UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – major works (including improvement works) on three blocks of flats – local authority lessor obtaining grant from London Development Agency towards costs of proposed works – majority of flats tenanted but some (including appellant's) held by lessees on long leases with service charge provisions which included power to recover costs of improvements – extent to which lessees entitled to benefit of grant in diminution of what would otherwise be her service charge.

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

BETWEEN	**CATHERINE EDOZIE**	**Appellant**
	and	
	BARNET HOMES	**Respondent**

Re: Flat 37,
Granville Point and
Flat 9, Harpenmead Point,
Granville Road,
London
NW2 2LL

Before: His Honour Judge Nicholas Huskinson

Sitting at: Upper Tribunal (Lands Chamber), Royal Court of Justice, Strand, London WC2A 2LL
on
17 & 18 June 2015

The appellant Catherine Edozie appeared in person
Jon Holbrook, instructed by Judge & Priestley on behalf of the respondent

The following cases were referred to in this decision:

Oliver v Sheffield City Council [2015] UKUT 0229 (LC)
Craighead v Homes for Islington Ltd [2010] UKUT 47 (LC)
London Borough of Haringey v Ball [2004] (His Honour Judge Cooke, Central London County Court – unreported)

DECISION

Introduction

1. This is an appeal from the decision of the First-tier Tribunal Property Chamber (Residential Property) ("the F-tT") dated 5 June 2014 whereby the F-tT decided certain matters concerning the amount recoverable by the respondent (on behalf of the lessor) from the appellant (as lessee) by way of service charge in respect of major works carried out at Granville Point and Harpenmead Point and a third block in Granville Road, London NW2.

2. The matter came before the F-tT by way of a transfer from the Barnet County Court, because the respondent had claimed payment of monies which it contended were payable by the appellant for service charge and the appellant had defended the action and put in a counterclaim.

3. The London Borough of Barnet is the freehold owner of three blocks of residential flats, each block containing 60 flats, in Granville Road. The respondent, Barnet Homes, can be considered for present purposes to be the agent of the Council who manages these properties on behalf of the Council and effectively stands in the shoes of the Council as lessor so far as concerns the provision of services and the recovery of service charges etc under the leases. I shall hereafter refer to the respondent as Barnet. There is reference in the papers to there being 179 flats between the three blocks, but I was told that this is in fact an error and that there are 60 flats in each of the three blocks making a total of 180 flats. There are, or at least were at the relevant time, 48 such flats which were held by lessees upon long leases at low rents. The remaining 132 flats (but erroneously stated to be 131 flats in some documents) were held by secure tenants. For convenience I will hereafter refer to the flats held upon long leases at low rents as the leasehold flats and I will refer to the remaining flats, held on secure tenancies, as the tenanted flats.

4. The appellant holds two of the leasehold flats, namely Flat 9, Harpenmead Point and Flat 37, Granville Point.

5. In about 2008 Barnet decided that major works should be carried out in relation to these three blocks. Barnet applied to London Development Agency ("LDA") for a grant in respect of such works and was duly awarded such grant. I will refer to the terms of the application and of the award in more detail later. Barnet then conducted consultation with the lessees in respect of the proposed works and in due course carried out such works and, having done so, sent demands for service charge payments to the lessees including the appellant. The appellant declined to pay the full amount demanded which led to the county court proceedings and the transfer of the matter to the F-tT.

6. Before the F-tT numerous points were raised for decision including whether the statutory consultation process had been properly undertaken; whether the works

undertaken were covered by the terms of the lease; whether there had been any relevant historic neglect of the buildings by Barnet such as to impinge on the question of how much could be recovered by Barnet through the service charge; whether the quality of the works undertaken was adequate; and whether the appellant could properly be charged with certain additional costs for electrical re-wiring and the re-routing of pipework and the installation of heating. The F-tT gave its decision upon those points and there is no appeal to the Upper Tribunal in respect of any of them. There was however one further point before the F-tT which is the subject of the present appeal to the Upper Tribunal. That point is briefly as follows. The question arose as to the relevance of the grant from LDA which Barnet had obtained in respect of the works. The appellant disagreed with the way in which the grant had been apportioned between Barnet (with its responsibility for the tenanted flats) and the lessees who held the leasehold flats. The appellant drew attention to the fact that, in the original application for grant, a sum of about £1.88m was applied for in respect of the 48 leasehold flats with a separate sum of about £5.13m being applied for in respect of the 131 (in fact it should have been 132) tenanted flats. The appellant contended that all of this amount of £1.88m should have been used to offset the costs which the lessees would otherwise incur for these works through the service charge. Barnet argued that the apportionment of the grant between the lessees on the one hand and Barnet itself (as freeholder of the tenanted flats) was a matter within its discretion and that it had acted reasonably and indeed generously in not requiring the appellant to pay for certain substantial items. Barnet pointed out that it had made reductions in costs which would otherwise, under the terms of the leases, have been properly chargeable to the lessees.

7. The F-tT gave its decision upon this question regarding the grant in the following terms:

> "**The Tribunal's decision:**
>
> 36. The Tribunal determines that the apportionment of the grant between the Applicant and the lessees is reasonable.
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> **Reasons for the Tribunal's decision:**
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> 37. The Tribunal considered the figures provided by the Applicant carefully. It noted that the total costs of the works was £9,465,214 of which £7,013,000 was funded by the grant, and of the remaining amount, £1,403,145 was funded by London Borough of Barnet and £1,049,068 was funded by leaseholders.
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> 38. The Tribunal considered that this was a reasonable apportionment of the costs and noted that it was arguable under the terms of the lease that the full costs were chargeable to the lessees."

8. The appellant applied to the Upper Tribunal for permission to appeal against the F-tT's decision in relation to the issue concerning the grant. She was granted such permission. Accordingly the issue before the Upper Tribunal is how (if at all) the fact that Barnet obtained this grant in respect of these works impacts upon the recoverability of service charge from the appellant and whether Barnet was entitled to follow the

course it did in seeking to reflect the grant by diminishing, in a way which it considered to be reasonable, the amount which would otherwise have been payable by way of service charge by the appellant and the other owners of the leasehold flats.

