LRX/102/2005

LANDS TRIBUNAL ACT 1949

LANDLORD AND TENANT – service charges – lease granted under Right to Buy legislation – improvement contributions – ascertainment of reference period – section 125 notices specifying reference periods notices under section 128(4) specifying later periods – construction of leases in light of these – Landlord and Tenant Act 1985 – appeals allowed

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

BETWEEN **(1) NICHOLAS HYAMS**
(2) EMMA ANDERSON **Appellants**

and

WILFRED EAST HOUSING CO-OPERATIVE LIMITED **Respondent**

Re: Flats 9a and 11 Corbin House
Bromley High Street
London E3 3BG

Before: The President

Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL
on 9 October 2006

Nr Nicholas Hyams, appellant, in person
Mr John Anderson for Miss Emma Anderson, appellant, with permission of the Tribunal
Christopher Baker and *Rebecca Cattermole* instructed by Devonshires for the respondent

The following cases are referred to in this decision:

East v Pantiles Plant Hire Ltd [1982] 2 EGLR 111
Capital and Counties Freehold Equity Trust Ltd v BL plc [1987] 2 EGLR 49

The following further cases were referred to in argument:

Sheffield City Council v Jackson (1998) 31 HLR 331
Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749
Holding & Barnes plc v Hill House Hammond Ltd [2001] EWCA Civ 1334
Littman v Aspen Oil (Banking) Ltd [2005] EWCA Civ 1579
Copping v Surrey County Council [2006] HLR 16
Bristol City Council v Lovell [1998] 1 WLR 446
Dance v Welwyn Hatfield District Council (1990) 22 HLR 339

DECISION

Introduction

1. This is an appeal from a decision of the leasehold valuation tribunal for the London Rent Assessment Panel under section 27A of the Landlord and Tenant Act 1985 determining in the respondent's favour the liability of the appellants to pay service charges for 2004 of £4,436,63. The respondent is a housing co-operative which owns the freehold land at 1-90, 9A, 30A, 46A, 57A and 77A Corbin House, Bromley High Street, Bow. The appellants, as assured tenants, had each exercised the right to buy their flats, respectively numbers 9A and 11 Corbin House, under Part V of the Housing Act 1985. They contended in their applications to the LVT that they were not liable to pay the service charges in question because, they said, these related to costs incurred before their leases were granted. On 20 October 2005 I gave permission to appeal against the LVT's determination.

The statutory provisions

2. The provisions in Part V of the 1985 Act, so far as applicable to flats, operate as follows. Section 118 confers on a secure tenant of a flat the right to be granted a lease. That right is subject to the conditions and exceptions stated in Part V. The tenant claims to exercise this right by serving written notice on the landlord under section 122. Under section 124 the landlord must give notice either admitting the right or denying it and explaining why. If the right is established, section 125, supplemented by sections 125A, 125B and 125C, requires the landlord to give notice stating the price and how it has been arrived at, the provisions to be contained in the lease, and estimates and other information in relation to service charges and improvement contributions. Section 128 enables a tenant, if he disputes the value of the flat, to have it determined by the district valuer. Under section 125D, after the tenant has received the landlord's section 125 notice and any notice stating the effect of a determination by the DV, he must serve notice stating either that he intends to pursue his claim or that he withdraws the claim. Section 138 provides that, where a secure tenant has claimed to exercise the right to buy and that right has been established and all matters relating to the deed or grant have been agreed or determined, the landlord must grant to the tenant a lease of the flat.

3. In relation to the issues that arise in the present appeals, the following sections in particular are relevant:

> "**122 Tenant's notice claiming to exercise right to buy**
>
> (1) A secure tenant claims to exercise the right to buy by written notice to that effect served on the landlord.
>
> (2) In this part 'the relevant time', in relation to an exercise of the right to buy, means the date on which that notice is served.

125 Landlord's notice of purchase price and other matters

(1) Where a secure tenant has claimed to exercise the right to buy and that right has been established (whether by the landlord's admission or otherwise), the landlord shall –

(a) within eight weeks where the right is that mentioned in section 118(1)(a) (right to acquire freehold), and

(b) within twelve weeks where the right is that mentioned in section 118(1)(b) (right to acquire leasehold interest),

serve on the tenant a notice complying with this section.

(2) The notice shall described the dwelling-house, shall state the price at which, in the opinion of the landlord the tenant is entitled to have the freehold conveyed or, as the case may be, the lease granted to him and shall, for the purpose of showing how the price has been arrived at, state –

(a) the value at the relevant time,

(b) the improvements disregarded in pursuance of section 127 (improvements to be disregarded in determining value), and

(c) the discount to which the tenant is entitled, stating the period to be taken into account under section 129 (discount) and, where applicable, the amount mentioned in section 130(1) (reduction for previous discount) or section 131(1) or (2) (limits on amount of discount).

