UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT –service charges – Whether parties agreed to composite approach to disputed costs of separate items of work – whether composite approach to costs permissible – whether quantification of costs essential or percentage reduction permissible -limited evidence presented - sections 19 and 27A Landlord and Tenant Act 1985 – appeal allowed and application remitted

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

BETWEEN	**LORD MAYOR & CITIZENS OF THE CITY OF WESTMINSTER**	**Appellant**
	and	
	ROGER ALLEN AND OTHERS	**Respondents**

Re: Holcroft Court,
Clipstone Street,
London W1W 5DN

Before: Martin Rodger QC, Deputy President

Sitting at 45 Bedford Square, London WC1B 3AS
on 13 September 2013

Alastair Redpath-Stevens, instructed by Judge & Priestley LLP, solicitors, for the appellant
The first respondent in person, and for all respondents, with assistance from Mr Andrew Slee

The following cases are referred to in this decision:

Yorkbrook Investments Ltd v Batten (1986) 52 P&CR 51

DECISION

Introduction

1. This is an appeal from a decision of a leasehold valuation tribunal for the London Rent Assessment Panel ("the LVT") given on 31 October 2011 concerning the service charges payable by the lessees of a block of flats known as Holcroft Court, Clipstone Street, London W1 ("Holcroft Court"). Permission for the appeal was refused by the LVT but granted on 3 April 2012 by the Tribunal (George Bartlett QC, President) on a single issue; on 17 August 2012 permission to appeal was given on three additional issues following further submissions.

2. Holcroft Court is a substantial residential building comprising 244 flats which was constructed in the 1960s or 1970s. The freehold interest is owned by the appellant, Westminster City Council, and 103 of the flats are let to its short term tenants. The remaining 141 flats have been sold off by the appellant on long leases. The respondents to the appeal are the long lessees of 90 of the 141 flats, each of whom is liable under the terms of their lease to contribute through a service charge towards the costs incurred by the appellant in carrying out repairs to the main structure of Holcroft Court. The lead respondent, Mr Roger Allen, is Chair of the Holcroft Court Residents Association and the lessee of flat 243.

3. The appellant was represented before me, as it has been before the LVT, by Mr Redpath-Stevens of counsel. The respondents were represented by Mr Allen, with assistance from Mr Andrew Slee, the lessee of flat 141, again as they had been before the LVT.

4. The proceedings before the LVT were commenced by the respondents on 14 April 2011. They sought a determination under section 27A, Landlord and Tenant Act 1985 ("the 1985 Act"), of their liability to contribute towards the cost of a programme of major works to Holcroft Court undertaken by the appellant in 2005 and 2006. The major works comprised a single contract for the refurbishment of the appellant's tenanted flats (to which the respondents are not expected to contribute) together with a programme of structural works including the resurfacing of the balconies and main roof of the building, the replacement of the glazing units which form its exterior façade, and the redecoration of parts of the exterior of the building around its substantial interior courtyard.

5. After inspecting the building and hearing almost three days of evidence and submissions on 12-14 September 2011, the LVT issued its decision on 31 October 2011. It decided that when calculating the sums recoverable through the service charge the aggregate cost of replacing the windows, resurfacing the balconies and redecorating the internal courtyard should be reduced by a composite 25%. The principal issue in this appeal is whether the LVT was entitled to approach its task in that way or whether, as the appellant argues, section 27A of the 1985 Act required the LVT to deal separately with each of the three disputed items of expenditure, and to specify in respect of each the quantified sum towards which the lessees would be required to contribute.

The facts

6. The material before the LVT was very extensive and included witness statements and oral evidence from 8 lay witnesses and 2 expert or quasi-expert witnesses. The hearing bundle comprised almost 1,000 pages, much of which was highly technical. In paragraph 5 of its decision the LVT emphasised that the summary of the evidence which it would give was necessarily incomplete and warned that it should not be assumed from its omission to refer to any particular piece of evidence that it had been overlooked.

7. The following summary of the facts is taken largely from the LVT's decision, supplemented by uncontroversial material taken from the witness statements.

8. Holcroft Court comprises a substantial concrete frame building on ground and five upper floors surrounding a large central courtyard. It occupies the whole of the city block formed by Clipstone Street, Clipstone Mews, Carburton Street and Great Titchfield Street. On the street side (as opposed to the courtyard side) the greater part of the external façades of the building comprises pre-fabricated, aluminium framed glazing units which are fitted into the openings created by the concrete frame of the building. The major works contract provided for all of the glazing units to be replaced.

9. Consultation over the major works began in 2001, and the lessees were invited to comment on two different styles of glazing units by different manufacturers, referred to as "Monarch" and "Nordan". The choice eventually made by the appellant was to install the Monarch design and work to replace the glazing units commenced in July 2005.

10. Each of the replacement units comprises an upper and lower frame which, when fitted together, reach from floor to ceiling. The upper frame contains two windows, and the lower frame contains an opaque insulating panel. Three of these glazing units, connected by aluminium mullions, are designed to fit into the space created, at top and bottom, by the upper and lower concrete floor plates on each floor and, on each side, by the concrete columns which divide the individual flats. In all there are some 860 of these glazing units in the building, containing 1,720 windows. The glazing units themselves are of extruded aluminium and of a standard size. The openings in the concrete frame of the building are less regular (as one would expect) and, after installation, the gaps between the perimeter of the glazing units and the frame of the building were intended to be filled with an expanding foam and then sealed with a mastic sealant to prevent the entry of water.

11. Mr Allen's flat was one of the earliest to have its windows replaced, but by November 2005 water had begun to penetrate the glazing units and to enter the flat after rainstorms. In January 2008 the units originally installed in Mr Allen's flat were replaced by new Monarch units but these too began to leak within a few months. A third set of Monarch windows was provided but these also leaked and it was not until February 2010 when a fourth set of windows, this time to the Nordan design, was installed in Mr Allen's flat that the problems he had experienced eventually ceased. Extensive tests were undertaken on Mr Allen's windows, both on site and at the laboratories of the Building Research Establishment, in an attempt to understand the cause of the problems which he had experienced.

