UPPER TRIBUNAL (LANDS CHAMBER)

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LT Case Number: LRX/183/2011

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT - service charges -whether landlord's costs of previous LVT hearing recoverable through the service charge

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

BETWEEN **KOLUP INVESTMENTS LIMITED** **Appellant**

and

DR LOUIS AL-DHAHIR **Respondent**

Re: 48A Westbourne Terrace,
London W2 3UH

Before: His Honour Judge Nicholas Huskinson

Sitting at: 45 Bedford Square, London WC1B 3DN
on 7 March 2013

Amanda Gourlay, instructed by Messrs Antony Gold, on behalf of the appellant
The respondent appeared in person

The following cases are referred to in this decision:
Church Commissioners v Derdabi [2010] UKUT 380 (LC).

DECISION

Introduction

1. This is an appeal from the decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel dated 31 October 2011 whereby the LVT gave a determination as to the amount of service charges payable by the respondent (as tenant) to the appellant (as landlord) in respect of the year ending 25 December 2010. One of the questions decided by the LVT was whether the appellant was entitled to include within the total of the service costs (which were to be divided in the appropriate proportions between the various lessees) a sum of £3,898.96, plus a further related £176.50 in respect of fees, being costs that the appellant had incurred in relation to some earlier proceedings in 2009 before the LVT ("the 2009 proceedings). The respondent indicated that his share of the disputed costs would be about £800.

2. 46/48 Westbourne Terrace is a 19th Century block converted into 8 flats. Three of the flats are held in hand by the appellant who lets them out on assured shorthold tenancies. The other 5 flats are held by long leaseholders. The respondent is one of these long leaseholders and holds the first floor flat in the building for a term of 99 years from 25 March 1984. The lease contains covenants requiring the appellant to insure the building and to repair and maintain it etc. There is also a covenant requiring the respondent to pay the service charge. The total of the service cost is divided between the 8 flats, with the appellant bearing a due proportion of the costs, namely those attributable to the 3 flats held in hand by the appellant.

3. The respondent accepted that the terms of the service charge provisions in his lease entitled the appellant to include, as part of the total expenditure which was to form the basis of the service charge, costs which had been incurred by the appellant as landlord in proceedings before the LVT in connection with the building. In any event the LVT found that the terms of the lease allowed in principle recovery through the service charge of costs of proceedings before the LVT in relation to the building and there is no appeal by the respondent against this decision. It may be noted that in the 2009 proceedings no application appears to have been made (and no order was made by the LVT) under section 20C of the Landlord and Tenant Act 1985 as amended. Also in the present proceedings the LVT was not concerned with whether the legal costs of the 2009 proceedings were excessive in amount – the respondent sought belatedly at the LVT hearing to raise this point but was not allowed to do.

4. In summary therefore the position is this:

   (1) The appellant did occur legal costs in the 2009 proceedings.

   (2) No order was made under section 20C preventing the recovery of such costs through the service charge.

   (3) The proper construction of the lease entitles the appellant to recover these costs through the service charge.

(4) The LVT was not concerned (and this Tribunal is not concerned on appeal) with any question of whether these costs were excessive in amount.

Accordingly it would at first sight appear that these legal costs of the 2009 proceedings should be recoverable through the service charge. The LVT however found they were not recoverable. In order to understand their reasons for so concluding and to understand the points raised by the parties in this appeal it is necessary to consider in a little more detail the 2009 proceedings.

The 2009 Proceedings

5. There is a communal central heating boiler in the building. For some time, namely from at least 2007 if not earlier, there had been discussions between the appellant and the lessees regarding whether there should be a replacement boiler (and if so what form of boiler) or whether it would be beneficial to all parties for everyone to agree that no longer would central heating be provided from a communal boiler but instead each lessee should have installed their own individual boiler within their demised premises. There was a perceived advantage to the appellant if the communal boiler was removed, with each lessee having their own boiler, because this would free up some space within the basement of the premises to the potential advantage of the appellant. It was thought by the appellant that there may also be some advantage to the lessees themselves from this arrangement. The appellant was prepared to make a contribution (which was £8,000) to be shared among the lessees to encourage them to agree to replace the communal boiler with individual units within their separate premises. The lessees did not accept this suggestion.

6. Until December 2009 the appellant used as a managing agent in respect of this building a company called A & H Property Consultants Limited ("A & H"). I have not been told who precisely were the members and directors of A & H, but this was a company effectively run by the respondent together, so I understand, with two of the other lessees in the block. Thus there was an in-house manager of the property, being a manager controlled by the lessees themselves or by some of the lessees. It is possible that this fact may have contributed to the difficulties which have arisen.

7. In 2009 A & H started the first stage of the consultation process under section 20 of the Landlord and Tenant Act 1985 as amended in respect of the proposed replacement of the boiler. By a letter dated 30 April 2009 to the various lessees A & H summarised responses obtained from contractors. Their conclusion was that there were two potential contractors to choose between, namely M Defoe Heating Engineers (who had quoted £19,500 or £25,200 depending on the choice of boiler) and Flame Installations (who had quoted £12,000). A & H's recommendation was to award the contract to Flame, but with the possibility of Defoe doing some works (depending upon the outcome of some asbestos analysis). The details of the quotes and the consultation do not matter for present purpose. What however emerged was that the respondent and A & H appeared to favour Flame whereas the appellant favoured Defoe.