(3) The notice shall state the provisions which, in the opinion of the landlord, should be contained in the conveyance or grant.

(4) Where the notice states provisions which would enable the landlord to recover from the tenant –

(a) service charges, or

(b) improvement contributions,

the notice shall also contain the estimates and other information required by section 125A (service charges) or 125B (improvement contributions).

125A Estimates and information about service charges

(1) A landlord's notice under section 125 shall state as regards service charges (excluding, in the case of a flat, charges to which subsection (2) applies) –

(a) the landlord's estimate of the average annual amount (at current prices) which would be payable in respect of each head of charge in the reference period, and

(b) the aggregate of those estimated amounts,

and shall contain a statement of the reference period adopted for the purpose of the estimates.

(2) A landlord's notice under section 125 given in respect of a flat shall, as regards service charges in respect of repairs (including works for the making good of structural defects), contain –

(a) the estimates required by subsection (3), together with a statement of the reference period adopted for the purpose of the estimates, and

(b) a statement of the effect of –

paragraph 16B of Schedule 6 (which restricts by reference to the estimates the amounts payable by the tenant), and section 450A and the regulations made under that section (right to a loan in respect of certain service charges).

(3) The following estimates are required for works in respect of which the landlord considers that costs may be incurred in the reference period –

(a) for works itemised in the notice, estimates of the amount (at current prices) of the likely cost of, and of the tenant's likely contribution in respect of, each item, and the aggregate amounts of those estimated costs and contributions, and

(b) for works not so itemised, an estimate of the average annual amount (at current prices) which the landlord considers is likely to be payable by the tenant.

125B Estimates and information about improvement contributions

(1) A landlord's notice under section 125 given in respect of a flat shall, as regards improvement contributions, contain –

(a) the estimates required by this section, together with a statement of the reference period adopted for the purpose of the estimates, and

(b) a statement of the effect of paragraph 16C of Schedule 6 (which restricts by reference to the estimates the amounts payable by the tenant).

(2) Estimates are required for works in respect of which the landlord considers that costs may be incurred in the reference period.

(3) The words to which the estimates relate shall be itemised and the estimates shall show –

(a) the amount (at current prices) of the likely cost of, and of the tenant's likely contribution in respect of, each item, and

(b) the aggregate amounts of those estimated costs and contributions.

125C Reference period for purposes of ss 125A and 125B

(1) The reference period for the purposes of the estimates required by section 125A or 125B is the period –

(a) beginning on such date not more than six months after the notice is given as the landlord may reasonably specify as being a date by which the conveyance will have been made or the lease granted, and

(b) ending five years after that date or, where the notice states that the conveyance or lease will provide for a service charge or improvement contribution to be calculated by reference to a specified annual period, with the end of the fifth such period beginning after that date.

(2) For the purpose of the estimates it shall be assumed that the conveyance will be made or the lease granted at the beginning of the reference period on the terms stated in the notice.

125D Tenant's notice of intention

(1) Where a notice under section 125 has been served on a secure tenant, he shall within the period specified in subsection (2) either –

(a) serve a written notice on the landlord stating either that he intends to pursue his claim to exercise the right to buy or that the withdraws that claim ....

126 Purchase price

(1) The price payable for a dwelling-house on a conveyance or grant in pursuance of this Part is –

(a) the amount which under section 127 is to be taken as its value at the relevant time, less

(b) the discount to which the purchaser is entitled under this Part.

(2) References in this Part to the purchase price include references to the consideration for the grant of a lease.

127 Value of dwelling-house

(1) The value of a dwelling-house at the relevant time shall be taken to be the price which at that time it would realise if sold on the open market by a willing vendor –

(a) on the assumptions stated for a conveyance in subsection (2) and for a grant in subsection (3),

(b) disregarding any improvements made by any of the persons specified in subsection (4) and any failure by any of those persons to keep the dwelling-house in good internal repair, and

(c) on the assumption that any service charges or improvement contributions payable will not be less than the amounts to be expected in accordance with the estimates contained in the landlord's notice under section 125.

128 Determination of value by district valuer

(1) Any question arising under this Part as to the value of a dwelling-house at the relevant time shall be determined by the district valuer in accordance with this section…

(4) As soon as practicable after a determination or re-determination has been made in pursuance of this section, the landlord shall serve on the tenant a notice stating the effect of the determination or re-determination and the matters mentioned in section 125(2) and (3) (terms for exercise of right to buy).