12. At least one other lessee, Mr Donegan of flat 209, experienced similar problems of direct water penetration into his flat following the installation of the new Monarch units. Extensive test were

carried out on Mr Donegan's windows, but eventually half of the windows in his flat were also replaced with new windows of the Nordan design.

13. Direct water penetration through the glazing units seems not to have been the general experience of the lessees at Holcroft Court, but many of them experienced different problems including damp penetration which caused mould and discolouration on and around the glazing units and damaged wooden floors, poor insulation and defective window furniture including handles which repeatedly broke.

14. In 2011, tests on the glazing units in eleven flats at Holcroft Court revealed that, in each case, sealant which the appellant's expert considered to be necessary had not been applied when the units were assembled.

15. Two other significant elements of the major works contract were subject to criticism by the lessees. First, the balconies or walkways which surround the internal courtyard on each level of Holcroft Court were resurfaced using new tiles laid on top of an asphalt surface. This approach restricted access to drainage channels on the balconies and caused a build up of surface water which eventually flooded the balconies. Secondly, the exterior painting carried out by the appellant's contractor produced a very poor finish and was prone to flaking and blistering.

16. The final account for the major works was signed off in November 2007 and the contractor's total bill was for £4,301,956. After omitting the works to the interior of the tenanted flats and adding professional fees and management costs the total sum to which the lessees were expected to contribute was £3,962,572. The contribution required of individual lessees varies depending on the size of their flat and the terms of their leases but, by way of example, Mr Allen's contribution towards the total cost of the major works is in the order of £20,200.

17. The appellant was not sympathetic to Mr Allen's complaints and seems to have regarded him as a nuisance and a troublemaker. The LVT was critical of what it described as the appellant's defensive position and its concern to demonstrate that it had done no wrong, rather than to resolve the legitimate requests of its lessees that they be protected from water penetration through the windows of their flats.

The proceedings before the LVT and its decision

18. In paragraph 2 of its decision the LVT identified four areas of controversy arising out of the contract for major works:

(1) Problems relating to the installation of the windows.

(2) Problems relating to the balcony works.

(3) Problems relating to the quality of external paintwork.

(4) A dispute as to the correct apportionment and allocation of certain costs to the service charge account.

19. Although a great deal of the evidence presented to the LVT attempted to diagnose the cause of the problems with the windows, no clear explanation was available. On this aspect of the case the lessees relied on the evidence of Mr Haskett, who had no formal professional qualifications but was an experienced project manager in the construction industry who styled himself a "freelance project recovery consultant". He had originally been recruited by the appellant to advise on how the problems with the windows at Holcroft Court might be solved, but he was called to give evidence on behalf of the respondents. The appellant's themselves relied on the evidence of Mr John Beasley MSc of the Building Research Establishment, an expert in building façade.

20. Mr Haskett considered that the root cause of the problems experienced by the lessees was the failure of the building contractor to drill drainage holes at the base of the glazing units to enable any water which penetrated into the frames of the units to escape to the outside of the building; the absence of internal drainage within the units allowed water to accumulate and eventually to overflow into the flats. Other factors contributed to a build up of water inside the units and allowed it to penetrate the building, including a failure to supply appropriate washers where screws were inserted into the frames, poorly fitting rubber gaskets, missing profile plugs at the end of the window sills and generally a low standard of workmanship in the manufacture and installation of the units. Mr Haskett reached his conclusions after considering the installation manuals produced by the manufacturers of the glazing units which appeared to him to indicate that internal drainage holes and the other missing defences were required.

21. The appellant did not accept the lessees' contention that there was a systemic design defect in the windows. Its expert, Mr Beasley believed that the glazing units were designed to keep water out of the building by means of seals on the exterior face of the units and not by means of an internal drainage system. Mr Beasley relied on a different product manual provided by the unit's manufacturers from that referred to by Mr Haskett. He concluded that the principal cause of the problem was that the units had not been properly sealed during installation. He, and other witnesses for the appellant, also suggested that some of the problems experienced by lessees were attributable to "lifestyle issues" including in particular their failure properly to ventilate their flats.

22. Having reviewed the evidence the LVT made a number of findings of fact in paragraphs 28 and 29 of its decision as follows:

> "28. A variety of different explanations may be given for the leakages from these windows, amongst them the cutting of the mitres where components meet at the corners, resulting in "open joints"; poorly cut gaskets resulting in gaps around the opening parts of the windows and around glass and the insulating panel in the lower frames; insufficient foam used to fill the gaps around the units and the concrete frames; the possibility that the concrete up-stand in some frames is not level and the units therefore do not rest flush on the up-stands; the use of thinner insulating panels than was specified (the exact specification was not supplied); and the fact that some frames may not have had the gaps between themselves and the opening sufficiently filled with mastic or sealant foam. All of these may be contributing factors and it may be that some or others do not apply; but whatever the position, on the undisputed evidence, Mr Allen had inadequate windows for a period of about five years and was living in miserable conditions during this period…. It seems to the Tribunal self evident that one of the

fairly fundamental features of a window is that, when closed, it should keep out the rain. For five years this was not the case with Mr Allen's windows nor, as understood by the Tribunal, some of the windows in Mr Donegan's flat. The fact that eleven out of eleven flats checked by the respondent did not have the appropriate sealant in the v-channel, which sealant is an important part of the water sealing process, points heavily to the installation of these windows having been carried out in an unsatisfactory manner. The Tribunal finds as a fact, on the balance of the evidence before it, that in many, albeit not all cases, these windows were poorly installed in such a way to cause subsequent problems for the leaseholders.