9. In summary it is the appellant's case that full credit should be given to the lessees for the £1.88m obtained by Barnet as a grant from LDA because this was obtained in respect of improvements to the 48 leasehold properties. The lessees should each have full credit for one forty-eighth share of this amount against what otherwise would be their service charge bill. In summary Barnet argues that the proper calculation of the service charge payable by a lessee does not require that there is brought into account the fact that Barnet has received any grant from LDA; that accordingly Barnet could properly calculate the service charge payable by the appellant disregarding the fact that any grant had been received; but that Barnet has properly exercised a discretion as to how and the extent to which the lessees should be entitled to benefit from the payment of the grant. The parties arguments are set out in more detail in due course:

10. At the hearing Mr Holbrook accepted that he could not properly suggest that the F-tT's decision upon the grant issue gave clear adequate and legally sustainable reasons for its decision. I have set out above the totality of the F-tT's conclusions upon the grant issue. I agree with Mr Holbrook (and would have so found even if the point had not been conceded by him) that this decision by the F-tT upon the grant issue cannot be upheld as an adequately reasoned decision. It does not deal sufficiently with the issues arguments advanced by the parties. That does not of course mean that the F-tT's ultimate conclusion is wrong. In support of the F-tT it should be noted that its decision dealt with several other separate topics upon none of which has any challenge been brought by way of appeal.

11. The present appeal is an appeal by way of review with a view to a re-hearing. Once it had been established at an early stage in the hearing before me that the F-tT's decision could not be upheld, it became necessary to decide how the re-hearing before me should proceed. I asked whether the parties wished to adduce evidence. Neither party wished to do so. Each party proceeded upon the basis that the matter could be decided upon the papers, including the witness statements, which were in the bundle. I therefore proceeded upon this basis.

The Facts

12. The appellant holds the flat at 9 Harpenmead Point upon the terms of a lease dated 7 January 2002 whereby the Mayor and Burgesses of the London Borough of Barnet demised the flat to the original lessee for a term of 125 years from 1 January 1985 at a premium and a ground rent and the other terms and conditions therein contained which included the following:

(1) The payment of a service charge was reserved and in clause 3(ii) the lessee covenanted:

"To pay without any deduction whatsoever the Corporation's expenses and outgoings as set out in the Third Schedule hereto (hereinafter together called "the Service Charges") at the times and in the manner aforesaid but subject to the terms and provisions set out in the Fourth Schedule hereto."

(2) By clause 9(5) it was provided that:

"(5) Nothing in this Lease shall impose any obligations on the Corporation to provide or install any system or service not in existence at the date hereof or to alter or improve the Block or Estate or any part thereof or any system or service in existence of the date hereof but the Corporation may in its absolute discretion provide install alter or improve any such system or service or the Block or Estate or any part thereof for the benefit of the Lessee and the other occupiers of the Block or other occupier on the Estate."

(3) The Third Schedule made provision for the Corporation's expenses and outgoings of which the lessee was to pay a proportionate part by way of service charges. The lease provided that as regards "the Block Percentage" this was 1.677% (although I am told that only 1.667% is charged – the intention being that this should be one sixtieth part of the expenses). The Third Schedule then listed what these expenses and outgoings, of which the lessee was to pay a proportionate part by way of service charges, were to be namely:

"All costs and charges and expenses incurred or expended or estimated to be incurred or expended by the Corporation whether in respect of current or future years (and so as to include expenditure incurred after commencement of the Reference Period and before the grant of this Lease) in carrying out or in pursuance or furtherance of or in intended pursuance or furtherance of the obligations or rights of the Corporation under this Lease to or in relation to the Block and in particular but without prejudice to the generality of the foregoing all such costs charges and expenses in respect of the following."

And there then followed a list of the various relevant categories of costs etc.

(4) Paragraph 11 of the Third Schedule made clear that these costs and expenses were to include the cost of exercising the lessor's right under clause 9(5) to carry out any improvements or alterations to the Block or any part thereof or to install new or to improve or alter existing systems or services.

13. For the purposes of the present case the respondent Barnet Homes (who I am calling Barnet) can be treated as having all the rights and obligations regarding service charges as the Corporation, i.e. the Mayor and Burgesses of the London Borough of Barnet who were the lessor under the lease.

14. It was not suggested to me that the lease under which the appellant holds 37 Granville Point was in any significantly different terms from the lease in respect of 9 Harpenmead Point.

15. Accordingly it will be seen that the service charge provisions expressly contemplate that Barnet may carry out improvements or alterations to the buildings and may recover the appropriate proportion of the costs thereof through the service charge from the lessees of the leasehold flats.

16. It will also be noted that what Barnet is entitled to recover is a proportion of certain costs and charges and expenses "incurred or expended" (or "estimated to be incurred or expended" – but these alternative words are not relevant to the present case) in doing certain things.

17. By an application submitted on 31 July 2008 Barnet (or more precisely the London Borough of Barnet) made an application to LDA in respect of what was described as Granville Road Estate Improvement Scheme. The application was made in respect of the Innovation and Opportunity Fund. The amount of Targeted Funding Stream funding sought was stated to be £7,012,558. The address of the relevant buildings was given. There was then a box entitled "Outputs delivered by this bid". There was guidance in the following terms given for the purpose of completing this box namely:

> "Enter the amount of targeted funding stream bid for against the relevant output categories as well as the outputs created as a result of this project in terms of number of homes."

This box invited the applicant to give details in respect of the following categories namely:

> New social rented;
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> New intermediate;
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> Social rented homes improved;
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> Private homes improved;
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> Extended or reconverted homes;
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> Empty properties brought back into use.