8. In June 2009 the following exchange of emails took place:

(1) Mr Lesley Zucker on behalf of City Estates London Limited (a company acting on behalf of the appellant, being a company which took over as the appellant's managing agent in respect of the building in December 2009) sent an email to the respondent which included the following text:

> "Be this as it may, I now attach below, having discussed with Mark, the reasons for his chosen boiler, which is more expensive, along with the benefits of proceeding with his boiler. I therefore await hearing from you now, with your confirmation that you have instructed Mr Defoe to proceed."

(2) The respondent on 5 June 2009 emailed to Mr Zucker (signing the e-mail with his name on behalf of A & H) stating that when the service charge statement is produced some lessees may use the LVT to challenge the decision to proceed with the more expensive option. He pointed out that the risk to the appellant was that a proportion of the extra costs (about £7,000 - £8,000) might not be recovered, such that the lessees might enjoy the best of both worlds, i.e. benefit from the more expensive and possibly more reliable boiler that Mark Defoe installs but only have to pay the cost quoted by Flame. The respondent said that both as a lessee and a director of A & H he would be pleased to receive precise instructions.

(3) Mr Zucker sent an email on 9 June 2009 to the respondent stating that he did not believe that A & H were acting in the appellant's interest. He gave six months notice to determinate A & H's management of the property. He also stated as follows:

> "Finally, as a result of your implication that the leaseholders may enjoy the best of both worlds, we do not give you authority to proceed with any of the options, until you have this clarified by the LVT. Kolup Investments are not prepared to expend this sort of money merely to have this thrashed out in front of the LVT. If you wish to make the application to the LVT now is the time to do it. Alternatively, if you do not wish to use this process, I will require a written undertaking from yourself and Messrs Schragger and Partridge that they wish to proceed with Mark Defoe's quotation".

(4) By an email dated 15 June 2009 Mr Zucker said to the respondent:

> "The decision is quite simply for you to act on my email of 9 June to either have this matter decided by the LVT or otherwise to agree to the installation of a far superior boiler."

9. In consequence of this exchange of emails the respondent, in the name of A & H Property Consultants Limited (described as managing agent) applied to the LVT. The appellant was named as the respondent to the application. The application was made under section 27A of the Landlord and Tenant Act 1985. The purpose of the application was to obtain a decision from the LVT as to the reasonableness of each of the proposals for boiler replacement, namely the cheaper proposal from Flame and the more expensive proposal from Defoe. These were the 2009 proceeding the costs of which are in issue in the present case.

10. There was a hearing on 21 September 2009 before the LVT. Evidence was called. Each side relied upon an expert's report. During the course of the hearing it emerged that the two quotes had been given upon a somewhat different basis. In its written decision dated 9 October 2009 LVT concluded that both quotes were reasonable for the works specified within them, subject to each quote making an adequate provision for the removal of any asbestos once the full extent of any asbestos removal works required had been ascertained by way of an expert opinion. The LVT also stated:

> "Although Dr Al-Dhahir stated he had issued outline specifications to the contractors, the specifications had not been produced to the Tribunal and M Defoe stated that he had not seen the specification. It is this that has resulted in the vast difference between the two quotes.
>
> It is clear having heard from the parties and considered the evidence that the difference in the two quotes is attributable to the additional scope of works included in the quote from M Defoe. Once these additional amounts are removed and difference in cost of the boiler is taken into account there remains little difference between the two quotes."

The present application to the LVT and its decision

11. It may be noted that prior to the present application to the LVT (the decision in which is subject to the present appeal) there had already been a previous separate application to the LVT in respect of effectively the same issue, namely the recoverability through the service charge provisions of the legal costs of the 2009 proceedings. The application was brought by Mrs Lampejo, a tenant of a basement flat at the building. She disputed various matters including whether the 2009 legal costs were recoverable under the terms of the lease and, if so, whether such costs had been reasonably incurred. On these points the LVT found in favour of the present appellant and allowed the legal costs to be recovered in full.

12. The present application was made by the respondent to the LVT in respect of the service charges for the year ending 25 December 2010. He raised various points namely:

(1) a point involving the benefit from paying electricity and gas bills through direct debit monthly rather than quarterly by cheque and whether the benefit of so doing should be available to the lessees.

(2) Points concerning the insurance premium.

(3) The question central to the present appeal, namely whether the legal costs of the 2009 proceedings could be recovered.

(4) A related question concerning £352.50 of solicitors fees.

(5) A point regarding management fees.

13. The LVT found in favour of the respondent upon the question of electricity and gas charges. Upon the question of insurance the LVT ultimately did not disallow any of the costs claimed by the

appellant (although the appearance to give evidence by Mr Block of Primary Insurance Consultants Limited on behalf of the appellant gave rise to some hope that additional information might, for the future, enable a lower premium to be found). £176.50 was disallowed in respect of solicitors fees. None of the management fees claimed were disallowed. On the presently central point of the legal costs of the 2009 proceedings the LVT disallowed the whole of these costs, such that the appellant was unable to recover any part of them through the service charge. The LVT made an order under section 20C of the 1985 Act and also ordered the appellant to reimburse to the respondent the application fee of £100 and the hearing fee of £150.

14. So far as concerns the legal costs of the 2009 proceedings, the respondent's application to the LVT involved pointing out that despite the 2009 LVT's decision the boiler still had not been renewed; that no reason had been advanced as to why it had not been renewed; and that the respondent (and other lessees) have therefore received nothing in return for the costs spent in the 2009 proceedings. It was suggested that the 2009 proceedings were unnecessary.