29. Not all of the problems have resulted in direct leakages. However there have indeed been several complaints (and the Tribunal heard direct evidence in this regard and inspected the facts concerned) of increased problems with mould, discolouration of wall surfaces and woodwork and general damp, increased cold and condensation, poor quality window furniture and fittings and greater than previous noise levels. Of course some of these problems may have been aggravated by "life style" issues and poor ventilation. But on the balance of the evidence before the Tribunal, the Tribunal again finds that it would be surprising if these problems which manifested themselves in not one, but several of the flats inspected, were entirely referable to the leaseholders themselves. In each case the Tribunal was told that the leaseholders themselves had not particularly changed their "life style" and that the only thing that had changed had been the windows. The inescapable conclusion, which is indeed what the Tribunal must conclude, is that these issues have arisen consequent upon the insulation of these windows. Does this render the service charges associated with the windows unreasonable or unreasonably incurred? To some extent the Tribunal answers this question in the affirmative but it seems to the Tribunal that if windows of this kind are to be installed, and they require some greater than previous modification of life style, then the respondent should have advised the leaseholders in this regard. If, for example, greater ventilation was going to be required because of these new windows then either extractors or sufficient ventilation should have been installed as part of the process over and above the "trickle vents" in this case. The Tribunal makes similar findings in respect of the poor quality handles which again the Tribunal found was made out on its inspections. There was a very noticeable difference between the solidity and feel of the handles in the Monarch windows compared with the Nordan windows installed in both Mr Allen's and Mr Donegan's flats."

23. After finding further serious faults with the work done to resurface the balconies and the quality of the external painting (which the LVT found "was indeed unimpressive, and will now have to be largely repaired or redone"), the LVT addressed the consequences of its conclusions in paragraphs 31-33 of the decision. Since these passages are the main focus of the appellant's criticisms of the LVT I will set them out in full:

"31. The difficult question posed to the Tribunal is how to reflect these findings in the Tribunal's determination. Ironically perhaps the most serious case, that of Mr Allen taxes the Tribunal least. Mr Allen, who it will be recalled, told the Tribunal that he became ill as a result of the stress involved in this saga, also said that he was happy with the Nordan windows now installed, and was not asking the Tribunal in his case to make any particular finding in respect of such "set off" as might arise out of the very considerable problems he has encountered in resolving the position. He told the Tribunal that he would be taking a case to the County Court in order to have his claim properly assessed and in a detailed fashion.

32. As for the other 89 applicants, their cases in some respects vary in terms of fact and degree. Clearly it would have been entirely disproportionate to have 90 leaseholders each giving their

separate accounts to the Tribunal in relation to this case, both in terms of Tribunal time and costs generally. The problem was ventilated with the parties and, with the party's consent, it was determined that the Tribunal, if it found any merit in the applicants' case (which it does) should reflect this in a composite discount in relation to the service charges referable to these major works. This is the course the Tribunal takes, albeit that it will be a necessarily robust finding.

33. The Tribunal does not accept the primary contention made on behalf of the applicants that these windows and the other services are "worthless". Undoubtedly the windows and the other works to the balconies and paintwork have some value, and this value will be increased at no cost to the leaseholders once the defects that have now been admitted on behalf of the respondent are made good. On balance, the Tribunal takes the view that a discount of 25% of the costs referable to these works will properly reflect the difference in value between the services supplied and those charged for. This is a generalised finding, and in individual cases on special facts, not considered by this Tribunal, there may be an argument for a significantly greater discount, but if this is to be the position, those concerned will have to pursue the matter in the county court where these specific matters can be considered in more detail and in a more appropriate forum."

24. It will be noted that, in arriving at the discount applicable to the disputed window, the balconies and the exterior redecoration, the LVT made no reference to specific figures. There had been very little focus on cost in the evidence presented to the LVT. It had been led to believe by both parties that the differences between them concerning the costs of the works were relatively minor, and the evidence which had been prepared reflected that apparent confidence.

25. The lessees' original case had been that, owing to the design defects which they believed they had identified, the glazing units installed in the building were worthless and would have to be removed and replaced with new units. They relied on a budget estimate prepared by Mr Slee, a quantity surveyor who is also the lessee of a flat at Holcroft Court, showing that the cost of removing the glazing units and replacing them would be approximately £3.3 million and they argued that they should not be required to contribute at all to the cost of the original glazing units.

26. The LVT appears to have signalled during the course of the hearing that it was not attracted to the lessees' approach; this indication prompted the lessees, on the third day of the hearing, to present a breakdown of the cost of individual components of the major works contract. No similar breakdown had been put before the LVT or, apparently, discussed between the parties, up to that time. It quickly became apparent that the lessees' breakdown of costs was not agreed by the appellant, but no alternative breakdown was available on the appellant's side, either before or during the hearing.

27. The LVT dealt with the problem of identifying the figures in paragraph 34 of its decision by making a pragmatic suggestion:

"The matter could be dealt with by giving permission to restore the application if the parties cannot reach consensus on this issue, however this would mean that the same members of the Tribunal would have to reconvene in order to deal with the matter and that may well either not be possible or result in very significant delay to the parties. Since it is a very discrete and self-contained issue, it seems preferable from all points of view that if (as is earnestly hoped will not

to be case) the parties cannot resolve the differences in this regard, a fresh application should be taken out to deal with this separate issue."

28. The LVT concluded its decision by directing that the appellant should recalculate the service charge in respect of the major works to reflect the discount which the LVT had awarded.

The issues

29. Permission was given by the Tribunal for an appeal by way of review limited to the following four issues:

(1) Whether the parties had consented to a single percentage deduction being made by the LVT if it found merit in the lessees case.

(2) Whether the LVT erred in not determining the figure of costs to which the 25% discount should be applied.

(3) Whether the LVT erred in not determining the correct method of design, construction and installation of the windows.

(4) Whether the LVT took into account irrelevant matters in determining the 25% deduction.

