
**LRX/60/2005**

**LANDS TRIBUNAL ACT 1949**

***Service charges – Procedure – Permission to appeal given by LVT - Construed in light of application – Reasonableness – Not reasonable to incur costs covered by guarantee – Historic breach increasing cost of repair – Expenditure reasonably incurred – not recoverable under covenant – S.27A of Landlord and Tenant Act 1985 – LVTs' jurisdiction.***

**IN THE MATTER OF AN APPEAL AGAINST THE DECISION OF THE LEASEHOLD VALUATION TRIBUNAL**

**BETWEEN** **CONTINENTAL PROPERTY VENTURES INC** **Appellant**

**and**

**MR. JEREMY WHITE**
**and**
**MRS PHILIPPA WHITE** **Respondents**

**Re: Flat 4, 36 Buckingham Gate, London SW1 E 6PB**

**Before: His Honour Michael Rich QC**

**Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL**
**On 10 February 2006**

*Mr Titmuss* of Layard Horsfall Limited solicitors for Appellant.
*Mr Justin Bates* instructed by College of Law pro bono unit for Respondents.

**The following cases are referred to in this decision:**

*Aylesbond Estates Limited v Macmillan and Others* (on 24 November 1998, unreported)
*Canary Riverside Pte v Schilling* (LRX/65/2005 decision dated 16 December 2005)
*Filross Securities v Midgley* (Peter Gibson, Aldhous and Potter L.JJ., 21 July 1998)
*Hanak v Green* [1958] 2 QB 9
*Loria v Hammer* [1989] 2 EGLR 249
*Wandsworth London Borough v Griffin* [2002] 2 EG 105

## DECISION

### Introductory

1. The respondents are lessees of Flat 4 at 36 Buckingham Gate of which the appellant is the freeholder. I shall refer to them respectively as "the tenants" and "the landlord". The management of the block has passed through a number of hands since 1990, and the Leasehold Valuation Tribunal ("LVT") to whom the tenants made application under s.27A of the Landlord and Tenant Act 1985 was critical of the state of the accounts. None the less of the four items of expenditure in respect of which the tenants sought a determination that the service charge was not payable, on the ground that the costs had not been reasonably incurred, the LVT reached conclusions favourable to the landlord in three cases.

2. In respect of the costs of damp-proofing and redecorating Flats 1 and 2 and the communal hall for which a total cost of £55,174.67 was accepted before the LVT as having been included in the accounts, the LVT however determined that a sum of only £3,000 plus VAT (making £3,525) had been reasonably incurred. The LVT, in its Decision dated 4 April 2005, accordingly determined that only 3.85% of that sum was payable by the tenants to the landlord by way of service charge in respect of such works.

3. The reasons for such reduction were twofold. Firstly the LVT held that the totality of the works to Flat 1 would have been covered by a by a guarantee given by Protim in respect of damp-proofing work carried out in 1994: this, it was agreed before me, accounted for £38,060.52. I shall refer to this work to Flat 1 as "the Guarantee Works". Secondly the LVT held that the works to Flat 2 (for which, by deduction, a service charge of £17,114.15 had been charged) were made necessary because the landlord had neglected to carry out repairs to a leaking pipe within a reasonable time. Had the landlord complied with its repairing covenant the cost, the LVT held, would have been only £3,525 (including VAT). Accordingly the sum reasonably incurred was held by the LVT to be only such sum as would have been incurred but for what was described as "the historic breach".

4. By Application dated 18 April 2005 the landlord sought permission to appeal against the LVT's determination reducing the costs in respect of which service charge was payable on these grounds. The grounds of the application were:

> ".. that the LVT's interpretation of section 19(1)(a) [of the 1985 Act] is wrong, and that section means precisely what it says, namely that 'relevant costs shall be taken into account for a period .. only to the extent that they are reasonably incurred', and there is no need to imply the words 'and the liability to incur them' between the words 'they'and 'are'.
> "Because of its wrong interpretation of section 19(1)(a) the LVT wrongly took account of irrelevant considerations, namely whether or not it was reasonable for the landlord to investigate the damp repair between 1994 and 1997 .."