A substantive entry was made against only two of these categories, namely the following entries were made:

Outputs delivered by this bid	**Targeted funding stream (£)**	**Number of homes (Net Additional)**
Social rented homes improved	£5,132,126	131
Private homes improved	£1,880,462	48

18. The next page of the application form required information regarding the proposed funding sources. In a box entitled "Please specify the detail of all funding sources identified above and whether this funding is capital or revenue and what it consists of" the following appears:

> "The total costs of the scheme total £14.1m. Barnet intends to fund the Decent Homes element of the scheme through £5.9m of capital monies set aside in the Decent Homes Programme. The London Borough of Barnet have also agreed to provide £1.2m of capital receipts to fund the project. Targeted funding of £7m will be used to take the estate beyond the Decent Homes standard and will specifically deliver innovative environmental and energy efficient solutions to fund the thermal cladding, insulated roof covering and environmental works. This will provide improved energy efficiency; improved insulation; reduce CO2 emission levels; improved SAP ratings; lower heating costs; reduction in over heating; elimination of interstitial condensation and cold bridging; improved living standards."

Thus the proposed funding for this scheme, which at that stage was envisaged to cost £14.1m, was stated to be £7,012,558 from the targeted funding stream (i.e. the grant which was being applied for); £5.9m from money Barnet held set aside in the Decent Homes Programme; and £1,203,829 which the Council had also agreed to provide to fund the project.

19. By a letter dated April 2009 LDA wrote to Barnet stating that it was pleased to inform Barnet that the Granville Road Estate Improvement Scheme bid had been successful. It stated that the Investment stream was "Beyond the Decent Homes standard". It stated that the 2010/11 indicative allocation was £7,013,000. It stated that the "Minimum output target (total number of homes improved)" was 179. The letter stated that the next steps were that LDA would contact the project officers named in the bid form to confirm programme monitoring and reporting arrangements. It added that Barnet needed to confirm by 4 May 2009 that it could deliver the minimal output target (i.e. a minimum output of 179 homes improved).

20. Pursuant to a request by the appellant to LDA under the Freedom of Information Act 2000, LDA wrote to the appellant on 26 August 2011 stating:

> "Our records indicate that funding for the improvement of homes in the three tower blocks in the Granville Road Estate was paid by the Department of Communities and Local Government (DCLG). The letter also stated that their records showed that a 2010/2011 allocation of £7,013,000 was approved.

21. As already noted above the originally estimated cost of the scheme was £14.1m and the application for grant was made upon that basis. There is no suggestion that this was anything other than a genuine estimate of cost as at the time of the grant application. However in due course the tender price for the works came in at £9,465,214. No adjustment of the amount of the grant was made. Accordingly Barnet received £7.1m pursuant to this grant application and award.

22. Pursuant to a request for information by the appellant, Barnet responded on 29 October 2012 confirming that the major works on the buildings were complete. The letter stated that the total cost of the major works carried out on the three tower blocks (internal, external and communal) was £9,454,375.76; that the total cost of the internal (kitchens and bathrooms) works carried out in the tenanted properties was £2,105,074.61; and that the total invoiced amount by Apollo Contractors was £9,235,562.36 (it seems that the difference between this and the total cost was in relation to certain fees and overheads etc and nothing turns upon that for the purposes of the present appeal). The letter also confirmed that all of the grant funding of £7.1m was used for the Granville Road Tower Blocks major works.

23. By documents dated 11 August 2009 to the various lessees, including the appellant, Barnet undertook the first stage of the necessary consultation upon the major works. The nature of the proposed works were listed. It was also stated that Barnet would also be carrying out other works which did not affect leasehold flats such as kitchen and bathroom renewals and re-wiring.

24. By documents dated 28 June 2010 Barnet undertook the second stage of the relevant consultation proceedings. The lessees were informed as follows:

> "We are very pleased to have secured government funding which will enable us to reduce the amount that would otherwise have been recharged to leaseholders to approximately one third."

The letter enclosed a breakdown of estimated costs and stated that a shaded column had been included to show what the lessee's contribution would have been without the grant funding reductions. I was told that these, so far as concerns the appellant, were the documents at pages 637-639 and 640-642 of the bundle. These documents were in relation to the estimated costs and had four columns in which entries were made in respect of each of a large number of items of work. The first column indicated the cost for the relevant block. The second column indicated the appellant's percentage liability towards this cost. The next column showed how much would be the appellant's contribution excluding grant. The last column indicated the appellant's individual contribution (but taking into account grant), such that for some of the works nothing was shown in this final column and for some of the works a figure of less than the amount in the previous column was shown (i.e. less than the amount which would have been the appellant's contribution excluding grant) and for some of the works the same amount was shown as in the previous column (indicating that no credit for the grant was made).

25. On 30 June 2010 the appellant wrote to Barnet in respect of these documents. On 9 July Barnet wrote to the appellant saying *inter alia*:

> "The grant funding was applied for and obtained on the basis that the over-cladding rain-screen system and other sustainable works would greatly improve the thermal efficiency and reduce the energy consumption of the blocks; had this not been included in the specification the funding would likely have been proportionately reduced or refused altogether.

Furthermore, Barnet Homes have taken the decision not to recharge leaseholders for this and other elements of the work that it could be argued could not have been foreseen by leaseholders. The remaining works could reasonably be expected in a building of this age and condition, and would have been noted by a survey at the time of purchase."

The letter made reference to the fact that grant funding was awarded to Barnet for the project as a whole and that Barnet had used its discretionary powers under the Social Landlord's Discretionary Reduction of Service Charges (England) Directions 1997 to reduce charges to leaseholders on the basis outlined in the letter. During the course of the hearing I asked Mr Holbrook whether these Directions were of any relevance to the present decision. He handed me a copy of the Directions but submitted that they were in fact of no relevance.