Issue 1 – Did the parties consent to a composite deduction?

30. The appellant's first complaint is that, contrary to the impression given by paragraph 32 of the decision, it did not consent to the LVT making a single percentage deduction from the aggregate of the costs referable to works to the windows, balconies and exterior redecoration in the event that the LVT found merit in the applicant's case. Mr Redpath-Stevens submitted that in the absence of such consent, by adopting a composite discount of 25% rather than giving separate consideration to the reasonable costs of each category of works, the LVT erred in law. There are therefore two aspects to this first issue. First, whether the parties consented to the LVT taking a particular course of action, and if so, what was it; and secondly, whether in the absence of consent, the composite discount approach which the LVT adopted was permissible.

31. In its original application to the LVT for permission to appeal the appellant did not directly challenge the statement in paragraph 32 of the decision that the parties had consented to it adopting a "composite discount in relation to the service charges referable to these major works". Rather, the proposed grounds of appeal focussed on the failure of the LVT to determine the amount to be paid and asserted that a composite discount was wrong in law. It was perhaps implicit in that complaint that the appellants did not accept that they had consented to the approach they now criticise, but it is a little surprising that, relatively soon after the hearing and the decision, the appellants did not say explicitly that they had not consented.

32. In its written reasons for refusing permission dated 24 November 2011, the LVT responded to the main thrust of the proposed grounds of appeal pointing out that none of the evidence before it included a schedule of individual sums payable in respect of the works. The LVT went on:

> "The Tribunal specifically ventilated with both counsel for the respondent and the lead-applicant, the matters referred to in paragraphs 31 and 33 of the decision, and agreed with the parties that the only approach feasible in this case (given the number of parties, and the lack of financial data) would be for the Tribunal to make a composite and necessarily robust finding in relation to the reasonableness of the costs generally. It was specifically agreed to the parties that the parties would themselves (subject to any argument on apportionment) calculate the sums due, if any, in the light of the Tribunal's principal finding".

33. In its application for permission to appeal to the Tribunal the appellant acknowledged that it had been agreed that it would be necessary for the LVT to take a "broad brush" approach but it disputed that it had given consent to a "composite reduction". In granting permission to appeal on that issue the Tribunal gave permission to each party to file a witness statement on the question of whether there was consent to a single percentage deduction.

34. In a witness statement dated 21 September 2012 (more than a year after the hearing before the LVT) Mr Allen says as follows:

> "We can confirm that we did not grant our consent to the single percentage deduction. The consent that we gave to the Tribunal was for them to evaluate our claim as presented to the LVT in a manner that the Tribunal considered to be fair and reasonable. We had anticipated that the Tribunal would ascertain a lump sum amount which was to be deducted from the costs of the works."

35. On 3 December 2012 the appellant submitted a witness statement of its own, made by a trainee solicitor who had attended counsel at the hearing. She exhibited her handwritten notes of the hearing and stated that on reviewing her notes, and from her recollection of the hearing itself, she could confirm that "that there was no agreement or consent between the parties to applying a composite approach and a generic single percentage deduction".

36. Quite understandably the trainee solicitor's handwritten notes do not appear to be a verbatim account of everything that was said at the hearing. Mr Redpath-Stevens went further and criticised the notes, describing them as "not good" and as "incomplete". They do, however appear to confirm that little if any of the hearing time was spent in the presentation of evidence identifying the sums which had been spent on each category of works.

37. At the beginning of day 2 the following notes appear to record statements made by the LVT:

> "-Make a finding as to whether S/C are reasonably incurred and of reasonable quality
>
> -If successful open to LVT to adjust the sum. …
>
> - can determine if 100% or something less and figure work can be looked at at a later date."

38. The notes also record evidence given by Mr David McCallion on behalf of the appellant (in an exchange which, Mr Redpath-Stevens informed me, occurred at the beginning of his cross-examination by Mr Allen). Figures relating to the total cost of installing the windows were either produced by Mr McCallion, or put to him by Mr Allen for him to comment on. There was an exchange over the attribution of the costs of scaffolding to different elements of the major works contract and this elicited a comment from the LVT which was recorded as follows:

> "LVT – would not be concerned with the figures."

Mr McCallion appears to have been unprepared to deal with the question of the apportionment of scaffolding costs since the remarks "cannot be resolved today" and "this methodology has never been employed in any council – cannot set a precedent today" are attributed to him in the notes.

39. Finally, Mr Redpath-Stevens drew my attention to the following note which he said was as far as the consensus achieved at the hearing extended:

> "LVT – allowed to give determination – resolve issue in interim – if not resolved have a further hearing".

This passage seems to be consistent with the LVT's eventual suggestion in paragraph 34 of its decision that after it had reached a determination on the issues on which it had heard evidence, the apportionment issue which had arisen very late in the day should be resolved by agreement between the parties or in the event that agreement was not possible, should be determined at a further hearing. It is true that the note does not refer to the making of a new application to bring the issue of apportionment back before a differently constituted tribunal, which was the LVT's eventual suggestion, but it is clear that there was at least a consensus that the issue of apportionment would not be dealt with in the first instance.

40. In my judgment the evidence filed by the parties on the extent of their agreement to the composite approach adopted by the LVT is contradictory, incomplete and inconclusive. Where it is recorded in a decision of a court or tribunal that the parties consented to a particular course of action, and it is subsequently suggested by one of the parties that it had not consented, an appellate court or tribunal is placed in a near impossible position unless it is supplied with a reliable record of the proceedings whether in the form of a transcript of the evidence, a note of the evidence agreed between the parties and approved by the LVT, or a copy of the LVT's own note of the proceedings. In this case the only contemporaneous record relied on is acknowledged to be incomplete and criticised by the appellant's own counsel. The lessees have no contemporaneous note but Mr Allen's witness statement records their understanding in terms which are not very different from the approach which the LVT understood them to have agreed: "we had anticipated that the Tribunal would ascertain a lump sum amount which was to be deducted from the costs of the works". The lessees' position seems to have been, effectively, that the LVT should do the best it could with the material it had been supplied with and that they would be content with any approach which the LVT considered to be fair and reasonable. That is exactly what the LVT did.