138 Duty of landlord to convey freehold or grant lease

(1) Where a secure tenant has claimed to exercise the right to buy and that right has been established, then, as soon as all matters relating to the grant .... have been agreed or determined, the landlord shall make to the tenant –

(a) if the dwelling-house is a house and the landlord owns the freehold, a grant of the dwelling-house for an estate in fee simple absolute, or

(b) if the landlord does not own the freehold or if the dwelling-house is a flat (whether or not the landlord owns the freehold), a grant of a lease of the dwelling-house,

in accordance with the following provisions of this Part."

4. Under section 139 a grant of a lease executed in pursuance of the right to buy must conform to specified provisions of Schedule 6. Paragraph 14 of that schedule contains implied covenants on the part of the landlord in respect of repair and the provision of services, and paragraph 16A provides that the lease may require the tenant to bear a reasonable part of the costs incurred in carrying out these obligations. Paragraph 16C, so far as material, provides:

"16C.(1) Where a lease of a flat requires the tenant to pay improvement contributions, his liability in respect of costs incurred in the initial period of the lease is restricted as follows.

(2) He is not required to make any payment in respect of works for which no estimate was given in the landlord's notice under section 125.

(3) He is not required to pay in respect of works for which an estimate was given in that notice any more than the amount shown as his estimated contribution in respect of that item, together with an inflation allowance.

(4) The initial period of the lease for the purposes of this paragraph begins with the grant of the lease and ends five years after the grant, except that –

(a) if the lease includes provision for improvement contributions to be payable in respect of costs incurred in a period before the grant of the lease, the initial period begins with the beginning of that period;"

The facts

5. There was no material disagreement on the relevant facts. The parties had agreed a statement of facts, and there was a bundle of documents. Nancy Hunt, a housing manager employed by the respondent, gave evidence, and there was a witness statement from Neil Brand, a solicitor employed by Devonshires, solicitors for the respondent.

6. The first appellant, Nicholas Hyams, gave notice claiming the right to buy under section 122 on 10 October 2002. The respondent gave notice under section 124 acknowledging his right to buy and on 9 April 2003 it gave notice under section 125. This stated the price at which in the landlord's opinion Mr Hyams was entitled to have a 125-year lease to be £82,000 (derived from a market value on 18 October 2002 of £120,000 and a discount of £38,000). It specified an estimated services charge for 2003-4 and a service charge in respect of specified works of repair. Nothing arises on these. The notice then said:

> "6. A Service Charge will be made in relation to the following works of improvement, in respect of which the landlord considers that costs may be incurred in the reference period mentioned below. Such a charge has been calculated as follows:
>
> | Details of works
Estimated amounts (at current prices) | Estimate of your
Likely contribution |
> |---|---|
> | External & environmental works | 4,383 |
> | Underground refuse system | 638 |
> | Aggregate of estimated costs | £5,021" |

The notice stated that the reference period for the estimates would begin on 18 November 2002 and end on 18 November 2007.

7. The notice went on to state what the tenant had to do (as provided for by section 125D, although the section was not referred to) in order to pursue the claim to exercise the right to buy. It said this:

> "8. Within twelve weeks of the service on you of this offer notice (or, if you have exercised your right to a determination or redetermination of value by the District Valuer, within twelve weeks after the service of a notice informing you of the effect of a determination or redetermination of value you must either (1) serve a written notice of intention on the landlord ("a notice of intention" stating that you intend to pursue your claim to exercise the preserved right to buy or that you withdraw that claim."

8. Mr Hyams disputed the value ascribed to the flat, and the matter was referred to the district valuer, who determined the value at £100,000. On 18 September 2003 the respondent served a notice on Mr Hyams in identical form to the notice of 18 October 2002. The content of the notice was the same, except that the price was stated to be £62,000 (£100,000 less the £38,000 deduction), and the reference period was stated to be from 18 September 2003 to 17

September 2008. On 17 October 2003 Mr Hyams wrote to say that he wished to proceed with the purchase. On 26 January 2004 the respondent sent another notice in the same form to Mr Hyams, and in this the reference period was stated to be 18 November 2002 to 18 November 2007 (ie as in the original notice). A covering letter explained that "as a matter of law, the reference period specified in the notice should remain the same as was stated in the original section 125 notice." Mr Hyams's solicitors queried the revision in a letter dated 3 February 2004 and asked what authority there was for it. They said that he was concerned that he might be charged for works which had been completed. No reply to this letter was received, and on 30 March 2004 the lease was signed. On 23 August 2004 the respondent sent to Mr Hyams an "Invoice for major works". This stated the amount due as £4463.63, comprising £3937.23 for garden works and £499.28 for the underground refuse system. Mr Hyams had previously queried his liability to pay the improvement contributions, and he wrote again after receiving the invoice.