26. In a letter dated 29 July 2010 Barnet informed the appellant *inter alia*:

"Prior to the tendering process taking place indicative costs for the works were sought for from an existing specialist constructor familiar with the area. In the event the quote for the rain-screen over-cladding element of the works proved to be much higher than the amount quoted for in the subsequent tender bids. This was partly due to the uncertainty in the market which resulted in more competitive rates. However, although the more detailed estimated total cost came in considerably lower the grant funding was awarded on the basis of the original indicative estimate.

All of the funding obtained will be used for the Granville Road refurbishment project benefitting all residents – both tenants (who contribute through their rent payments) and leaseholders.

The decision to allocate some of the funding to offset leaseholder contributions was based on the elements of the work that it could not have been reasonably anticipated in advance would be needed such as the over-cladding with a rain-screen and the remodelling of the entrances.

However, some of the works would be reasonably expected in buildings of this age and condition, for example the roof and window renewal, concrete repairs, internal and external redecoration, landlord's electrics, lift renewal etc, which could or should have been anticipated by buyers, especially with the aid of a survey. It was therefore decided that it was fair and reasonable to expect leaseholders to pay for these elements of the works and the associated costs.

It should be noted that the government who direct the distribution of the Housing Revenue Account social housing subsidy are clear that it is not intended to subsidise home ownership. Furthermore, it would be grossly unfair to more heavily subsidise leaseholders whose properties are involved in this project when you consider that similar concessions have not been made for works of this nature affecting other leasehold properties across the borough (a total of approximately 4.500 properties)."

27. Eventually after these major works had been completed Barnet sent to the appellant demands for the payment of service charges in respect of them. The demands were accompanied by documents in a form similar to that described in paragraph 24 above, showing for each of numerous items the cost for the block and the appellant's contribution excluding grant and the contribution actually required from her. In this last column for some items nothing was required to be paid and for some items less than the full amount was required to be paid and for some items the full amount was required To be paid.

The appellant's submissions

28. The appellant drew attention to the express basis upon which the application for grant was made. The application was not for the global grant of £7.1m. Instead the application expressly stated that £5,132,126 was applied for in respect of 131 social rented homes which were to be improved. It stated that £1,880,462 was applied for in respect of 48 private homes to be improved. The application was successful and the full amount of grant applied for was provided. It was provided on the basis that there was a minimum output target, namely 179 homes were to be improved.

29. On this basis, there was no justification for Barnet to do anything other than apply the grant consistently with the basis upon which it had been applied for and awarded. In fact the figures given in the application form come to the same amount per flat, whether tenanted or whether a private home namely £39,176. Accordingly the simple way for the grant to be applied was as set forth in her skeleton argument in Option 2 (she indicated she no longer pursued Option 1) namely: First take the total cost of the works £9,454.376. Deduct from this the full amount of the grant namely £7,012,588. This leaves the unfunded cost of the works as £2,441,788. Dividing these costs equally between the three blocks gives £813,929 per block. Apply the appellant's appropriate percentage of 1.667%. This gives a sum payable of £13,568.

30. The appellant submitted that this was the appropriate calculation to do and that the amount she should be charged in respect of each flat for these major works was £13,568 rather than the sums actually charged, namely £24,067.84 for Flat 37 and £24,196.65 for Flat 9.

31. The appellant relied on the case of *Oliver v Sheffield City Council* [2015] UKUT 0229 (LC). She submitted that the same reasoning applied in the present case.

32. In summary the appellant submitted that Barnet did not have a discretion as to how to allocate the grant. It was not entitled to allocate to itself (in respect of the tenanted flats) substantially more per flat than it allocated to the leasehold flats.

33. The appellant accepted that Barnet was entitled to recover all of the monies claimed through the service charge in respect of these major works, save for the questions arising from the fact that Barnet received the LDA grant and omitted (wrongly

in the appellant's submission) to give effectively a full and equal share of that to the credit of the appellant.

Barnet's Submissions

34. On behalf of Barnet in summary Mr Holbrook advanced the following submissions:

(1) He raised a question of whether the present dispute raised matters which were actually within the jurisdiction of the F-tT (and the Upper Tribunal upon appeal) to consider. Ultimately this argument was not pressed. I shall however briefly refer to it below because Mr Holbrook submitted it assisted in identifying what were the relevant points for decision in the present appeal.

(2) He submitted that there can be no doubt that the full cost of the works to these three blocks, namely about £9.4m, was actually incurred by Barnet. It was paid over by Barnet to the contractor. The fact that these costs were incurred is of central importance bearing in mind the terms of the lease, the terms of section 19 of the Landlord and Tenant Act 1985, and the analysis in *Oliver v Sheffield City Council* [2015] UKUT 0229 (LC).

(3) The terms of the leases are very wide so far as concerns the charging provisions and the items which Barnet can carry out and charge to the appellant through the service charge. In particular, having regard to the provisions of clause 9(5) and paragraph 11 of the Third Schedule in the lease, Barnet is entitled to carry out improvements and charge the costs thereof through the service charge.

(4) The major works which were carried out to the buildings did include improvements. However, disregarding for a moment the grant, Barnet could have charged all (or effectively all) of the cost of these major works through the service charge and recovered the appellant's relevant percentage.

(5) Barnet was under no obligation to its funder, namely LDA who provided the grant, to apply the grant money in equal shares for the benefit of each of the 180 flats. Even less was Barnet under any such obligation to the appellant to do so.

(6) Barnet had a discretion as to whether to give the appellant some benefit from the grant against what would otherwise be recoverable service charge costs. It properly exercised that discretion. This gave her a substantial benefit, albeit less than the appellant would have liked to have received. The appellant has no legal basis for any complaint.

(7) The case of *Oliver v Sheffield City Council* is distinguishable.

(8) It is true that this matter came to the F-tT by way of transfer from the county court and that in the county court proceedings the appellant had

> filed a counterclaim which included claims based upon the fact that Barnet had received this grant from LDA. However the appellant clearly has no contractual claim against Barnet in respect of this grant. Her only theoretically possible basis of claim would be a restitutionary claim based upon unjust enrichment. Such a claim cannot succeed in the present case.