41. The most closely contemporaneous account of what the parties agreed is contained in paragraph 32 of the decision itself. I am not prepared to find, as the appellant invites me to do, that

the LVT was mistaken when it said that the parties had consented to it adopting a composite discount in relation to the cost of the three elements of the major works which were in issue.

42. I am fortified in my reluctance to go behind the LVT's statement concerning the approach which the parties agreed it should take by considering the evidence which they presented. It is a remarkable feature of this case that the appellant led no evidence, whether in writing or orally, from which the LVT could reliably identify what proportion of the final account was referable to each of the three disputed categories of work.

43. The final account itself was included in the hearing bundle, but not the schedule of works from the building contract. The final account comprised seven pages of omissions and additions to an agreed contract price and included a number of tender documents but nowhere was there a clear statement of how much each of the individual categories had cost, or any apportionment of preliminaries between them. The sum total of the evidence on costs included in the appellant's witness statements comprised the following short paragraph from the statement of Mr McCallion:

> "The contractor's total final account sum is £4,301,956.51. The final account sum for the block refurbishment only is £3,398,205.15. With the addition of professional fees and management costs the total block cost is £3,962,572.46."

As I have already indicated, it does not appear from the appellant's notes of the oral evidence given by Mr McCallion that he supplemented his witness statement with any greater detail. No mention appears to have been made of the cost of the work to the balconies or the redecoration and Mr Allen's attempt to cross-examine Mr McCallion on the respondent's breakdown of the figures, produced extremely late in the day, was predictably unproductive.

44. The LVT was not assisted in its task by the absolutist positions taken up by each party. The appellant's approach was that the cost of the major works programme was recoverable through the service charge in full, because any remedial works which were required (which it considered to be relatively minor) had either already been carried out or would be carried out with no additional expense to the lessees. The appellant did not have an alternative case in the event that the LVT accepted the lessees proposition that there were very widespread defects which meant that the windows in particular were worth less than the appellant had paid for them. The lessees' original approach was that no part of the costs of the major works contract should be recoverable through the service charge and it was only towards the very end of the hearing that it presented an alternative and more conservative case which attempted to deal with individual heads of expenditure.

45. Faced with evidence presented at such a high level of generality, it is unsurprising that the LVT felt compelled to approach its task of determining the extent to which costs have been reasonably incurred with an unusually broad brush. The state of the evidence, and the manner in which each side had presented its case, seems to me to make it quite credible that the LVT sought and obtained the consent of the parties to deal with the figures on a robust and composite basis.

46. Although I accept the LVT's statement that it had the parties' consent, I have also considered whether it would have been entitled to adopt the approach it did without that consent. I am satisfied that although the global deduction which the LVT made from the cost of a group of items was

unorthodox, it was not unlawful. Having decided that none of the works to which the relevant costs related were of a reasonable standard, the LVT's next task was to determine the limit which should be applied to those costs when calculating the service charge payable. That was the exercise required by section 19(1) of the 1985 Act and it was for the LVT to determine, by reference to the evidence presented to it, how best to express its conclusions.

47. As is well known, section 19(1) of the 1985 Act imposes a statutory limit on the costs recoverable under a service charge by reference to a standard of reasonableness. It provides:

> 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.

48. Section 19(1)(b) has not been interpreted as meaning that, in all cases, the relevant costs of work which was not of a reasonable standard is to be disregarded in full. In *Yorkbrook Investments Ltd v Batten* (1986) 52 P&CR 51, the Court of Appeal considered a case under section 91A of the Housing Finance Act 1972 (the statutory predecessor to section 19(1) of the 1985 Act) concerning service charges payable by the lessees of a complex of 280 flats in Chiswick. Gardening services had been provided by the landlord over a period of more than seven years, but the defendant lessee objected to paying for them at all because, as the trial judge accepted, the service had not been of a reasonable standard. The judge had reflected his conclusion on the quality of the service by making a reduction of one-seventh in the total cost of the service provided over the full period in dispute. The Court of Appeal approved that approach and rejected the suggestion that nothing could be recovered for a service which had not been of a reasonable standard. *Yorkbrook* provides some support for the approach adopted by the LVT in this case: without demur by the Court of Appeal a fractional discount was applied to the cost of a substantial volume of work comprising a large number of individual operations carried out over a lengthy period.

49. In most cases the evidence presented to a Tribunal will be sufficiently detailed to enable it to address specific heads of expenditure. This was not such a case, and the LVT was entitled in my judgment to do the best it could and to indicate a global deduction in percentage terms to reflect the standard of work achieved in all three categories. It explained that that was the course it was taking and made clear enough findings concerning the deficiencies which the discount was intended to cover for the parties to understand its thought processes and the reasons for its decision. No doubt it would have been preferable for the LVT to have considered each of the disputed categories in its own right but in the case of so large a building, and so complex a catalogue of deficiencies (for which the evidence was representative rather than comprehensive) too great an attempt at precision could have been equally unsatisfactory. The assessment of the extent to which works are unsatisfactory, and the reflection of that assessment in a reduced price or discount, is not a scientific exercise but is a matter of judgment. Provided a sufficient explanation is given of why a particular approach is being

taken, it does not seem to me to be unlawful, where more detailed analysis is not possible, for an expert and highly experienced tribunal (as this tribunal was) to take a global approach to a number of different items.