Accordingly the Application claimed that:

> "The point at issue is a pure point of law on the interpretation of what is probably the most important provision of the Landlord and Tenant Act 1985 so far as LVTs are concerned."

The LVT accordingly gave permission to appeal to the Lands Tribunal saying

> "We accept .. that the application raises a point of potentially wide implication. Namely whether the words 'reasonably incurred' in Section 19(1)(a) permit consideration of the circumstances in which the costs were incurred."

It is this that the LVT said was an issue "of considerable importance [which] goes to the heart of the Tribunal's jurisdiction", which justified their giving permission to appeal.

5. When however the landlord lodged its statement of case on 8 August 2005 it raised not only the "Historic Breach Argument", but also, under the heading "Causation" said

> "Secondly (in the alternative) the Tribunal's decision was flawed on the facts and causation of damage."

The statement of case on behalf of the tenants dated 3 September 2005 therefore said

> "This appeal raises one question of law and one of fact"

and proceeded to respond to both. It is in those circumstances that the Registrar made an Order dated 29 September 2005 that:

> "Both parties must file and serve the report of any expert witness that you intend to call and the witness statements of any witness of fact you intend to call within 28 days .."

Accordingly the landlord did so file and serve both an expert's report and a witness statement. and prepared a statement of issues for agreement in which it was asserted that

> "This appeal raises one important question of law, and <u>two</u> questions of fact" (my underlining).

6. It is fair to those acting on the landlord's behalf to note that they had said in the last paragraph of their somewhat discursive Application for permission to appeal that

> "Finally, the Respondent [landlord] will submit to the Lands Tribunal that the LVT's decision in relation to the recoverability of the costs of remedying the damp disrepair in 2002 is, with respect to the LVT, patently erroneous."

This was not however, on any fair reading of the application the "pure point of law" which was said to be the subject matter of the proposed appeal, nor can it be said that the LVT either understood this issue of fact to be a ground of the proposed appeal, nor can they be said to have granted permission to appeal on such ground. When, at the hearing, having given notice before the hearing, I raised the question of the scope of the appeal, Mr Titmuss, for the landlord,

sought the permission of the Tribunal to appeal in relation to the Guarantee Works. The LVT had, however reached its conclusion as to the extent of the work which would be covered by the guarantee, on the basis of the evidence called before it. The landlord, relying on its irrelevance, elected to call no evidence on this matter. Where a party wishes to appeal on an issue of fact, as to which he has not called evidence before the LVT, permission will normally be refused, unless there is some good reason for that failure. If the landlord's Application for permission to appeal is to be construed as including an application to appeal on this issue of fact, and the LVT is therefore to be construed as having refused such application, I would have had jurisdiction to grant permission, if the application to the Lands Tribunal had been duly made. If however all those preliminaries had been satisfied, I would not, for the reason explained, have granted permission.

7. This appeal, accordingly was limited to the issue of the proper construction of s. 19(1)(a) of the Act of 1985. I have dealt at such length with the history of the Application for Permission only because it shows the necessity for precision in such applications, and, where there is doubt as to their scope, of precision in the terms of any permission. It is the aim of this Tribunal, so far as possible, to deal with appeals from the LVTs by way of review, rather than rehearing, and where a rehearing is necessarily involved, directions will be given accordingly (see Practice Direction 5.8). Directions given as a result of assertion in the Statement of Case, cannot, however, themselves constitute the giving of permission for an appeal beyond that granted by the LVT.

