable – held no evidence to support LVT's conclusion that it was not – whether existence of a sinking fund a relevant consideration in determining reasonableness – held that it was – appeal upheld - Landlord and Tenant Act 1985 S.19.

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

BETWEEN **SOUTHALL COURT (RESIDENTS) LTD** **Appellant**

and

(1) PARMJEET TIWARI **Respondents**
(2) ASHOK TIWARI

Re: Flats 1-48
Southall Court
Lady Margaret Road
Southall
Middlesex
UB1 2RG

Before: N J Rose FRICS

APPEAL DETERMINED ON WRITTEN REPRESENTATIONS

The following cases are referred to in this decision:
Veena SA v Cheong [2003] 1 EGLR 175
Forcelux v Sweetman [2001] 2 ELGR 173
City of Westminster v Fleury and others [2001] UKUT 136 (LC)
Post Office v Foley [2000] IRLR 827
Bowater v Northwest London Hospitals NHS Trust [2011] EWCA Civ 63
Paddington Basin Developments v West End Quay [2010] 1WLR 2735.

DECISION

Introduction

1. This is an appeal by the landlord of a block of 48 flats known as Southall Court, Lady Margaret Road, Southall, Middlesex, UB1 2RG from a decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel. The LVT determined, among other matters, that the amount payable by the tenant of each flat by way of interim service charge for the year commencing 24 June 2009 was £482.50, being the appropriate proportion of the estimated cost of proposed major works to the stairways of the block. The total service charge contribution that had been sought by the landlord was £83,885.00 plus VAT, equivalent to £2,053.43 per flat. The difference of £1,570.93 per flat between that figure and the sum awarded reflected the cost of major works to the roofs of the west and south wings of the block.

2. The appellant landlord is Southall Court (Residents) Ltd. The President granted permission to appeal, limited to the issue of roof repairs, to be determined by way of review. The only respondents to the appeal were Mrs Parmjeet Tiwari and Mr Ashok Tiwari, the lessees of flats 9 and 10. The appeal was conducted, by agreement, by way of written representations. Submissions have been received from Mr Peter Ward, a director of the appellant and from Mrs Tiwari on behalf of herself and her husband.

The LVT's decision

3. In its decision, under the heading "The Inspection", the LVT said:

> "10. The Tribunal inspected the property on the morning of 29 April 2010 in the presence of Mr Ward and a number of the tenants. The block is built around three sides of an elongated courtyard with a garage area at the back. It probably dates from between the Wars. The front is on the west side and is somewhat narrower than the north and south sides. The block is three-storeys high. Access is gained to the flats through some eight staircases…
>
> 12. The roofs of the block were conventional pitched tile. We observed the roofs from the ground with binoculars. The roof to the north side of the block had already been replaced and no further works were envisaged in relation to that block. The roofs to the west and south sides were of some age. The tiles looked to be typical of the 1950s but it is possible that they are the original pre-War covering.
>
> 13. The roof to the west side had some slipped tiles and on the eastern side of the west block there was a hole in the roof. On the north side of the south block there were some slipped tiles. The south side of the south block did not appear to be in particularly poor condition. Throughout the west and south blocks there was evidence of patch repairs having been carried out. The Tribunal did not look into the loft space."

4. The LVT then recounted the history of the dispute. It said this:

"14. Southall Court has probably been the subject of more applications to the Tribunal than any other property in the country. In most years since at least 1999 there has been at least one application of one sort or another to the Tribunal. There has also been regular recourse to the County Court.

15. One long-running problem was that there were three different sorts of leases granted of flats in the block. There was a dispute as to whether the leases permitted the creation of a sinking fund. In 2006 the Tribunal ordered that Type "A" leases should be varied to correspond with Type 'B' and 'C' leases, but in a subsequent decision in 2007, which was unsuccessfully appealed to the Lands Tribunal, it was determined that the leases (including those varied) did not permit the creation of a sinking fund. As a result the landlord applied again to vary all the leases. By order of the Tribunal of 26 November 2009, the leases were varied and a sinking fund has now been instigated with standard terms for the collection of service charges on account.

16. The roof too has been a long-running issue. As long ago as 2002 the Tribunal determined that the roof at that time did not require replacement, although (as appears from a subsequent decision in 2006 at page 204 of the bundle) the Tribunal considered that replacement of the roof within a timescale of 5-10 years was reasonable. In 2006 the Tribunal held that 'the case for renewing the roof had simply not been made out' (bundle page 213). Mr Lawrence gave evidence to the Tribunal then and he did to us. The Tribunal in 2006 'accepted that Mr Lawrence gave his evidence in good faith [but] found it extremely difficult to reconcile his expert witness report dated 14 March 2006 with his original condition survey based on inspections carried out between October and December 2004. The condition survey had been meticulous and yet it revealed no major failure of the roof covering'.