50. At the conclusion of his submissions on this aspect of the appeal, Mr Redpath-Stevens pointed out that the LVT's global approach created a particular difficulty in the context of right to buy leases acquired under Part V of the Housing Act 1985 ("the Housing Act"). Paragraph 16B of schedule 6 to the Housing Act limits the liability of a right to buy lessee to pay service charges in respect of costs incurred in the initial period of five years after the grant of the lease. Before the lease is granted section 125 requires the local authority landlord to provide an estimate of the lessee's liability for specific items of expenditure during the initial period. The lessee cannot, in that period, be required to pay any more than the amount shown as his estimated contribution in respect of that item, together with an inflation allowance.

51. Mr Redpath-Stevens pointed out that there may be cases at Holcroft Court in which it becomes necessary for the appellant to distinguish between the different categories of works which the LVT dealt with collectively in order to apply the statutory limit on service charges. The cases he had in mind were cases involving any of the 90 respondents whose lease had been granted under Part V of the Housing Act within the five years ending on the date on which costs under the major works contract were incurred. Mr Redpath-Stevens understood that a number of flats at Holcroft Court had been leased under the right to buy procedure during that period but there was no evidence before either the LVT or the Tribunal dealing with the number of such leases. Nor is it known whether any of the right to buy lessees is entitled to protection against expenditure in some of the categories of work, but not others; it would only be necessary to further refine the LVT's composite deduction if such cases existed and the appropriate apportionment proved to be contentious. Since consultation on the major works began in 2001, and the works did not commence until 2005, the potential for such partial protection may be rather limited.

52. It is clear that further detailed consideration may need to be given to the effect of the right to buy legislation on the liability of certain lessees to contribute towards the costs of the major works. Nobody has suggested that the LVT was expected to undertake that task on the evidence provided to it in this case. Both parties agreed before me that it was never intended that the LVT should calculate the liability of any individual lessee, whatever the circumstances of their lease, and no evidence at all was led in relation to the contribution of individuals. The arithmetical exercise of determining the effect of the LVT's conclusions on the liability of each lessee was to be the subject of agreement between the parties once the LVT's broader conclusions were known. In those circumstances I do not consider that the LVT's approach of determining a composite reduction in the value of the disputed items, which I otherwise consider to have been lawful, is rendered unlawful or erroneous by its failure to cater separately for the position of a sub-category of lessees. The appropriate method of dealing with those individual cases, if there prove to be any which cannot be agreed, is for the outstanding issues which they disclose to be referred back to the LVT.

53. For these reasons I reject the appellant's first ground of appeal.

Issue 2: The LVT's failure to specify figures

54. The appellant's second ground of appeal is that the LVT failed to carry out the task allotted to it under section 27A(1)(c) of the Landlord and Tenant Act 1985 to determine "the amount which is payable" in relation to each category of works. The application had been for a determination whether a service charge was payable in respect of the works at all, and if it was, of the amount which was payable. Mr Redpath-Stevens complains that the LVT simply failed to carry out that basic exercise. He was also critical of the LVT's failure to refer to, or resolve, a specific issue concerning a contribution towards the cost of works which the respondents argued should be made by the appellant in respect of the basement car-park.

55. Mr Allen, for the respondents, pointed out that this ground of appeal overlaps substantially with the appellant's first ground of appeal. He explained how the evidence presented to the LVT had been supplemented late on the final day of the hearing by the lessees' first attempt to break the final account figures down and to allocate costs to the different disputed items, and how the appellants had relied only on the final account itself. He had expected the LVT to ascertain a lump sum, but he acknowledged that there were issues of apportionment which had not been properly explored in the evidence or argument and which the LVT had expected the parties to deal with either by agreement or by restoring the application for further consideration.

56. The answer to this ground of appeal has largely been given already. The parties did not present their cases to the LVT in a way which would have permitted it to make clear findings of fact as to the expenditure incurred on the different categories of work. Nor did the parties expect the LVT to make a determination in relation to individual lessees of the service charge which they were liable to pay. The whole issue of quantification of figures had been side-lined before the hearing commenced. The appellant, in its statement of case to the LVT, made no mention of figures at all; in their statement of case the lessees referred to the final account and said:

> "Although we have a few queries on the breakdown, we believe that these are of a relatively minor nature and should be able to be resolved between the two parties without further reference to the LVT".

As the LVT explained in paragraph 34 of its decision, that remained the position on the evidence until very shortly before the conclusion of the hearing. It was only at that stage that it became apparent that there were fundamental differences between the parties on the apportionment of the final account to the various categories of work.

57. The LVT was entitled, in my judgment, to reflect its conclusions on the quality of the work by specifying a discount in percentage terms from the unascertained cost of the disputed items. With one minor exception, to which I will refer shortly, the LVT decided as much as the evidence and argument allowed it to decide. I do not think it now lies in the mouth of the appellant, which could have presented its evidence in greater detail, to complain that the decision did not resolve more issues.

58. The LVT knew that issues of apportionment and quantification remained to be determined and it suggested in paragraph 34 of its decision that if those issues could not be resolved by agreement, they should come back for determination. The LVT's suggestion that the parties could bring the matter back on a fresh application was made with the convenience of the parties in mind in order to avoid a lengthy delay necessitated by the need to relist the outstanding issues before the same tribunal members. As the LVT had, in effect, determined only part of the application before it, the parties

might have been entitled to insist on the remaining issues coming back to the same tribunal. It is not necessary to consider that question, since neither party has sought to restore the original application for further hearing, nor have they taken up the LVT's suggestion that they issue a fresh application to deal with their disagreements over the apportionment of costs for different categories of work. The parties have, however, made some progress in narrowing the outstanding issues between them.

59. Although the LVT referred to the existence of fundamental differences between the parties on the allocation of costs, there are now only two aspects of the apportionment of the final account on which the parties disagree. Most significantly, they have agreed all matters relating to the apportionment of costs to the different categories of work except the treatment of the cost of scaffolding and hoists. There will be no difficulty in applying the LVT's composite deduction of 25% to the agreed costs. As for the cost of scaffolding, the appellant's approach has been to apportion it pro rota to all of the work in the major works contract. The lessees' approach is to attribute the scaffolding costs to the replacement of the windows and the resurfacing of the roof and then to apportion the total costs pro rota between those two elements. That may be a crude summary of the parties' respective positions but it sufficiently encapsulates the issue of principle which continues to divide them. The parties agree that that issue of principle should be remitted to the LVT for determination.