35. Mr Holbrook elaborated upon these submissions as follows.

36. The point which Mr Holbrook originally called the jurisdiction point was based upon section 19 of the 1985 Act and was to the following effect. The point started with the proposition that Barnet had uncontrovertibly incurred the £9.4m of costs upon these major works (this is a point which must be revisited later and considering *Oliver v Sheffield City Council*). Upon that basis Mr Holbrook was minded to submit that (i) section 19 could be of no assistance to the appellant, but (ii) the appellant's arguments properly understood were effectively entirely reliant upon section 19. Mr Holbrook pointed out that section 19 is concerned with whether costs have been incurred (his argument started upon the basis that this was not and could not be challenged); that section 19 then allowed consideration of whether costs had been "reasonably incurred" and whether the works carried out were of "a reasonable standard". However Mr Holbrook pointed out that section 19 does not invite consideration of whether the incurred costs could reasonably have been defrayed from other sources of income. He was minded to submit that the effect of the appellant's arguments were such that she was inviting there to be read into section 19 a jurisdiction in the F-tT to consider whether costs which had actually been incurred (and were reasonably incurred and were upon works to a reasonable standard) could have been reasonably defrayed from other sources of income. In so far as the appellant was arguing that the F-tT should have concerned itself with whether such costs could reasonably had been defrayed from some other source of income, there was no jurisdiction for the F-tT to do so.

37. However Mr Holbrook accepted that the F-tT and the Upper Tribunal did have jurisdiction to analyse and to rule upon the points in dispute between the appellant and Barnet. This must plainly be correct. The matter has been transferred for decision by the F-tT from the county court. The issue to be decided is how much is properly payable by way of service charge by the appellant in respect of the major works in respect of these buildings. This matter is within the Tribunal's jurisdiction and must be decided under section 27A of the 1985 Act.

38. Mr Holbrook submitted that it was of importance to examine the basis upon which the grant was applied for and was awarded. He accepted that the application was for a sum which was broken up in the manner described in paragraph 17 above namely about £5.13m for 131 social rented homes and about £1.88m for 48 private homes. However there was no promise in the grant application that the money would be expended precisely in equal shares upon every property. In effect the application was submitted to LDA for a grant of £7.01m in respect of 179 properties and the division as mentioned in respect of the 131 social rented homes and the 48 private homes was merely a mathematical division allocating an equal amount for each property. This did not carry

with it any promise that the money would be spent in precisely this way. Properly understood the application was in effect one for £7.01m to carry out major works on these three blocks, being blocks which contain 131 social rented homes and 48 private homes.

39. Thus the application for grant included no promise as to how much would be spent upon any private home in general or upon the appellant's flats in particular. The fact that there was no obligation to spend money (or to allocate the credit of the grant) upon this equal basis of the same amount per flat is further confirmed by the document from LDA awarding the grant. This awarded a grant of £7.01m for the Granville Road Estate Improvement Scheme; it stated that the investment stream was "Beyond the Decent Homes Standard" and it stated that the minimum output target by way of total number of homes improved was 179. No condition was attached requiring the grant to be spent in equal shares for the benefit of private homes and social rented homes. Obviously the grant money had to be spent upon the improvement of the three blocks rather than some wholly different project such as improvement works to the Town Hall. However Barnet had in fact spent all of this money, together with a further £2.3m, upon major works to these blocks. In short the grant was awarded upon a broad basis not upon a detailed basis requiring that the money must be spent in a certain manner or must be credited to individual properties in a certain manner.

40. Mr Holbrook further submitted that, even if as between LDA and Barnet LDA was entitled to expect that Barnet spent the grant money equally upon each flat or gave credit equally to the owners of each leasehold flat, this was entirely a matter between LDA and Barnet. The appellant had no right herself to complain if Barnet did not use the grant for the equal credit of each flat (even supposing that as between Barnet and LDA there was some obligation to do so).

41. Mr Holbrook drew attention to the consultation procedures under the 1985 Act in respect of these major works. Barnet had made the position clear regarding how it was proposed the grant should be dealt with from an early stage. Thus the consultation indicated that the appellant (and other lessees of leasehold flats) would obtain substantial benefit from the fact that this grant from LDA was payable. The consultation documents showed that for each of the appellant's two flats the estimated ultimate service charge for these major works would amount to approximately £25,355. This figure was in fact very close to the amount ultimately charged to the appellant in respect of her two flats – the charge being £24,667.80 for flat 37 and £24,196.65 for flat 9. The consultation documents included a detailed schedule with columns showing the estimated costs of numerous items and the appellant's percentage share of those costs ignoring grant; and the amount it was proposed actually to charge her. The documents thereby showed that she would be getting a substantial benefit from the grant. For instance in respect of Flat 37 Granville Point the document showed that, while the total estimated contribution which would be required from the appellant was £24,355.90, the amount which would have been payable if the grant was not available was £45,868.94.

42. Mr Holbrook pointed out that Barnet had from an early stage explained its reasoning as to why it was dealing with the grant in this manner, see for instance

Barnet's letter of 29 July 2010 (paragraph 26 above). This letter raised three important points, namely that the Housing Revenue account (into which the grant was received) was not to subsidise private home ownership; that the grant must be dealt with on a basis that was fair to all; and that the holders of the leasehold flats would obtain a substantial capital benefit from the grant.

43. Mr Holbrook submitted that it was absurd to suggest that Barnet was under some obligation to spend the grant money equally across all the properties. This was especially so when it was known that, as regards the tenanted properties as opposed to the leasehold properties, there were substantial additional works involving renewal of the kitchens and bathrooms etc which came in total to about £2.1m.

44. Having regard to the wide wording of the leases regarding the recovery through the service charge of the cost of works which could include improvement works, Barnet could (ignoring for a moment the grant) have recovered from the appellant the appropriate percentage of the full costs of these works even though they involved substantial improvements.