17. Nothing daunted, in 2007 the landlord again applied to the Tribunal but this time limiting its application to the roof of the north side of the block. Scaffolding had been erected so that Mr Lawrence had been able to inspect the north roof closely. His evidence there (bundle pages 237-238) was that the north roof (unlike the west and south roofs) had no sarking felt, so that there was no second line of defence if a tile slipped. The Tribunal concluded (bundle page 239) that 'the time [had] now arrived when the roof of the north wing should be re-covered. At our inspection at roof level we were able to confirm the general degradation of the original tiles, many ill-fitting patch repairs, some chipped tiles, and tile debris in the newly installed guttering. We also saw the weatherproofing properties of the roof covering had been compromised by the need to use new and old tiles. From our inspection of the roof void we saw that daylight was visible in numerous places on both pitches'.

5. The LVT then summarised the evidence in these terms:

"18. Before us Mr Lawrence gave evidence and was cross-examined by the tenants. He had prepared a report (bundle 149ff) dated 22 February 2010. In para.

5.1ff he summarises the defects which had been in the condition survey report prepared in February 2005, based on inspections carried out in October-December 2004. He summarised his observations from the scaffolding erected in 2007. In para 5.19 he said: 'Further external surveys and internal inspections of the relevant loft spaces in September and October 2007 and the summer-autumn of 2009 revealed the following: attempted sealing of holes in the sarking felt with carpet off-cuts and binbags…; a large bowl full of (assumed) rainwater positioned below a sarking felt hole above flat 18; very damp and mouldy valley board timbers at the south wing roof change in level; mice infestation…; polythene sheeting laid out above flat 40 ceiling as (assumed) water penetration defence; missing hip irons; valley and main gutters filled with eroded tile debris'. He concluded in para. 5.20 that 'the tiles have deteriorated sufficiently to justify 100% replacement.'

19. In cross-examination Mr Lawrence said initially that he did not know if the roof was currently leaking. When pressed, he said that, when he had visited the loft a few months before, there was evidence of historic links, but there was no evidence of current leaks. He accepted that 'you could stagger on for a few more years'. He said the cost of the roof was £65,000 and the cost of the stairways £18,000, to which professional fees of 9.5% and VAT needed to be added…

21. The tenants' evidence was that there was no substantial problem of leakage in the west and south wings. They did not consider that the stairs were dangerous.

22. So far as consultation is concerned, it was common ground that the landlord had fulfilled its obligations under section 20 of the Landlord and Tenant Act 1985. It was also common ground that the tenants had made no comment whatsoever in response to the landlord's statutory consultation."

6. Under the heading "Decision" the LVT said:

"23. Once again, the Tribunal is forced to point out the discrepancy between Mr Lawrence's written evidence and the other evidence, in this case his oral evidence. Mr Lawrence had to concede that on his inspections in late 2009 there was no evidence of current leaks. At the hearing he accepted that the roof could 'stagger on for a few years' with only patch repairs. This accords with the Tribunal's own view based on its inspection of the property.

24. The Tribunal also notes that there is now provision for a sinking fund and that contributions are being made to that fund. The tenants understandably complain that they are being asked to contribute both to the sinking fund and to the major works. The purpose of a sinking fund is to obviate or reduce the need for large calls to fund major works. The lease variations were made for that very purpose.

25. The Tribunal reminds itself that a landlord has a wide discretion as to what works should be done and when and what programme of works should be adopted. The Tribunal also notes that the tenants made no response whatsoever to the consultation exercise carried out by the landlord, but on the very special facts of this case, this consideration can be given less weight. It was obvious to absolutely

everyone involved in the case that the matter would be coming back, yet again, to the Tribunal as indeed it has, so the tenants' failure to comment is explicable, even if not excusable.

26. Notwithstanding these points, on the basis of Mr Lawrence's oral evidence and our inspection we find as a fact that the roof does not need immediate replacement and has some life left in it. It is not reasonable for the landlord at the moment to replace it.

27. That is sufficient to dispose of the issue regarding the roof, but we are reinforced in this view by the history of the lease variation. A landlord acting reasonably would take into account the fact that a sinking fund is being built up precisely in order to fund works such as that to the roof. It may of course be that the roof will need replacing before the sinking fund is large enough to cover the whole cost, but the landlord, acting reasonably, should have regard to spreading the burden of major works over time."