9. In the case of Emma Anderson, her notice claiming the right to buy was sent to her on 13 September 2002. On 2 January 2003 she issued a formal notice of delay since she had not received a notice under section 125. On 10 January 2003 a section 125 notice was served specifying a reference period beginning on 5 March 2002 and ending on 5 March 2007 and stating the price at which in the landlord's opinion she was entitled to a lease of 125 years to be £77,000 (based on a market value at 5 February 2002 of £115,000 and a discount of £38,000). The notice contained the same statement in relation to improvement charges as that in Mr Hyams's original section 125 notice, but it specified the reference period as beginning on 5 March 2002 and ending on 5 March 2007.

10. Miss Anderson challenged the valuation, and the DV, having received a copy of the section 125 notice, determined a value of £100,000 in July 2003. Under cover of a letter of 4 August 2003 the respondent sent Miss Anderson a notice that was identical to the section 125 notice that had previously been served, except that the reference period for the improvement contributions estimates was specified as beginning on 28 July 2003 and ending on 27 July 2008. By letter dated 1 September 2003 Miss Anderson confirmed that she would be proceeding with the purchase of Flat 11. She referred to an error in the recent notice, namely that the price should have been the redetermined price of £62,000 post discount. On 4 September 2003 the respondent sent a letter enclosing a further notice in the same form, stating: "Please find enclosed a corrected Section 125 offer notice – please destroy the previous. Perhaps you would be good enough to forward one copy to your solicitor." In the notice the price was stated to be £62,000, based on the valuation at £100,000. The notice, like the one that it was sent to replace, was dated 4 August 2003. Miss Anderson duly passed the notice to her solicitors, and on 17 November 2003 she was granted a lease of Flat 11.

11. The respondent sent Miss Anderson an "Invoice for major works" dated 23 August 2004. This was the same as the one sent to Mr Hyams. She asserted that she was not liable to pay this amount. On 21 February 2005 the respondent wrote to Miss Anderson saying: "Having received the relevant information it is now the Co-ops clear understanding that despite the reference date being changed in error after the second valuation on your flat the original reference period is in fact correct and relates to the date of your original RTB1 form."

12. The leases granted to the appellants were in the same form. Each is stated to be "Lease pursuant to section 133 Housing Act 1988 and Section 171A of the Housing Act 1985 as applied by the Housing (preservation of Right to Buy) Regulations 1993". There is a covenant on the part of the tenant to pay "the Service Charge" as provided in the Fifth Schedule. "The Service Charge" is defined in paragraph 1(2) of the schedule as "such reasonable proportion of Total Expenditure as the Lessors shall state is attributable to the Demised Premises". (In each case the proportion is agreed to be 1/95th, there being 95 flats in Corbin House.) "Total Expenditure" is defined in paragraph 1(1) as the costs incurred by the lessors in carrying out their obligations under the lease "and any other costs and expenses reasonably and properly incurred in connection with the building". Paragraph 8 of the schedule is in these terms:

> "Provided always and notwithstanding anything herein contained it is agreed and declared that the Lessee shall be liable to pay the Service Charge in respect of those items listed in the Notice under the headings 'Itemised Repairs' and 'Itemised Improvements' from the date commencing in the Reference Period (as defined in the Notice) notwithstanding that this date is prior to the date of this Lease but subject to the limitations imposed by paragraphs 16B and 16C of Schedule 6 to the Housing Act."

Clause 1(13) defines "the Notice" as "the Section 125 Notice annexed to this Lease". In neither case was any such notice annexed to the lease.

LVT decision

13. The LVT, in a full and clearly explained decision, rejected the contentions of the appellants that their liability in respect of improvement contributions was limited by the reference periods in the later notices served by the respondent. It held that, considered against the original section 125 notices, the demands were lawful. It expressed the view that, since there was no statutory requirement to re-issue a section 125 notice following a determination of the price by the DV, the original notices in each case remained the effective instrument. It said that the action of the respondent in serving unnecessary section 125 notices had not prejudiced the appellants. They were not being asked to pay any more than the amounts specified in the original notices. On the other hand, the LVT said, the respondent would be prejudiced if they were not obliged to pay the amounts demanded, since the price had been calculated on the basis of those contributions.