15. The LVT gave directions for the hearing. One of those directions was to the effect that the LVT did not consider there was a need for witnesses and if either party disagreed it should apply to the LVT for permission to use a witness. Neither party did so apply. Accordingly the matter came before the LVT without either side serving any witness statements and on a basis where it appeared the matter would proceed without witnesses.

16. In his written submissions dated 22 August 2011 the respondent drew attention to the fact that the boiler still had not been replaced despite the fact that the lessees had paid their contributions towards the prospective costs. The respondent then said:

> "This suggests that the Respondent might not have really had any intention of replacing the boiler and was merely trying to be obstructive to A & H's management of the building so as to provoke a dispute that could lead to their dismissal as managing agents and replacement with City Estates.

The respondent also made reference to an application by the appellant to Westminster Council for planning permission in respect of the basement area which included the existing boiler room. He pointed out that the planning application was refused, but that if the application had succeeded it would have meant that the boiler could not have been replaced as originally planned because the existing boiler room would have become part of the proposed new flat. He stated:

> "This further supports the notion that the Respondents were not serious about replacing the boiler."

17. The appellant submitted a statement of case dated 27 September 2011 in response to the respondent's case. So far as concerns the costs of the 2009 proceedings the appellant submitted:

(1) The issue had already been determined in favour of the appellant by the LVT in Mrs Lampejo's application.

(2) Accordingly the respondent was seeking to reargue a case which had already been determined against him both on the point as to the recoverability of the costs of the 2009 proceedings through the service charge and as to the reasonableness of these costs.

(3) The appellant's application was vexatious. He was seeking to reargue something already determined.

(4) Subsequent events have no relevance as to whether the costs of the 2009 proceedings were reasonable or payable. The fact that the boiler in question had not actually yet been replaced was irrelevant. It was pointed out that the appellant had been in discussions with the lessees over possibly replacing the communal boiler with individual units.

18. The hearing before the LVT in the 2009 proceedings took place on 21 September 2009. A bundle of documents had been prepared, a copy of which is before me. The respondent appeared in person. The appellant was represented by counsel (Ms Gourlay who has appeared before me). The appellant initially had no witness to call – the intention being to address the LVT upon the bundle of documents. In fact a point concerning insurance arose during the discussions at the hearing, as a result of which the appellant was able at very short notice to secure the attendance of Mr Block who gave evidence regarding certain insurance matters as recorded in paragraphs 14-20 of the LVT's decision. The respondent informed me that this caused him embarrassment and disadvantage because he was not aware that any such evidence was going to be called and no witness statement had been served. However the emergence of this evidence at the last minute led to certain information becoming available regarding the basis upon which the rate of risk was assessed for the building which gave some comfort to the respondent that, upon further information being made available by the respondent to Mr Block, insurance premiums might in the future be reduced.

19. The LVT's decision upon the 2009 costs is contained in paragraphs 23-31 of its decision which are in the following terms (and which follow a passage immediately preceding referring to the decision of the LVT in Mrs Lampejo's application):

> "23. The Tribunal determined that legal costs were recoverable under the terms of the lease. We agree for the reasons given by that Tribunal. Indeed Dr Al-Dhahir did not seek to argue the contrary. Instead he took two different points:
>
> (a) that the landlord did not incur these costs in its capacity as "lessor", but rather in its capacity as the owners in possession of the three flats not let on long leases; and
>
> (b) that the 2009 proceedings were a charade, because the landlord never intended to replace the boiler.
>
> These two points were not the subject of argument in the Lampejo determination and accordingly the decision of the Tribunal in that case is not authority in respect of these points. For completeness we should add that after he had argued his case on these two grounds and Ms Gourlay had answered him, as part of his reply Dr Al-Dhahir sought to argue that the sums claimed by way of legal costs were excessive. This ground had not been foreshadowed

in his written case and Ms Gourlay did not have the materials available to argue the matter. In these circumstances we refused to allow Dr Al-Dhahir to argue his third point.

24. On the first point, the relevant definition in the lease is paragraph 1(2) of the Fifth Schedule to the lease, which defines "total expenditure" recoverable under the service charge provisions as meaning:

> "the total expenditure incurred by the Lessor in any Accounting Period in carrying out its obligations under Clauses 3(2)(6) and (7) hereof and any other costs and expenses reasonably and properly incurred in connection with the Building."

We note that there is no clause 3(7) in the lease, but nothing turns on that.

25. In our judgment "expenditure incurred by the Lessor" refers to expenditure incurred in the landlord's capacity as reversioner. Clause 3(4) of the lease envisages all the flats being let on long leases. The fact that the landlord prefers to keep some three flats in its own possession, or only let on short tenancies, does not mean that expenditure made in respect of those three flats is relevant expenditure under paragraph 1(2).

26. We find as a matter of fact that the landlord's expenditure in the 2009 proceedings was not caused by any concern of the landlord qua landlord. Under the lease the service charge provisions would have meant that the landlord qua landlord would have suffered no loss or gain regardless of the Tribunal's determination. Rather the landlord incurred these substantial legal fees in capacity as owner of the three flats (where the landlord would have to bear its own portion of the costs of the boiler replacement) or as part of its plan to obtain planning permission for additional flats in the basement.

27. Accordingly on the first point raised by the tenant we disallow this expenditure.

28. On the second point, the position is that the landlord had already made an application for planning permission in respect of the basement, which was incompatible with the proposals for the replacement of the boiler in its existing position in the basement, and had given notice to terminate A & H's management of the property, so that it could take over management itself. The grounds for the termination are flimsy. City Estates have since taking over taken no steps to replace the boiler. Rather they have attempted to offer £8,000 to the long lessees to persuade them to install individual heating and hot water systems.