Submissions

7. The appellants' submissions may be summarised as follows. Firstly, whether works are reasonable does not depend on whether they are the only option, but whether they fall within a range of reasonable decisions. Thus, whilst it might have been reasonable to wait a short while longer before replacing all the roof tiles, that did not render it unreasonable to replace them immediately. In support of this submission the appellant referred to the following cases: *Veena SA v Cheong* [2003] 1 EGLR 175, *Forcelux v Sweetman* [2001] 2 ELGR 173, *City of Westminster v Fleury and others* [2001] UKUT 136 (LC), *Post Office v Foley [2000] IRLR 827,* and *Bowater v Northwest London Hospitals NHS Trust* [2011] EWCA Civ 63. Secondly, the LVT erred in relying solely on Mr Lawrence's observation that the present patching up regime could stagger on for a few more years. This offended the maxim that preservation is better than cure, on no or no sufficient evidence. It also effectively condoned unlawful conduct, in that some tenants had taken it upon themselves to usurp the landlord's duty to maintain the roof. The recommendation of the only expert witness, Mr Lawrence, was that all roof tiles should be replaced. No credible evidence was presented to suggest that this opinion was wrong, and it should therefore have been accepted. Thirdly, although the evidence taken into consideration by the LVT may include surrounding facts and circumstances, the existence of a sinking fund is not a relevant factor when considering whether proposed works are reasonable. Alternatively, if it is relevant, too much weight was attached to it on this occasion. The tenants of Southall Court were made aware in 2002 that the LVT considered that the roof had some 5-10 years of remaining life and it would be sensible to build up a reserve fund to spread the cost burden. Even if it were relevant to take affordability into account, the reasonable tenant should have taken reasonable steps to ensure that funds were available for the inevitable day when roof tile replacement could not be put off any longer.

8. The respondents' submissions were there. Firstly, the LVT was right to take the sinking fund into account. It was initiated by a variation of the leases ordered by the LVT on 26 November 2009 at the landlord's behest. Since the LVT were instrumental in establishing the sinking fund, they ought to have a duty to adjudicate on its use. If the current appeal is successful perhaps there should be no sinking fund. Secondly, the LVT was right to conclude that there was no urgent need to replace the roof. The appellant had been arguing for such a replacement since 1999. In 2007 its

surveyor again proposed replacing the whole roof, but in cross-examination he agreed that only the north roof showed any signs of damage. At that time the LVT estimated the remaining life of the rest of the roof at 5-10 years. At the LVT hearing in 2009 the appellants' surveyor agreed that, although there was evidence of historic leaks in the roof, there was no evidence of current leaks and it was possible to stagger on for a few years. The appellant relied on the same surveyor who, for a number of years, has been stating that the roof needs urgent replacement, but under cross-examination he was unable to provide any proof of its failure. The LVT's decision did not apply too restricted an approach to the landlord's discretion; it was a check on arbitrary decisions taken by the landlord that could cost the tenants large sums of money. The roof has survived since 1999 and has a good few years of life remaining. It is true that the tenants did not respond to the appellant's consultation exercise on the proposed works, but that was because the appellant was not interested in hearing the tenants' views. Commonsense dictates that there is no need to fix what is not broken. The proposed works would place an extra financial burden on the tenants and unnecessarily transform their residence into a building site. The LVT members are experts, they heard the evidence, they inspected the roof and they gave the right decision. Whilst the landlord has rights, it is important not to forget the effect on the tenants. The LVT has determined that each tenant should pay £482.50 in respect of repairs to the stairways. The respondents paid their contribution on 21 July 2010, but no work has been undertaken to rectify the dangerous state of the stairs. Perhaps the appellant does not intend to do this work.

Statutory Provisions

9. The Landlord and Tenant Act 1985, as amended by the Housing Act 1996 and the Commonhold and Leasehold Reform Act 2002, so far as relevant, provides:

> **Section 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 the 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…
>
> (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.

Section 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…

Section 27A Liability to pay service charges: jurisdiction

(1) An application may be made to a leasehold valuation tribunal for a determination of 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…"

Conclusions

10. In stating my conclusions I start with the first question identified by the President when granting permission to appeal, namely whether the LVT applied too restrictive an approach to the landlord's discretion. *City of Westminster v Fleury* was another appeal to this Tribunal which concerned the reasonableness of interim service charges in respect of roof works. The Member, HH Judge Alice Robinson, considered a number of previous decisions of the Tribunal. She held in para 10 that the question (under section 19(1))

> "is whether the decision to re-cover the roofs was a reasonable one in all the circumstances, even if other reasonable decisions could also be made."

11. In *City of Westminster* the works to the roof were not proposed to be carried out in the future, as they were in this appeal, but had already been carried out. The fact that the limitation of service charges is here governed by section 19(2), however, does not in my judgment mean that the test of reasonableness is different from that under section 19(1). The LVT was therefore right to remind itself, as it did before reaching its conclusion on the reasonableness of the proposed works, that the landlord has a wide discretion as to the programme of works to be adopted.