60. Subject to the remission of that discrete issue, I therefore reject the second ground of appeal.

Issue 3: Whether the LVT erred in not determining the correct method of design, construction and installation of the windows

61. Before the LVT a great deal of evidence was devoted to the issue of whether there had been a systemic failure in the design of the glazing units, as the lessees argued, or whether the only problems concerned the quality of the workmanship in their installation, which was the conclusion of Mr Beasley, the appellant's expert. The debate focussed on an examination of two different manuals for the assembly and installation of Monarch windows, with each party insisting that the manual it relied on was relevant to the installations at Holcroft Court. The manual relied on by the lessees showed glazing units with an internal drainage system, while the manual espoused by the appellants did not. The LVT made no finding on this dispute. The appellant's third ground of appeal is based on the contention that it was essential for the LVT to reach a conclusion on the issue of the disputed manuals in order to decide how far it could be said that the work undertaken had not been of a reasonable quality.

62. The LVT approached the issue of the quality of the glazing units at a practical and functional level, rather than at a technical level. In paragraph 28 of its decision (see paragraph 22 above) it listed those factors which, on the evidence, it considered may have contributed to the problems experienced by the lessees. It is noticeable that nowhere in that catalogue of defects did the LVT include the suggestion that the glazing units should have been provided with internal drainage holes. It is true that the LVT's list did not purport to be exhaustive and was prefaced by the statement that the evidence was very much more extensive than the summary it was providing, but it is nonetheless striking that the LVT focussed on problems other than the alleged design defects which had pre-occupied the lessees.

63. Although it summarised the main features of the evidence and provided a list of probable causes of the problems, the LVT's primary focus was on the practical consequences of the installation of the new glazing units. On that issue it was in no doubt as to its conclusion. The tests which had been carried out on eleven separate windows demonstrated that sealant which was an important part of the water-proofing of these windows had been omitted. This fact, as the LVT found in the end of paragraph 28 of its decision, pointed heavily to the installation of the windows having been carried out in an unsatisfactory manner and supported the LVT's explicit factual conclusion that "in many, albeit not all cases, these windows were poorly installed in such a way as to cause subsequent problems for the leaseholders".

64. In my judgment it was not necessary for the LVT to reach a conclusion on the question of which installation manual was appropriate, or on the broader issue of whether the windows had been appropriately designed. The LVT had detailed evidence covering a period of more than five years following the installation of the windows and it inspected five of the flats in the building. It also had information on tests and inspections carried out on a representative sample of eleven flats in the building. In my judgment this material was quite sufficient to enable the LVT to form a view on whether the windows were of a reasonable standard, by reference to their performance, without the need for it to resolve technical questions of considerable complexity. It was also sufficient to enable the LVT, using its expertise, to determine the extent to which the costs of the works should be reduced when the service charge came to be calculated.

65. Accordingly, I reject the third ground of appeal.

Issue 4: Did the LVT take irrelevant matters into account?

66. The appellant's final ground of appeal focuses on paragraphs 31 to 33 of the LVT's decision. Mr Redpath-Stevens has argued that those passages suggest that, in arriving at the global discount of 25% to be applied to the cost of the disputed works, the LVT took into account the following irrelevant considerations:

(1) The extent to which the lessees might be entitled to set off against their service charge liability claims for damages for breach of the appellant's repairing obligations in their leases.

(2) A comparison between the fittings on the replacement Nordan windows provided to Mr Allen and the fittings on the original Monarch windows;

(3) The need for further works in the form of additional ventilation.

67. Although Mr Redpath-Stevens skilfully developed these criticisms in oral argument, I did not find them convincing. As to the suggestion that the LVT may have taken into account an equitable set off as part of the 25% discount it arrived at, Mr Redpath-Stevens is right to say that there are aspects of paragraphs 31 to 33 of the decision which are a little puzzling. In particular it is not clear what the LVT had in mind when it picked out Mr Allen and said that his case "taxes the Tribunal least" because he had indicated an intention to bring proceedings in the county court to have his claim for damages properly assessed. All of the lessees are obliged to contribute a fixed percentage of the total cost of works, rather than a sum referable to the work on their own flat. The fact that some

individuals were more troubled by the new windows than others is therefore not obviously relevant to the assessment of their service charge liability. For that reason it is not obvious why the LVT drew the distinction it did between Mr Allen and the other 89 applicants when considering how it should reflect its factual findings.

68. Nonetheless, it seems to me to be sufficiently clear what the LVT was saying in the disputed passages. The reason it was not troubled by the particularly serious problems experienced by Mr Allen was because he was not inviting the LVT to reduce his service charge on account of any equitable set off of damages to which he may be entitled, as it explained in paragraph 31 of its decision. In paragraph 33 the LVT was adopting the same approach in relation to all of the other lessees. It described its finding that a discount of 25% was appropriate as "a generalised finding", by which I take it to have meant that it would apply to all lessees, irrespective of their individual experiences. The LVT was not purporting to take into account the effect of any claim for damages which individual lessees might have and which might, in principle, have formed the basis of an equitable set off reducing their service charge liability. That is suggested by the final sentence of paragraph 33 in which the LVT recognised that "in individual cases, on special facts not considered by this Tribunal, there may be an argument for a significantly greater discount" but emphasised that any lessee who considered themselves to have entitlement to a greater discount would have to pursue a claim in the county court. In that context the "greater discount" which the LVT seems to have had in mind was not the type of discount which it applied to the costs of the works to reflect the fact that they had not been carried out to a reasonable standard, but was rather a discount which could only be achieved by individual lessees demonstrating that they had been caused loss by the appellant's breach of its repairing obligations under the leases. This reading of the Tribunal's reasoning seems to me to make much greater sense and to demonstrate that it did not fall into the error alleged by the appellants of reflecting a potential claim for damages in its assessment of the reasonable cost of the works.