29. City Estates chose not to send any representative to the hearing before the Tribunal. Instead the landlord appeared solely by counsel, who was entirely without anyone to give instruction to her in the hearing room.

30. In our judgment the tenant has made a powerful case, which is unanswered by the landlord, that the 2009 proceedings were indeed a charade. In our judgment the landlord never had any genuine interest in obtaining the determination of the Tribunal on which boiler system should be installed. The proceedings were brought as a means of stalling for time, so that the landlord could obtain its planning permission for the basement development.

31. Accordingly on the tenant's second point, we find that the costs of the 2009 proceedings were not reasonably incurred and on this ground too we disallow them completely."

20. The appellant applied to the LVT for permission to appeal complaining of procedural unfairness, it being alleged that the point of whether the appellant had incurred the costs "qua landlord" had not been raised at all by the respondent, and on the basis of an allegedly erroneous analysis of the facts as shown in the bundle. It was submitted that the finding that the 2009 proceedings were a "charade" was unsustainable. The LVT refused permission to appeal in terms which included the following paragraphs:

> "4. Whilst it is true that Dr Al-Dhahir did not use the expression "landlord qua landlord", which was the Tribunal's formulation, the substance of this point was at the heart of Dr Al-Dhahir's case on this issue. There is no failure to permit the landlord to answer the argument and indeed counsel argued strongly against it.
>
> 5. It is true that the Tribunal had given directions that there be no witness evidence. However, it is plain that the Tribunal giving directions anticipated all matters (as is common in the Tribunal) being determined on the basis of informal submissions. Otherwise (as must have been obvious to the landlord) the Tribunal would have been unable to determine any issue of fact.
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> 6. Counsel for the landlord did not seek any adjournment to adduce evidence in answer to the points raised by the tenant. It is clear that the landlord made a conscious strategic decision not to have anyone in attendance who could give counsel instructions and cynically used this decision on its part so as to allow counsel to say that she "could not give evidence".
>
> 7. There was evidence on which the Tribunal could properly consider that the 2009 proceedings were a charade. No complaint is made that the landlord was unaware that this point would be taken. There is thus no ground on which further evidence could be adduced, as the landlord appears to be seeking to do."

21. The appellant sought permission to appeal from the Upper Tribunal. The phraseology of the text of the LVT's decision refusing permission to appeal led the appellant to include a ground of appeal alleging that the LVT's decision was tainted by the appearance of bias when the LVT's decision was read together with its refusal of permission to appeal. The Upper Tribunal granted permission to appeal. The appeal was ordered to be dealt with by way of review.

22. The points which the appellant sought to raise and have been given permission to raise in this appeal are summarised in paragraph 15 of Ms Gourlay's written submissions to the Upper Tribunal:

(a) There was evidence of an appearance of bias by the LVT against the appellant;

(b) The LVT erred in holding that the appellant could not recover its legal costs and associated professional fees in connection with the 2009 proceedings because:

(i) it found that the issue of whether those costs had been reasonably incurred had not been dealt with in the Lampejo application.

(ii) it found that the appellant acted in the 2009 proceedings in its capacity as lessees, whereas in fact its involvement was in its capacity as the respondent's landlord;

(iii) it found that the 2009 proceedings were a "charade";

(c) The LVT exceeded the ambit of its discretion in making a s.20C order.

The hearing before the Upper Tribunal

23. At the hearing before me the respondent appeared in person. At the outset of the hearing he addressed me to the effect that there had been late service by the appellant of the bundle. He submitted that for that reason alone the appellant's appeal should be dismissed; alternatively the hearing should be adjourned. He submitted there had been a deliberate tactic by the appellant's solicitor to delay service of the trial bundle so as to prejudice him. He wished to lay before the Tribunal a 2012 decision of the LVT which he contended was of significance (in due course I received this document from him and have considered it).

24. In response to these preliminary submissions by the respondent, I stated that I was provisionally unable to see that the respondent had suffered any significant prejudice from any late delivery of documents. I decided that the hearing should continue but that the respondent should be at liberty at any stage, if matters developed in such a way that he felt he was being prejudiced by the late service of documents, to renew his application for an adjournment. As matters progressed the respondent did not make any such further application for an adjournment. Instead the respondent addressed me on the basis of his statement of case (page 84 and following of the bundle) which he helpfully developed further in oral submissions. For the avoidance of doubt I am satisfied that the respondent has not suffered any significant prejudice by any late delivery of documents and that it would have been wrong to adjourn these proceedings.

25. On behalf of the appellant Ms Gourlay addressed me first upon the argument that the LVT's decision could not stand because of the appearance of bias against the appellant. She recognised that if this argument were to succeed then the disposal of the appeal would have to be a remittal to a differently constituted LVT for a redetermination. However her subsequent arguments upon other points (summarised below) were arguments that she submitted could and should lead the Tribunal to conclude that, leaving wholly aside any question of bias, the LVT's decision could not stand and must be reversed – i.e. reversed rather than remitted for a fresh hearing. In these circumstances it is in my view appropriate to consider first these subsequent arguments and only to revert to the allegation of bias in so far as it is necessary to do so after considering these subsequent arguments.