**Guarantee Works**

8. The landlord's proposition that s.19(1)(a) of the Act of 1985 means precisely what it says raises no difficulty for the LVT's conclusion in regard to the Guarantee Works. The Section provides:

> "(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"

The LVT held as a matter of fact that the landlord could have had the Guarantee Works carried out under the guarantee at no charge. It concluded therefore that to carry out those works at a cost was to incur the cost other than reasonably. Unless there was evidence of some disadvantage or good reason to reject the availability of the works without cost in favour of incurring a cost, this seems to me to be incontrovertible.

9. Mr Titmuss was unable to explain what limited construction of the words used in the sub-section, could avoid that result. He relied on the written submissions made on behalf of the landlord to the LVT by Mr Michael Daiches, but those were directed exclusively to the question whether the subsection entitles the tribunal to hold that costs incurred as a result of historic breach are capable of being held to have been incurred other than reasonably. As Mr Titmuss realised, the only basis upon which it was arguable that the LVT was wrong as to the cost of the Guarantee Works would be evidence that they could not or would not have been carried out, either in part or at all, under the guarantee. That is the matter of fact, which the

landlord decided not to dispute before the LVT except by argument, which in the absence of evidence failed. The appeal in respect of this part of the LVT's decision must therefore fail also.

**Historic Breach**

10. Mr Daiches' submission to the LVT had been that

> "Where a landlord has covenanted to maintain and repair premises, the proper and reasonable costs of maintaining and repairing the premises will always be "reasonably incurred" within the meaning of s.19(1)(a) of the Landlord and Tenant Act 1985 notwithstanding that some or all of the costs would not have been incurred had the landlord or his predecessors in title timeously complied with the covenant. Any other construction of the subsection involves construing the word "incurred" to mean, not "rendered legally liable to pay" but "brought about" or "caused"."

As I follow the LVT's decision they accepted that the construction which they adopted did require an extended meaning of the word "incurred", but they adopted a purposive construction of the Act as follows:

> "The narrow interpretation proposed by Mr Daiches would restrict the remedy introduced by the Act: some tenants would find themselves having to pursue their remedies before the Courts whilst others would have difficulty in pursuing their applications before the Tribunal without the assistance of legal representation. We did not consider that that was what Parliament intended. We considered that the purpose of section 19 was to introduce a test of reasonableness in a wider rather than a narrower sense. The words of the section should be given their natural meaning to encompass both the costs actually incurred and the circumstances in which they were incurred including past disrepair."

In my judgement the recourse to the supposed intention of Parliament is a dangerous approach to statutory construction. Words should be given their natural meaning, and it should not be assumed that Parliament intends to deprive a person of his contractual rights, unless clear language is used. If, of course, the "natural meaning" of "incurred" did encompass the circumstances in which the costs were incurred other than those relevant to whether, at the date when they are incurred, it is or is not reasonable to incur them, then there would be no need for resort to such supposed purposive construction. But that is not the natural meaning of "reasonably incurred" which by the tense used and the incorporation of the definition of "relevant costs" in s.18(2), directs the question to the circumstances appertaining when the costs are in fact incurred.. That is why the LVT thought it necessary to recount the history of this legislation in order to justify giving an extended meaning to its provisions.

11. It is right that Mr Norman Rose FRICS sitting in this tribunal in *Wandsworth London Borough v Griffin* [2002] 2 EG 105 had accepted a submission which supports the LVT's construction. He said at p.110 G:

> "Mr Cunningham also suggests that the appellants' maintenance policy in the past increased the cost of overhauling the windows. If the windows had been regularly

> repaired and redecorated, he implies, the result of the [life cycle costing] might have been different. In my judgement, to the extent that costs are incurred as a result of past neglect on the part of the lessor, they are not "reasonably incurred" for the purposes of section 19(1)(a)."