45. In short the full costs of these major works were incurred by Barnet. Barnet was entitled to recover the costs through the service charge. Barnet has chosen in its discretion (although under no obligation to do so) to allow the owners of the leasehold flats a substantial credit out of this grant against what would otherwise be their service charge accounts. The appellant has no basis upon which to claim that she is entitled to a greater credit than this.

46. Mr Holbrook then turned to the Upper Tribunal decision in the recent case of *Oliver v Sheffield City Council*. In that case the council had received monies from the Community Energy Savings Programme ("CESP"), which was a scheme created as part of the government's Home Energy Saving Programme and which ran for a specified period of time. In broad outline, a community energy saving target was set by the Department of Energy and Climate Change which was to be met by requiring commercial gas and electricity suppliers and electricity generators to fund energy saving measures for domestic consumers. CESP was targeted at specific low income areas of Britain selected using published indices of multiple deprivations. In England, the lowest 10% of areas ranked according to indices of multiple deprivation qualified for CESP funding. The council obtained CESP funding in respect of completing specific qualifying works to an approved standard by a certain date. The council received a sum of just over £1.5m which was referable to the refurbishment of the estates which included Ms Oliver's flat. Not all of the work on the estates was eligible for a CESP contribution, because the later phases of the project did not commence until after the scheme had closed and also not all of the estates were within the relevant zone. CESP funding was applicable to the block containing Mr Oliver's property and just over £43,000 was received by the council in respect thereof. The view taken by the council was that the CESP funding would not be passed directly to the leaseholders as a set off against their service charge contributions. Instead the funds were to be used as a contribution towards the cost aspects of the work which the council had chosen not to charge the leaseholders. The question arose as to whether the council was entitled to

deal with the matter on this basis or whether instead the lessee was entitled as of right to a credit against what would otherwise be her service charge.

47. Mr Holbrook drew particular attention to paragraph 118 in which the Tribunal stated:

> "118. We do not consider that the debate over how the Council has accounted for the CESP funding is significant. The important question for leaseholders is whether, having received CESP funds for specific items of work to improve the Estates, the costs which the Council is entitled to recoup through the service charge in respect of those works should be reduced by the amount of the CESP contribution."

Mr Holbrook stressed that in that case the council had received the CESP funds for specific items of work, which included specific items of work upon Miss Oliver's flat. He drew attention to the analysis in paragraph 120:

> "In principle we do not think it is open to the Council to calculate the service charge without reference to the receipt by it from a commercial third party of funds specifically intended to meet the cost of part of the works. We do not consider that the Council has "incurred" those costs within the meaning of the lease in circumstances where in the course of the contract, it reached agreement with a third party which bound that party to reimburse part of the cost. The fact that the CESP funding was not limited to properties let to the Council's own secure tenants, but was equally applicable to work done to those belonging to its long leaseholders, prohibits the Council from treating the funding as if it was part of its general revenue. If the Council had not carried out the specific items of work which it now seeks to charge to the leaseholders it would not have received the CESP funds. In those circumstances for it to retain the CESP funding while recovering the leaseholders' contributions towards the cost of the work in full would amount to double recovery."

Mr Holbrook emphasised the point that if the council had not carried out the specific items of work that it sought to charge to the leaseholders it would not have received the CESP funds. It was upon that basis that the Tribunal found that to retain the CESP funding while recovering the leaseholder's contributions towards the cost of the work in full would amount to double recovery.

48. In the present case the application for the grant and the award of the grant each proceeded upon a broad basis. The money was not applied for nor was it awarded upon the basis that the money would be spent upon any particular works or in any particular way or upon any particular property. It could not be said so far as concerns any particular item of work which Barnet sought to charge to the appellant through the service charge that Barnet had received grant monies in respect of that item of work from LDA.

49. Mr Holbrook referred to the decision of the Upper Tribunal in *Craighead v Homes for Islington Limited* [2010] UKUT 47 (LC). In paragraph 18 of that decision the Upper

Tribunal (Mr Andrew Trott FRICS) referred to the provisions of section 20A of the 1985 Act and its interpretation by His Honour Judge Cooke sitting in Central London County Court in *Haringey Borough Council v Ball* [2004] unreported where Judge Cook at paragraph 27 stated:

> "… what it [Section 20A] shows (and this is the whole point) is that, absent a special provision, grants (or to my mind any other type of outside funding) are not regarded for the purpose of this part of the law as affecting what the leaseholder is charged for by way of service charge."

Mr Holbrook submitted that this was a correct analysis and that a lessor's source of funding to meet the costs incurred in meeting its obligations under the lease was irrelevant to a lessee's service charge liability.

50. Mr Holbrook submitted that, for the foregoing reasons, Barnet was entitled to recover service charges in the amount claimed unless the appellant could show that she had an equitable set off based upon her counterclaim in relation to the payment of grant.

51. So far as concerns the question of whether the appellant had some entitlement to claim a share of the grant money on the basis of a claim for unjust enrichment, Mr Holbrook referred to Chitty Vol 1 (2012) at paragraph 29-017 and following. He pointed out that the appellant had no legal right to any share of the grant money either pursuant to the contract between her and Barnet (i.e. the lease) or under section 19 of the 1985 Act. Also he submitted there was no double recovery in the present case by Barnet and accordingly Barnet had not been enriched in any relevant sense, such that there could be no unjust enrichment here. In any event any enrichment was not unjust because Barnet had in fact given the appellant a substantial credit out of the grant money. Accordingly if (contrary to his principal argument) the appellant had any equitable right in relation to the grant money, this equitable right had been adequately satisfied.

Discussion

52. I consider first this last point regarding unjust enrichment. Chitty at paragraph 29-017 states in relation to the elements of unjust enrichment:

> "A claim in unjust enrichment is a claim in debt and not for damages and is a claim which is not founded on the commission of a wrong. The principle of unjust enrichment requires: first, that the defendant has been enriched by the receipt of a benefit; secondly, that this enrichment is at the expense of the claimant; thirdly that the retention of the enrichment be unjust and finally that there is no defence or bar to the claim."