26. Ms Gourlay advanced the following arguments:

(1) The LVT misunderstood the earlier decision of the LVT in the Lampejo case which was dealing with the recoverability of these self same legal costs of the 2009 proceedings. She pointed out that the LVT's decision in the Lampejo case did not merely deal with the contractual terms of the lease (i.e. whether in principle the costs of the 2009 proceedings were recoverable through the service charge) but also dealt with the reasonableness of these charges and whether they were recoverable in full. The LVT decided in the Lampejo case that these costs were recoverable in full. Ms Gourlay accepted that the respondent was not a party to this earlier LVT decision, but she

submitted that the present LVT's misunderstanding of what had been decided in that case was a relevant misdirection by the LVT.

(2) As regards the LVT's decision that the costs of the 2009 proceedings were incurred by the appellant not qua landlord but instead in the appellant's capacity as owner of three flats or as part of its plan to obtain planning permission for additional flats in the basement, Ms Gourlay raised the following points:

(a) This point was not raised at all by the respondent. It was a new point taken by the LVT of its own motion at the hearing. This resulted in a procedural unfairness. The appellant had prepared for and attended the hearing without any witnesses and without any knowledge that such a point would be taken.

(b) In any event the LVT's decision that the appellant did not incur the costs qua landlord was wrong on the facts. The appellant's participation in the 2009 proceedings was clearly as landlord. The appellant had been named as respondent to the proceedings by the present respondent (who was in effect the applicant – he had made the application in the name of A & H). Also for the LVT's decision in the 2009 proceedings to be of any significance it was necessary that the appellant was joined as landlord.

(c) As regards the LVT's conclusion that the costs were not incurred by the appellant qua landlord because under the lease the service charge provisions would have meant that the appellant qua landlord would have suffered no loss or gain regardless of the LVT's determination, Ms Gourlay submitted that this could not be a reason for concluding that any costs expended by a landlord were not expended qua landlord. She gave by way of example a case where a landlord of a block did not retain any of the flats in hand and was entitled to recover 100% of the relevant costs through the service charge. In such a case if there was an application to the LVT in advance of the incurring of substantial costs (ie so as to decide whether the prospective costs would be reasonable if they were incurred, see section 27A(3)) the landlord would be an appropriate (indeed a necessary) party to the proceedings even though the landlord would suffer no loss or gain regardless of the determination.

(d) Further, on this point raised by the Tribunal as to whether the costs of the 2009 proceedings were incurred by the appellant qua landlord, Ms Gourlay pointed out that in its refusal of permission to appeal the LVT stated:

> "There is no failure to permit the landlord to answer the argument and indeed counsel argued strongly against it."

However Ms Gourlay submitted that the LVT had failed to set out what these strong arguments were and had failed to give any reasons as to why these strong arguments were rejected.

(3) As regards the LVT's decision that the 2009 proceedings were a charade Ms Gourlay submitted that the conclusion reached by the LVT was not properly open to it and was reached having disregarded material considerations namely:

(a) the long negotiations that had taken place regarding the prospective replacement of the communal boiler;

(b) the perceived substantial difference in price as between the Flame quote and the Defoe quote;

(c) the fact that the LVT which actually dealt with the substance of this disagreement regarding which quote should be accepted did not discern any ulterior motive on the part of the appellant;

(d) the LVT failed properly to take into consideration the material revealed in the exchange of emails which was in the bundle before the LVT; and

(e) the fact that the point that the 2009 proceedings were a charade was not expressly raised by the respondent in his application to the LVT or his statement of case before the LVT, but was a point developed by the LVT itself.

27. Ms Gourlay submitted that the LVT's decision against the appellant on these two points (namely the qua landlord point and the charade point) could not stand and must be quashed. She submitted the only proper conclusion upon the material before the LVT (and therefore upon the material before this Tribunal) was that the costs of the 2009 proceedings were reasonably incurred and were recoverable in full through the service charge.

28. The respondent through his statement of case and his oral submissions advanced the following arguments:

(1) He dealt with the submission of apparent bias (I leave this on one side for the moment).

(2) He pointed out that the LVT's directions for the hearing made clear that if either party disagreed with the LVT's perception that no witnesses were required that party was at liberty to apply for permission to call a witness. However the appellant did not do so (save for calling Mr Block regarding insurance). It was therefore appropriate for the LVT to decide the case on the material before it.

(3) He pointed out that his application to the LVT had made clear his contention that the 2009 proceedings were unnecessary and that he had in effect repeated this allegation in his submissions dated 22 August 2011 to the LVT, where he had suggested that the appellant was not serious about replacing the boiler, might not have really had any intention of replacing the boiler, and was merely trying to be obstructive to A & H's management so as to provoke a dispute justifying their dismissal as managing agents.

(4) He pointed out that had he known that the difference between the Flame quote and the Defoe quote was so little (when properly analysed) he would never had gone to the LVT.

(5) He pointed out that the boiler still had not been replaced.

(6) He submitted there had never been any explanation as to why, after the LVT's decision in 2009 that both of the quotes were reasonable, the boiler had not been replaced.

(7) He drew attention to the making of an application for planning permission by the appellant which appears to have been made around or just after the date of the LVT's decision in the 2009 proceedings. He drew attention to the plans attached to that planning application (which the appellant had made available for the purposes of the present appeal) which showed that, if such planning permission had been granted, the communal boiler would have had to be repositioned and this would or could have undermined the basis of the two quotes which the LVT was considering in the 2009 proceedings.

(8) For the foregoing reasons he submitted the LVT was entitled to conclude that the 2009 proceedings were a charade.

(9) As regards the LVT's finding that the appellant had incurred the costs of the 2009 proceedings otherwise than qua landlord, he submitted that the costs of the boiler replacement made no difference to the appellant as freeholder – they were only affected because they had 3 flats in hand. He agreed that the point that the appellant had not incurred the costs "qua landlord" was not phraseology which he had used – this was an interpretation put on the material by the LVT.