69. As for the standard of fittings, the LVT made a specific finding at the end of paragraph 29 of its decision that the handles on the new windows were of poor quality. It observed additionally, that there was a very noticeable difference between the "solidity and feel" of the handles in the new Nordan windows supplied to Mr Allen as the fourth replacement of the Monarch windows provided to other lessees. It is suggested by the appellants that this comparison was illegitimate and did not take into account the fact that the replacement Nordan windows may have been of a higher specification than those original installed. There seems to me to be nothing in this complaint. In two short sentences the LVT was reaching a factual conclusion on the basis of the totality of the evidence which it had heard concerning the window handles. That evidence included first hand accounts of the handles breaking and regularly having to be replaced to the point where the appellant kept a supply of replacement handles ready to meet the well known problem. The comparison between the poor quality handles and those in the flats of Mr Allen and Mr Donegan was a legitimate one since it demonstrated the contrast between a handle of reasonable quality and one of poor quality. It is also worth recalling that the appellant had originally consulted the lessees on both styles of window, which suggests that the appellants did not regard the Nordan windows as being in a different class or category from the Monarch windows.

70. Nor do I consider that the Tribunal was in error in referring in paragraph 29 of the decision to the question of additional ventilation. It was the appellant's case that the problems experienced by the lessees were substantially due to their failure adequately to ventilate their flats, a problem which the appellant referred to as a "lifestyle issue". In paragraph 29 the LVT rejected this explanation and

concluded that the problems experienced by the lessees were "consequent upon the installation of the windows". There was no suggestion that lessees had been advised that the new windows would require them to modify their lifestyle and, given the significance which the appellants had attached to "lifestyle issues" it was legitimate for the LVT to draw attention to that fact. It was also legitimate for the LVT to take into account the apparent need for additional ventilation, which had not been provided, when assessing whether the work carried out was of a reasonable standard.

71. It follows that I reject the appellant's fourth ground of appeal.

The car park issue

72. One particular issue was debated before the LVT but did not feature in its decision. Holcroft Court includes an underground car park which is leased by the appellant to a commercial car park operator. The lessees consider that the cost of repairs to the roof of the building should be the subject of a contribution by the appellant in its capacity as owner and landlord of the underground car park.

73. It is not clear whether the omission to refer to this matter was simply an oversight, or whether the LVT regarded the issue as an aspect of the broader question of apportionment on which it did not hear proper evidence or argument. The point raises a short question of interpretation of the standard lease used at Holcroft Court, and is capable of being determined without further evidence. The parties agreed that, although this appeal is a review, having heard the argument on the point, it would be appropriate for me to determine it now rather than remit it to the LVT.

74. The basis of the lessees' suggestion that a contribution should be made by the appellant is that, although the car park is not immediately under the roof it should bear a proportion of the expenditure on the roof in the same way as a lessee whose flat is on the ground floor bears a share.

75. The contribution which each party is required to make to repairs depends on the particular terms of that party's lease, and not on some principle of more general application. Each lessee's liability under clause 3(A) of the standard form of long lease at Holcroft Court is to pay to the appellant a "Due Proportion" of the costs and expenses incurred by the appellant in carrying out its obligations, including its obligation at paragraph 1 of the ninth schedule to keep the main structure of the property in good and substantial repair and condition. It is common ground that each lessee is therefore obliged to contribute towards the cost of repairs to the roof.

76. The "Due Proportion" which each lessee is to contribute is defined in paragraph (G) of the recital with which the lease commences. In the case of Mr Allen, whose lease was in evidence before the LVT, his Due Proportion is 0.501%.

77. The lease makes no provision for the lessor to recoup part of the expense of repairing the structure of Holcroft Court from a third party occupier of the basement car park nor is the lessor required to make any contribution in its own right on account of its ownership of the basement. There is therefore no contractual basis on which the sum payable by individual lessees could be

reduced to reflect the fact that the occupier of the basement had benefited to an extent from the repairs carried out to the roof.

78. In this regard the car park operator's position is no different from that of the 103 tenants who occupy flats at Holcroft Court on short-term tenancies granted by the appellant. They are not liable to make any contribution in their own right, because they have not contracted to do so (or so I assume). In contrast, each lessee is required by the terms of his or her own lease to contribution a Due Proportion and cannot now question the basis on which that percentage has been calculated.

Conclusion

79. I am satisfied that the LVT did the best job that could be expected of it on the material which the parties chose to present. Had the parties adopted the LVT's suggestion of bringing the outstanding issues of apportionment before a differently constituted tribunal on a further application, it may be that those issues would have been resolved many months ago. As it is, I am satisfied that the only matters that remain to be considered by the LVT are:

(a) The apportionment of the cost of scaffolding and hoists between the work to the windows, balconies and exterior redecoration on the one hand, and the remaining categories of work under the major works contract on the other ; and

(b) The apportionment of costs to the three categories of works to the extent necessary, if at all, to enable determination of the liability of any individual lessee whose service charges are limited by paragraph 16A of schedule 6 to the Housing Act 1985.

80. I see no reason why those limited issues ought not to be determined by the LVT in its original constitution. Equally, however, the issues are discrete and would be suitable for determination by a differently constituted Tribunal if the original members are not available.

81. The appeal is allowed to the limited extent that the case is remitted to the LVT to consider the two issues mentioned above. Once the parties have taken time to digest this decision the respondents, who were applicants in the proceedings below, should apply to the Property Chamber of the First-tier Tribunal for directions for the resolution of those issues.

Dated: 26 September 2013

Martin Rodger QC
Deputy President