Barnet has been enriched by the receipt of the benefit, namely the payment of the grant by LDA. However this enrichment has not been at the expense of the appellant. There is nothing to indicate that the appellant could have obtained any grant herself from LDA (or any equivalent grant from any other funder) if Barnet had not itself applied for and received the LDA grant. No expense has been occasioned to the appellant by reason of the receipt by Barnet of the grant from LDA. Separately from the foregoing point, there

is in my judgement nothing unjust in the retention by Barnet of the grant money. For those separate reasons the appellant can have no restitutionary claim against Barnet for some proportion of the grant money.

53. I do not overlook the fact that in its application to LDA for the grant Barnet indicated that the estimated total cost of the proposed major works was £14.1m and Barnet did not indicate that it proposed to charge the leaseholders a proportion of this cost through the service charge. As things have turned out the total cost was about £9.4m and Barnet has charged a substantial contribution to the cost of the works through the service charge. It is possible that the terms of the grant as between LDA and Barnet would have enabled LDA to complain about this situation and to ask for repayment of some proportion of the grant. However there is no evidence before me that LDA would in fact have been entitled to do so. More importantly even if LDA were so entitled, this would be a matter as between LDA and Barnet in respect of which the appellant could have no status or rights.

54. I accept Mr Holbrook's argument that the Upper Tribunal's decision in *Oliver v Sheffield City Council* can be distinguished. In that case money was made available by way of grant for specific items of work on individual buildings and once such work had been completed the qualifying work to each building was inspected and approved by an independent chartered surveyor (see paragraph 113 of decision). Accordingly the council in that case received from a commercial third party funds specifically intended to meet the cost of works referable to the lessee's flat. It was in these circumstances that the Upper Tribunal decided that the council had not "incurred", within the terms of the lease, the costs of the works which had been funded in this manner. In the present case the grant was applied for and awarded upon a much broader and unspecific basis. All that was specified by way of the required outcome was that there should be a minimum output target of 179 homes improved. Barnet would appear upon the facts of the present case to have had a far wider discretion as to how the grant money should be spent than was available to Sheffield City Council.

55. I also accept Mr Holbrook's argument that Barnet was not under any obligation enforceable by LDA either to lay out any particular amount of the grant money on works specifically for the benefit of the appellant or any other owner of a leasehold flat or to give credit for any particular proportion of the grant money to the appellant or any other owner of a leasehold flat. If this is so then, still less, could Barnet be under any obligation enforceable by the appellant to do so.

56. The circumstances in which the grant was made available included circumstances regarding the existence of legislation and directions regarding the topic of whether grants received by a lessor should be available for the credit of a lessee who might otherwise be required to pay a service charge in respect of works which the lessor paid for in whole or in part with the grant money. Section 20A of the Landlord and Tenant Act 1985 as amended makes provision regarding the limitation of service charges in respect of grant-aided works. It is not suggested that the grant payable in the present case falls within those provisions. Also directions were given in 1997 by the Secretary of State for the Environment giving social landlords a discretion in certain cases to reduce service

charges which would otherwise be payable in respect of works which had been funded in whole or part through some grant or other financial assistance. However these directions were time-limited so as to apply to cases where relevant assistance was granted in respect of an application made before the date when the directions came into force. Accordingly these directions, namely the Social Landlords Discretionary Reduction of Service Charges (England) Directions 1997, can have no direct application in the present case. However what is significant is this. Barnet applied for and was awarded the grant by LDA in circumstances where there existed this legislation, namely section 20A, and these directions. The grant did not fall within the ambit of either. In these circumstances neither LDA nor the appellant could have legitimately expected that the owners of the leasehold flats would be entitled as a matter of right to the credit of some part of the grant money.

57. Against this background it is necessary to turn to the question of whether Barnet is entitled to recover from the appellant the amount of service charges which it claims in respect of the major works to these buildings. This question must turn upon the wording of the appellant's leases and the provisions of the Landlord and Tenant Act 1985 as amended in so far as that makes any relevant provision which is applicable in the present case.

58. Considering first the question of whether the 1985 Act affects the issue before me, this is not a case where there is any relevant challenge (now that the F-tT has made certain rulings against which there is no appeal before me) upon whether the cost of the major works were reasonably incurred and whether the works were of a reasonable standard. Accordingly I accept Mr Holbrook's argument that in the present case section 19 cannot affect the question of whether the appellant owes the sums claimed by way of service charge.

59. The recoverability of the sums claimed by way of service charge in respect of the major works must therefore turn upon the construction of the lease, which provides that Barnet can recover by way of service charge a proportion of Barnet's expenses and outgoings as set out in the Third Schedule. This provides that the expenses and outgoings, a proportion of which the appellant is required to pay, are all costs charges and expenses "incurred or expended" by Barnet upon certain matters.

60. The lease includes provision entitling Barnet to carry out improvements to the buildings and to charge the cost of such works through the service charge. I have not been addressed with any argument (nor is this a live issue in the appeal) that any specific item of work went beyond what Barnet could in principle charge for through the service charge.

61. In consequence Barnet could charge the appellant for the cost of the major works provided that it can be said that, despite the receipt by Barnet of the grant, Barnet had "incurred" the costs of the major works or had "expended" money to meet these costs.

62. Mr Holbrook's argument in effect involved asking and answering three questions, namely:

> Who entered into the relevant contractual obligations? Answer: Barnet.
>
> Who paid the contractors? Answer: Barnet.
>
> Who would have been sued if the contracts had not been honoured or the sums not paid? Answer: Barnet.

Having regard to these answers Mr Holbrook submitted that therefore Barnet had indeed incurred the costs of the major works to the buildings and had done so notwithstanding the grant money had been made available by LDA to pay for a substantial amount of the works.