(10) In summary he submitted that he and the other lessees did not have anything to show for all the trouble and expense of the 2009 proceedings. The boiler had not been replaced and no reason for this failure had been advanced.

29. The parties also advanced arguments regarding whether this Tribunal could or should interfere with the LVT's decision regarding the costs of the 2011 proceedings before the LVT, including the application fee and the hearing fee; and including also whether the LVT should have made an order (or a complete rather than a partial order) under section 20C of the 1985 Act regarding the costs of these proceedings in 2011 before the LVT. I will return to these submissions after giving my decision upon the principal points.

Conclusions

30. In my view an important consideration in deciding this appeal is the fact that the application to the LVT in the 2009 proceedings was made not by the appellant but by the respondent (in the name of A & H). It was at one stage in the documents suggested by the respondent that in making this application he was doing so not for himself as lessee but instead for A & H as managing agent for and behalf of the appellant as landlord. I had difficulty in understanding this point bearing in mind the

text of the exchange of emails in June 2009. It appears clear from these emails that the appellant as landlord contended that the quote from Defoe should be accepted, but it was the respondent (admittedly in the name of A & H) who was contending that the cheaper Flame quote should be accepted. However the fact remains that the appellant made it clear that it wanted to proceed with the more expensive Defoe quote. Mr Zucker's email of 9 June 2009 (see paragraph 8 above) must in my view be read as effectively telling the respondent that the appellant as landlord wished to proceed with the Defoe quote but that if the respondent and the other two named lessees (Mr Schragger and Mr Partridge) wished to persist in the argument that the cheaper Flame quote should be accepted (and wished to reserve their position that if the Flame quote were not accepted then the additional costs of the Defoe installation should be disallowed) they should now make an application to the LVT. It is here that the confusion arises in the position of the defendant (together it seems with Mr Schragger and Mr Partridge) as on the one hand a lessee of a flat and on the other hand being involved with A & H who were then acting as managing agents for the appellant. However an application was made by the respondent (in the name of A & H) seeking to promote before the LVT the reasonableness of the Flame quote and, so it would appear, seeking to argue that the appellant's preferred Defoe quote was unreasonable. In other words the application to the LVT made by the respondent (in the name of A & H) was promoting a case which was precisely contrary to the case which the appellant as landlord wished to promote. I am unable in these circumstances to accept that this application to the LVT which launched the 2009 proceedings was an application that can properly be said to have been made by A & H on behalf of the appellant. In my view it was in substance an application made by the respondent as lessee of the flat or by A & H on behalf of the lessees rather than on behalf of the appellant. I raised this point during the course of the hearing with the respondent and as I understood him he accepted (but in any event if he did not accept I so find) that the application to the LVT should properly be taken as made by the respondent in the name of A & H on behalf of lessees of the building rather than on behalf of the appellant as landlord.

31. I accept Ms Gourlay's argument that the LVT appears to have misunderstood what was decided by the earlier LVT in the Lampejo case. That is unfortunate, but is not central to my decision.

32. As regards the finding by the LVT that the costs of the 2009 proceedings were incurred by the appellant not qua landlord I conclude that this finding cannot stand for the following reasons:

(1) As analysed in the paragraph 30 above, the application to the LVT which started the 2009 proceedings was made by the respondent (or by A & H on behalf of the respondent). The application raised a point contrary to the arguments and apparent interests of the appellant. The application named (as it had to) the appellant as respondent to these proceedings – it was necessary that the appellant as landlord was a party to the proceedings. Thus the entire 2009 proceedings were started by the respondent not by the appellant.

(2) It cannot be right that the fact that the appellant had 3 flats in hand meant that the appellant's interest was otherwise than qua landlord. In a standard case where a landlord does not have any flats in hand and enjoys the right to recover a 100% of the service charge costs through the service charge provisions, the landlord is nonetheless an appropriate and necessary party to an application by a tenant under section 27A(3) seeking a determination from a leasehold valuation tribunal as to whether, if costs were

incurred for certain matters, a service charge would be payable etc. In such a case it cannot be said that the landlord is in some way not properly interested in the proceedings as landlord because it is entitled to this 100% recovery. It cannot properly in my view be said that if such a landlord, rather than having no flats in hand has one or more flats in hand, then such a landlord is only interested by reason of having the flats in hand rather than qua landlord.

(3) Further, I accept Ms Gourlay's point that the LVT in its reasons for refusing permission to appeal has recorded her as arguing "strongly against" this point taken by the LVT, but the LVT has failed to record what these arguments were and has failed to give any reasons for rejecting these arguments.

33. For the foregoing reasons I conclude that the LVT has failed to give any legally sustainable reason for its decision that the costs were incurred by the appellant otherwise than qua landlord. I further conclude that the only proper conclusion open to the LVT on the material before it was that the costs were indeed incurred by the appellant qua landlord.

34. As regards the LVT's decision that the 2009 proceedings were a charade, I do not accept Ms Gourlay's submission that the respondent had failed properly to raise the substance of this point in his written material to the LVT. I view the submissions summarised in paragraphs 14 and 16 above as adequate warning that the respondent proposed to argue that in effect the proceedings were unnecessary because there was no intention to replace the boiler. However having said that I conclude that the LVT's decision that the 2009 proceedings were a charade is legally flawed and cannot stand. The LVT failed to take material considerations as mentioned below into account and failed to give any legally sustainable reasons for its conclusions. Clear reasons were necessary for any such conclusion because a separate LVT had earlier concluded on precisely this point (namely the recoverability through the service charge of the costs of the 2009 proceedings) that they were recoverable in full – see the Lampejo decision.