I accept that this short statement has a superficial attractiveness which might be thought to justify the conclusion that such is the "natural meaning" of the words. But the "relevant costs" which by s.19(1)(a) are limited to what is "reasonably incurred" are defined by s.18(2) as the "costs .. incurred ..by the landlord .. in connection with the matters for which the service charge is payable" Those matters include "repairs maintenance etc" . The question of what the costs of repairs is does not depend upon whether the repairs ought to have been allowed to accrue. The reasonableness of incurring costs for their remedy cannot, as a matter of natural meaning depend upon how the need for remedy arose.

12. Mr Justin Bates, for the tenants, in a well-researched submission in support of the LVT's Decision referred me to three other LVT decisions where the dictum of Mr Rose was accepted, although as in Mr Rose's case not applied on the facts. Those decisions however contained no reasoning which has persuaded me that this is a possible construction of the subsection. I do not therefore spend time to explore the rival anomalies which arise whether such expenditure can or cannot be determined to be unreasonably incurred by reason of historic breach.

13. I think that the fears of the LVT that a tenant may have to pursue his remedies in the Courts in the event that a landlord incurs greater costs than he would have, but for his own historic breach, misunderstands what has been the effect of s.27A upon the conclusion which Mr John Lindsay QC (as he then was), sitting as a deputy judge of the Chancery Division, reached in *Loria v Hammer* [1989] 2 EGLR 249. He said, at the foot of p.258:

> "Mr Powell-Jones dealt with the interrelation in this particular case between the landlord's ability to recover his expenditure on repairs by way of service charge from the lessees and the landlord's covenant to repair… Mr Powell-Jones submits that the lessor's expense in a timely performance of his repairing covenant may properly be passed on to the lessees but that the consequences of his not punctually performing his covenant, he says, may not. It is of the nature of building defects that they get worse with the passage of time, often at an accelerating rate. A stitch in time, he reminds me, can save nine; the landlord can, as it were, recover the cost of the timely one stitch but, if he fails to make that one stitch, he cannot later pass on the cost of the nine which would have become necessary simply because the one was not made or was not made in good time."

On this basis on the facts of that case the Judge deducted £150 from the sums payable by way of service charge for repairs resulting from water incursion. Mr Daiches was therefore mistaken in suggesting that these observation were *obiter*. They were part of the reasoning leading to the actual decision in that case, and at least in so far as the failure to place the one stitch was a matter of neglect, I entirely accept the rightness of Mr Lindsay's conclusion.

14. One reason for the correctness of Mr Lindsay's conclusion is that there can be no doubt that breach of the landlord's covenant to repair would give rise to a claim in damages. If the breach results in further disrepair imposing a liability on the lessee to pay service charge, that

is part of what may be claimed by way of damages. At least to that extent it would, as was held by the Court of Appeal in *Filross Securities v Midgley* ( Peter Gibson, Aldhous and Potter L.JJ., 21 July 1998), give rise to an equitable set-off within the rules laid down in *Hanak v Green* [1958] 2 QB 9, and as such constitute a defence. This would not mean that the costs incurred for the "nine stitches" were not reasonably incurred. It would however mean that there would be a defence to their recovery. What the LVT was engaged upon was determining whether these costs were "payable" within the meaning of s.27A. They held that they were not, because they had not been reasonably incurred. That, in my judgement was a mistaken reason. But the conclusion at which they arrived, upon their findings of fact, was none the less correct and the appeal must be dismissed.

**Jurisdiction**

15. It was submitted that the determination of such claims for damages was outside the jurisdiction of the LVT. I accept that the LVT has jurisdiction to determine claims for damages for breach of covenant only in so far as they constitute a defence to a service charge in respect of which the LVT's jurisdiction under s.27A has been invoked. I see no reason of principle why such jurisdiction should not extend to determining even a claim for loss of amenity or loss of health arising from breach of a repairing covenant, but would draw attention to what I said in *Canary Riverside Pte v Schilling* (LRX/65/2005 decision dated 16 December 2005) as to the desirability of the LVT's exercising restraint in the exercise of the extended jurisdiction given to it by the Commonhold and Leasehold Reform Act 2002. I said at paragraph 42 and following of my Decision:

> "42. When the issue [as to the applicability of the Unfair Terms in Consumer Contracts Regulations 1999] was raised in the course of the Costs application, Mr Fancourt QC submitted that the LVT had no jurisdiction to consider the matter. But s. 27A of the Act of 1985, inserted by s.155 of the Act of 2002 provides, without limitation that "an application may be made to the leasehold valuation tribunal for a determination whether a service charge is payable". Mr Fancourt raised both before the LVT and before this Tribunal a number of examples of issues which it would hardly be appropriate for the LVT to undertake to determine, at least if another more appropriate tribunal was seized of the matter. This, however does not mean that Parliament has not also given the LVT jurisdiction to determine such issues.
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> 43. No doubt, if a party to proceedings before a LVT takes proceedings for the determination of such an issue before what the LVT accepts is a more appropriate court, the LVT will, as it did in the course of the Service Charges application adjourn its proceedings pending such determination. It has power so to do under its inherent jurisdiction to regulate its own procedure. That this would be a reasonable and proper course if an issue were raised, to take Mr Fancourt's examples, as to voidability for mistake, forgery or misrepresentation, I do not doubt. Such matters are better determined under Court procedures and by judges, rather than by specialist tribunals, encouraged to adopt comparatively informal procedures.
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> 44. I should take the same view where the LVT has jurisdiction to determine only one aspect of a matter better determined as a whole. The LVT, although, as I think, entitled to decide whether a term is not binding because unfair, has no jurisdiction

> thereupon to make a determination whether the lease shall continue in existence without the alleged unfair term. It may well therefore regard it as convenient, if other proceedings are brought to determine whether service charge is payable under a term said not to be binding because unfair, to adjourn an application within its jurisdiction, pending such determination
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> 45. I can see no basis, however, for saying that the LVT lacks jurisdiction to determine any issue not expressly the subject of some other tribunal's exclusive jurisdiction, if determination of that issue is essential to determining whether "a service charge is payable." That is the issue which s.27A gives the LVT jurisdiction to determine. That must include any issue necessary for or incidental to such determination….."

16. The decision of the Court of Appeal (Tuckey LJ. and Cazalet J.) in *Aylesbond Estates Limited v Macmillan and Others* (on 24 November 1998, unreported), to which Mr Titmuss drew my attention, is not in point. It was concerned with the appropriateness of transferring an issue to the LVT under s.19(2A) of the Act as amended by the Housing Act 1996, which gave the LVT jurisdiction to determine whether costs had been reasonably incurred. S.155 of the Commonhold and Leasehold Reform Act 2002 gives jurisdiction to determine whether service charge is "payable". That the costs have not been reasonably incurred is only one reason why it might not be payable. In any case the questions identified as outside the jurisdiction of the LVT do not arise in this case: disputed questions of forfeiture and relief from forfeiture and damages for breach of covenant other than the covenant to repair. Those are not matters within the jurisdiction of the LVT even as extended under the Act of 2002, unless the breach of covenant can be pleaded as an equitable set-off. Moreover the issue before the Court of Appeal was whether, as a matter of discretion, to transfer a case before the County Court to the LVT. Although the LVT's jurisdiction has been vastly extended, it does not follow that the matters in respect of which the LVT ought to determine to exercise such jurisdiction have been equally extended. As I pointed out in the *Canary Riverside* Case the LVT may, as a matter of its discretion, think it inappropriate to exercise its jurisdiction, which it holds concurrently with the County Court, at least where one party asks it not to do so, in a matter where the LVT accepts that the nature of the issues makes a court procedure more appropriate.

17. I accordingly dismiss this appeal. Any application for costs within the limits of s.155 (6) of the Act of 2002 must be made, setting out the conduct relied upon, within 14 days of the date of this Decision which will otherwise become final on that date.

Dated 15 February 2006

His Honour Michael Rich QC