63. This is in effect the same argument as was advanced to and accepted by His Honour Judge Cooke (sitting at the Central London County Court in 2004 -- decision not reported) in *London Borough of Haringey v Ball.* One of the issues in that case was whether the local authority lessor could recover from the owners of leasehold flats a proportion of the cost of carrying out works which had been grant aided.

64. In the course of the hearing before me Mr Holbrook made reference to and relied upon this decision in *London Borough of Haringey v Ball*, but I was only referred to it to the extent that it was mentioned in *Craighead v Homes for Islington Limited* (see paragraph 49 above). I have however subsequently considered the full judgement upon this point (the judgment is available on the Internet). During the course of the argument before me certain analogies were considered, such as the cost of works funded through an insurance claim or from a tortfeasor. It is interesting to find that the same analogies were considered by Judge Cooke.

65. The argument set out in paragraph 62 above was in substance that advanced by Mr Brock QC to Judge Cooke on behalf of the lessor. I set out below a passage from Judge Cooke's judgement which records the submissions on behalf of the leaseholders, because in the present case the appellant has been acting in person and, while clear courteous and articulate in her presentation, she did not claim any legal expertise. It is therefore instructive to consider what was urged by counsel on behalf of persons in a similar position to her:

> "25. Mr. Ashfield in his able and careful argument for the leaseholders put it quite differently. Focusing on the words "incurred by the Corporation "[Cl 4(2) and "incurred or expended…" [Third schedule], he says the question is whether this means "incurred" or "expended " by the Council from its own resources (and thereby excluding such sources as gifts grants from other or insurances monies, or does it merely mean money passing through the Council's hands as,(I would put it) a conduit pipe. In developing his argument he drew attention to and developed the following analogies

(a) Insurance; absent specific provisions in the lease for the laying out of insurance on repair/reconstruction can a landlord simply pocket the insurance money and charge the leaseholder under the service charge?
(b) A not wholly dissimilar situation where the cost of repair is recovered from a tortfeasor.
(c) Where there is (not uncommonly) an arrangement whereby the Council carries out a repair/work for the benefit of one tenant alone can the Council also charge the long leaseholders through the service charge for the same work? (d) If somebody makes a gift for and thereby pays the Council to carry out some work can the Council recover it also through the service charge?

The answer to all and each of these rhetorical questions must be, says Mr. Ashfield, plainly "No" .In order to achieve that (obviously desirable) answer you construe "incurred" so as to exclude such a situation, and hold that "incurred" or expended" means that what is expended is from the Council's own resources and not resources provided (specifically) by others. If you do that then he says, a similar process of construction should be applied where a specific sum is received from Central Government for expenditure on a specific project on the estate."

66. I, in agreement with Judge Cooke, consider that the answer is given by the analysis in paragraph 62 above. The cost of the major works was incurred by Barnet despite the receipt by Barnet of the grant.

67. As regards the various anomalies raised in the argument recorded in paragraph 65 above, none of these points was really argued in detail before me (and it seems also they were not argued in detail before Judge Cooke). However I agree with Judge Cooke that these situations raised in argument in paragraph 65, which might be considered obviously unjust if the lessor was entitled to recover the cost of such works through the service charge, may well be capable of solution on the individual principles applicable to each of those situations and do not justify a forced construction of whether a cost or expense has been "incurred" within the meaning of the lease. For instance, as regards works paid for by the lessor out of money received from an insurance claim, the lessee will invariably have paid a contribution towards the insurance premiums and in these circumstances the lessor may have fiduciary duties towards the lessee in respect of the insurance money. Similarly a fiduciary duty may arise if money is paid to the lessor by a tortfeasor specifically in respect of a particular item of expenditure to mend damage which the tortfeasor has done to the building. The cost of works carried out by a lessor specifically for the benefit of one lessee and pursuant to a private arrangement between lessor and lessee may be difficult to regard as part of the service charge at all. As regards the analogy of the gift it may be that, if the lessor retained the gift and nonetheless imposed the service charges in respect of the works paid for by the gift, the donor might legitimately argue that the gift was conditional upon money being spent for the credit of the lessees and might be entitled to demand the gift back.

68. I refer again to the matters mentioned in paragraph 56 above. These serve to confirm me in the conclusion that in circumstances such as the present (which as I have already explained are distinguishable from those in *Oliver v Sheffield City Council*) the position in general, and absent specific provisions such as those in section 20A or in the 1997 Directions, is that the receipt by a local authority lessor of a grant in respect of works to a building is not regarded as affecting what the owner of a leasehold flat can properly be charged through the service charge.

69. Accordingly I conclude that in the calculation of the service charge payable by the appellant in accordance with the terms of her leases she is not entitled to require there be disregarded the cost of works paid for by Barnet from money received by way of grant from LDA. Nor does the appellant have any claim against Barnet entitling her to some specific proportion of the grant.

70. In fact Barnet has allowed the appellant a substantial credit against what would otherwise have been her service charge in order to take into account the receipt of the grant. Barnet chose to consult the lessees under section 20 of the 1985 Act on a basis which made clear Barnet's intention to allow a substantial credit for each lessee to take into account receipt of the grant. Having regard to my analysis above Barnet would have been within its rights to conduct the consultation exercise without any such offer of a credit from the grant money. In these circumstances Barnet might well have met substantial and potentially legitimate objection regarding the proposed works. Barnet chose to offer this substantial credit. Having done so it must of course hold good to that offer, as indeed it has done. Having undertaken this consultation on the express basis of making available substantial credit from the grant for the lessees Barnet could scarcely then have withdrawn such a credit, the lessees in the meantime having relied upon this promise when deciding what if any consultation responses to make in respect of the proposed works.

71. In the result therefore I reach the same conclusion as reached by the F-tT namely that the appellant has no legitimate complaint that she has been given insufficient credit for the LDA grant when calculating the amount of the service charge payable by her.

Conclusion

72. The appellant's appeal is dismissed.

His Honour Judge Nicholas Huskinson

Dated: 25 June 2015