(1) The LVT appears to have found of substantial significance the fact that since taking over the management City Estates have taken no steps to replace the boiler and rather "they have attempted to offer £8,000 to the long lessees to persuade them to install individual heating and hot water systems". Further, in paragraph 10 of the decision the LVT have referred to City Estates having "subsequently" offered the long lessees £8,000 to replace the communal system with individual boilers in each flat. The LVT appear to have viewed this as some indication, only arising subsequent to the LVT's decision in the 2009 proceedings, that there was no intention to replace the boiler. However it is clear from the documentary material before the LVT that this proposal of £8,000 had been made over a substantial time period, and from long before the 2009 proceedings.

(2) The LVT failed to make any reference to or analysis of the emails which I have referred to above. These show that it was the respondent (in the name of A & H) who made the application which launched the 2009 proceedings. They also show that, far from seeking to prevent or delay the installation of a new communal boiler, the appellant actually expressly instructed the respondent (in the name of A & H in its role managing the property) to instruct Mr Defoe to proceed with the installation of the more expensive boiler, see the email of 4 June 2009. It was the difficulties raised by the respondent

subsequent to this instruction which led to the making of the application to the LVT by the respondent. There is no explanation by the LVT as to how the appellant can properly be taken as merely bringing these 2009 proceedings for the purpose of stalling for time, when (a) the proceedings were brought not by the appellant but by the respondent and (b) the appellant had expressly authorised the instruction of Defoe to install the more expensive boiler, but this was not acted upon because the respondent wished to go to the LVT to argue that installation of the Defoe boiler was unreasonable and that the Flame quote should be accepted.

(3) I also accept that it is apparent from the LVT's decision in the 2009 proceedings that substantial effort and evidence, including the provision on experts' reports, was put into these proceedings by the appellant. It would be remarkable for this to occur if the proceedings truly were a charade.

(4) The LVT appears to have given no consideration to material that was in the bundle before it (at page LVT-13) recording that there was a delay until 2010 in the renewal of the boiler pending asbestos removal; and showing that in July 2010 the appellant instructed an external surveyor (Mr Ian Hyman) to take further the question of the boiler replacement and to deal with a consultation process under section 20.

35. Accordingly for the foregoing reasons I conclude that the LVT's decision against the appellant upon the qua landlord point and upon the charade point is legally flawed and cannot stand. The LVT did not receive any evidence. Instead it made its decision on the basis of the documents before it and submissions from the parties. Sitting in this Tribunal I am therefore able, having quashed the LVT's decision regarding the costs of the 2009 proceedings (as I must) to reach my own conclusion upon the basis of the material that was before the LVT.

36. I conclude that the 2009 proceedings were commenced by the respondent on behalf of himself as a lessee in the building (or perhaps on behalf of himself and others lessees in the building). The respondent joined the appellant, as landlord, as a party to the 2009 proceedings. The appellant incurred the costs qua landlord. I also conclude that the only decision open on the facts is that the 2009 proceedings were not a charade. There had been negotiations for a long time between the appellant and the lessees regarding the prospective replacement of the boiler and the possibility of each lessee having their own boiler in their own flat; the appellant told the respondent to instruct Defoe to proceed; the reason this was not done was that the respondent desired to promote the cheaper Flame quote; the fact that the appellant chose to make a planning application which if granted (it was in fact refused) would have required the repositioning of the boiler is not a sufficient reason to conclude that the proceedings were a charade either when viewed by itself or in combination with all the other evidence including the fact that no communal boiler has yet been replaced. In summary I conclude on the papers that the appellant would have proceeded in June 2009 with the replacement of the communal boiler in accordance with the Defoe quote but was diverted from doing so by the respondent making the application in the 2009 proceedings to the LVT. The respondent failed in these 2009 proceedings in his contention that the Defoe quote was unreasonable. The respondent made no application to the LVT in the 2009 proceedings for an order under section 20C so as to prevent the costs of the 2009 proceedings being recovered through the service charge; upon the true construction of the lease these costs are recoverable through the service charge; the costs have been held to be reasonable in amount (and there is no challenge regarding this

before me). There is no reason why the appellant should not recover the costs of the 2009 proceedings through the service charge.

37. The LVT also disallowed £176.50 of professional fees because this was work in relation to the 2009 proceedings. For the same reasons as I have concluded the LVT's decision on the costs of the 2009 proceedings is wrong and must be reversed, I conclude that the decision disallowing £176.50 is also wrong and must be reversed.

38. Having regard to the conclusions I have reached above, it is not necessary for me to deal in any detail with the appellant's allegation that the LVT's decision should be quashed because of an appearance of bias. I can however briefly deal with the point. There is no suggestion of any bias arising from any alleged or apparent connection between the members of the LVT and any interested party in the case. There is nothing in the LVT's decision itself to justify a finding of an appearance of bias – the LVT merely reached decisions against the appellant that high have concluded were wrong. It is true the language in which the LVT refused permission to appeal is forthright, and it may be unjustified, but I do not consider it amounts to an appearance of bias. Also, during the hearing before the LVT it emerged that it was necessary for evidence regarding insurance to be called. Despite the appellant's omission to have prepared any such evidence and despite this being awkward for the respondent, the LVT allowed the appellant at the last minute to call Mr Block to give evidence. This points away from there being any appearance of bias on behalf of the LVT against the appellant. Accordingly, in agreement with the respondent's submissions on this point, I reject the appellant's argument that there was an appearance of bias on behalf of the LVT.