12. Applying that test to the present appeal, the facts are as follows. The expert witness called on behalf of the appellant was Mr Lawrence. His conclusion, in para 8.1 of his report, was that:

> "The south and central wing roof coverings are at the end of their useful service life, and should be replaced."

Mr Lawrence did not depart from that conclusion in oral evidence, although he agreed that it would be possible to defer replacement for a few more years. Having inspected the property, the LVT took the view that immediate replacement was not essential. Although they did not accept Mr Lawrence's opinion that the roof coverings had already reached the end of their useful life, they considered that they might well do so in the near future. That is clear from the LVT's decision on the initial application for permission to appeal where, at para 8, they said:

> "The Tribunal adds that an appeal would bring no practical benefit to the landlord, since it would usually take a year to eighteen months for an appeal to be heard. The 2009-2010 service charge year is nearly over. By the time an appeal is heard, the condition of the roof may well have deteriorated, so that the landlord would be entitled to carry out new works in any event."

13. Thus, the LVT's conclusion that it was unreasonable for the appellant to re-cover the roof immediately was reached in the light of its view that the tiles had another 12-18 months of useful life. Given the discretion allowed to a landlord as to the programme of works to be adopted, and in the absence of any expert evidence apart from that of Mr Lawrence, it was not in my judgment open to the LVT to find that the appellant's decision not to defer the roof work was unreasonable.

14. In reaching this conclusion, I have not overlooked the fact that a sinking fund to spread the cost of major repairs over a number of years had only recently been established and that, at the relevant date, it was wholly insufficient to pay for the proposed roofing works. Although Mr

Ward's primary submission on this matter was that the existence of the sinking fund was irrelevant to the question of reasonableness, he did not put forward any justification for that proposition. He simply asserted that either it was, as a matter of fact, given the state of the roof, reasonable to carry out the works now, or it was not. I am satisfied that the existence of a sinking fund is not irrelevant. When deciding whether proposed works are reasonable, there is no warrant for excluding from consideration any part of the factual matrix, the weight to be given to each element of that matrix being a matter for the tribunal in the light of the evidence. Nevertheless, the existence of a very small sinking fund cannot in my judgment have made the difference between the reasonableness of a decision to re-cover the roof now or in 12-18 months time, by when the LVT considered the landlord may well have been entitled to carry out the works in any event. Moreover, it was unreasonable of the tenants to rely on the very recent establishment of the sinking fund, since it was only as a result of their objections that one had not been established some years earlier.

15. I think it appropriate to refer to the tenants' failure to respond to the landlord's consultation exercise on the proposed works, which had been carried out pursuant to section 20 of the Landlord and Tenant Act 1985. The LVT considered that less weight should be given to this failure than would normally be the case, because it was "absolutely obvious" that the matter would be referred to the LVT. It would be unfortunate if this conclusion were to encourage other tenants to ignore the consultation process which was established by Parliament "to ensure a degree of transparency and accountability when a landlord decides to undertake qualifying works" (per Lewison J in *Paddington Basin Developments v West End Quay* [2010] 1WLR 2735).

16. It is in my judgment incumbent upon tenants who are unhappy about proposed works on which they have been consulted in this manner to make their concerns known to the landlord within the period of time specified in the landlord's notice. In the absence of any objection during the consultation process, a landlord is entitled to conclude that there is no serious objection to the proposed works. The tenants' duty to participate in the consultation process applies even if, as the LVT suggested, it is plain from past experience that any observations submitted by the tenants will be ignored. In this case the LVT's conclusion that the matter would inevitably be referred to it was based on the extraordinary number of previous LVT determinations in respect of Southall Court. But it is far from clear that the need for such determinations was always the fault of the landlord. In 2007 the landlord persuaded the LVT that the roof of the north wing of the block should be recovered; in 2009 the LVT accepted the landlord's argument for the establishment of a sinking fund and, in 2010, the LVT required the hearing and application fees to be repaid by the tenants. It found that the appellant "has acted reasonably throughout" and refused to make an order under section 20C of the Landlord and Tenant Act 1985.

17 It is strongly to be hoped that any future disagreements about service charges payable at Southall Court will be resolved by negotiation rather than litigation, if necessary with the assistance of mediation. For all landlords and tenants, recourse to courts or tribunals should be a last resort, and certainly not an inevitability.

18. Finally, I should refer to the respondents' allegation that their service charge payment towards the cost of repairs to stairways, made in July 2010, has not yet been used for its intended purpose. It is clearly in the interests of good relations between the parties that the tenant should be kept fully informed of the proposed time-table for these works and the reason for any delay to date.

19. The appeal is allowed. I determine the amount payable by the tenants of each flat in Southall Court by way of interim service charge for the year commencing 24 June 2009 to be £2,053.43. I make no order as to costs.

Dated 16 June 2011

N J Rose FRICS