39. So far as concerns the appellant's challenge to the LVT's decision to make a section 20C order and to order the appellants to reimburse the respondent with the application fee of £100 and the hearing fee of £150 I reach the following conclusions. The LVT's decision on these points was on the basis that the respondent had in large measure won the case. Bearing in mind my conclusions in relation to the costs of the 2009 proceedings set out above, whereby I have reversed the LVT's decision on this point, it can no longer be said that the respondent has in large measure won. However the respondent won upon a substantial point, namely that concerning gas and electricity charges. Also the LVT's ultimate decision that nothing should be disallowed in respect of insurance premiums was only reached after the appellant had been allowed, through appropriate indulgence on behalf of the LVT, to call at the last minute Mr Block to give evidence. I have regard to the case referred to by Ms Gourlay of *Church Commissioners v Derdabi* [2010] UKUT 380 (LC). I conclude the proper order is to allow the appellant's appeal upon the costs issue to the following extent, namely to substitute for the LVT's decision a decision that the appellant must reimburse the respondent with 50% of the application fee and the hearing fee (i.e. must reimburse the respondent £125) and that as regards section 20C it is ordered that 50% of the costs incurred by the appellant in connection with the proceedings before the LVT are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the respondent. I consider that in all the circumstances it is just equitable to make this order.

40. In the result therefore I allow the appellant's appeal. I decide:

(1) the appellant is entitled to recover through the service charge the legal costs of the 2009 proceedings;

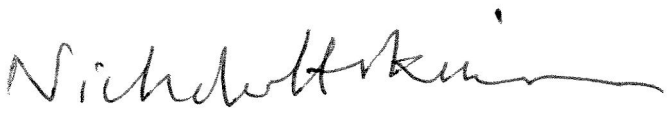
(2) the appellant is entitled to recover through the service charge the further sum of £176.50 for solicitor's fees, which had been disallowed by the LVT;

(3) the appellant is to reimburse to the respondent 50% of the application fee and the hearing fee before the LVT (namely £125); and

(4) 50% of the costs incurred by the appellant in connection with the proceedings before the LVT are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the respondent.

41. There remains the question of what if any order under section 20C I should make in relation to the present proceedings before the Upper Tribunal. The parties invited me to defer any consideration on this point until my decision on the substantive matters had been received. Accordingly the parties have 28 days from the date of this decision to submit to the Tribunal (with copies to the other party) such representations as they wish to make in respect of this section 20C point regarding the costs of these proceedings before the Upper Tribunal. I will then give a separate decision upon this point.

Dated 15 March 2013



His Honour Judge Nicholas Huskinson

Addendum (dealing with the application for an order under section 20C of the Landlord and Tenant Act 1985) to the decision of the Upper Tribunal dated 15 March 2013

1. The central issue in the appeal to the Upper Tribunal was the question of whether the legal costs incurred in the 2009 proceedings were recoverable through the service charge. Upon this point the appellant succeeded.

2. The appellant also challenged the order for costs and the order under section 20C made by the LVT and was successful in obtaining a more favourable order on these points than that made by the LVT. The appellant did not succeed in wholly avoiding any section 20C order or any costs order. However the appellant did succeed in displacing the orders on these points made by the LVT. Also my decision upon these points followed from my decision upon the central issue. No additional costs were incurred in separately dealing with these points.

3. I have had regard to the submissions made in writing by the parties upon the question of what if any order should be made under section 20C so far as concerns the costs of these proceedings before the Upper Tribunal. I have considered the decision of this Tribunal in *St John's Wood Leases Limited v O'Neil* [2012] UKUT 374 (LC).

4. (1) Much of the submissions advanced upon this section 20C point by the respondent is material rehearsing arguments which were advanced at the substantive appeal before me, for instance references to the alleged significance of the fact that the boiler remainder unreplaced after the 2009 decision of the LVT.

(2) The reference to the fact that in February 2013 the management of the building by City Estates has been terminated is of no relevance to the question I have to decide under section 20C.

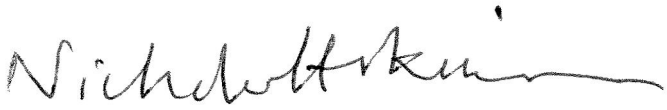
(3) The respondent points out that the Upper Tribunal has accepted that the respondent still won on the matter of electricity and gas. However the finding upon electricity and gas was not a live point in the appeal before me. The appeal to the Upper Tribunal was dealing with the central issue referred to above, upon which the appellant succeeded.

5. I do however note the respondent's point that there was a substantial and separate strand of argument advanced in the appellant's papers upon which the appellant did not succeed, namely the allegation of bias on the part of the LVT. Also I note the respondent's complaints of late service of documents which may have led to additional expenditure being incurred (for instance upon a courier service). Some costs will inevitably have been incurred in relation to such matters, for instance the additional costs of researching and including in the written documentation the arguments based upon bias.

6. The Upper Tribunal has jurisdiction to make such order on the application made under section 20C as it considers just and equitable in the circumstances. In recognition of the points mentioned in paragraph 5 above I consider it just and equitable that the appellant should be prevented from recovering a small part (but only a small part) of its costs of these proceedings before the Upper Tribunal. I assess this part as 10%.

7. Accordingly I ordered that 10% of the costs incurred by the appellant in connection with these proceedings before the Upper Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the respondent.

Dated: 15 May 2013



His Honour Judge Nicholas Huskinson