The parties' contentions

14. Appearing for his daughter with permission of the Tribunal, Mr Anderson said that his case was based primarily on contract. His daughter had received an offer in the form of the section 125 notice dated 4 August 2003, and he had communicated in writing her acceptance of it. There was therefore a binding contract. The reference period was stated in the notice to start on 28 July 2003, and, since Miss Anderson had accepted her liabilities on the basis of the contents of the notice, that was when her liability in respect of improvements began. The lease referred to the section 125 notice annexed to it. No notice had been annexed, but the clear intention of the parties was that it was the notice of 4 August 2003 that should be annexed. That was the only notice on her file and there was no evidence that the respondent's solicitors,

who were responsible for the lease, ever saw the original version. Mr Anderson said that his daughter's liability was confined to improvement costs incurred during the reference period, and that meant becoming payable during that period. It was only the final payment, therefore, that gave rise to a liability on her part.

15. Mr Anderson contended further that in any event the reference period stated in the original notice was unlawful since it began before the date of the notice itself. Section 125C required the landlord to make a reasonable estimate of the likely date of grant of the lease, and by definition it was impossible for this to be before the issue of the section 125 notice. The lawful solution of the problem of how to take into account improvements carried out before the valuation date (the date of the tenant's originating notice) was for the council to backdate the initial period.

16. On the question of what matters a notice under section 128(4) had to contain, Mr Anderson argued that there were not only the matters referred to in section 125(2) and (3) but also the section 125(4) matters (estimates and the reference period). There was no mention of section 125(4) in section 128(4), but that was because it was not necessary to mention it. Section 125(4) was brought in automatically by section 125(3).

17. Mr Hyams said that he adopted Mr Anderson's submissions to the extent that they were applicable to his own case. It was unlawful to backdate the start of the reference period, so that the notice of 26 January 2004, which contained the same reference period (starting on 18 Novembers 2002) as in the original notice, was in this respect unlawful. The notice of 18 September 2003, which stated the start of the reference period to be that date, 18 September 2003, was not unlawful, and it was on the basis of that notice that he had entered into the lease. Mr Hyams said that he had gained no benefit from the garden works.

18. For the respondent Mr Baker said that, to the extent that each appellant sought to change the validity of the section 125 notice, it was too late to do so because of the structure of the statutory scheme. The appellants could have challenged the validity of the section 125 notice by a notice of delay under section 153A or by way of application to the county court under section 181 or by judicial review. They did not do so, and the process moved through its remaining stages to the grant of a lease in each case at the price determined by the DV. It was accordingly inconsistent for the appellants to seek to take the benefit of the leases and the DV's valuations but to dispute the validity of the section 125 notices.

19. Mr Baker submitted that it was within the scope of section 125C for the respondent to state, as it did in the original section 125 notices, reference periods that ante-dated the eventual grant of the leases. The statutory wording permitted the landlord to choose when the period should start, and it limited the period that could be prescribed in terms of the latest, rather than the earliest date, that it might be. Even if the reference period stated did not comply with section 125C this would not, Mr Baker said, render either the notice or the estimates invalid. The reference period was subsidiary to the requirement to give estimates, and the requirement to state it was directory and not mandatory. At the time the original notices were served Mr Baker said the garden works had not reached the stages of practical completion, although

some payments had already become due. The preferable approach, in any event, was to consider that costs payable in stages were not finally incurred until this notice had been given.

Conclusions

20. The liability of the tenant in each case depends on a construction of the lease, and in particular the definition of "the Notice" as "the Section 125 Notice annexed to this lease". Reference to a notice annexed to the lease was an error because no notice was annexed to the lease. There is no difficulty in correcting this error as a matter of construction. This can be done simply by the deletion of the words "annexed to this lease": see *East v Pantiles Plant Hire Ltd* [1982] 2 EGLR 111, where Brightman LJ (with whom Lawton and Oliver LJJ agreed) said at 112:

> "It is clear on the authorities that a mistake in a written instrument can, in certain limited circumstances, be corrected as a matter of construction without obtaining a decree in an action for rectification. Two conditions must be satisfied: first, there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to be made in order to cure the mistake."

21. Making that deletion, however, does not solve the problem of construction: what notice is "the Section 125 Notice" for the purpose of the definition? Mr Hyams says that in his case it was the notice of 18 September 2003, in response to which his letter of 17 October 2003 stated his wish to proceed with the purchase. For Miss Anderson it is said that the notice was that sent to her on 4 September 2003 as a corrected version of the one that had been sent to her on 4 August 2003, and in response to which she had in her letter of 1 September 2003 confirmed that she would be proceeding with the purchase. In each case, it is to be noted, the notice served was in the form and contained the particulars of a section 125 notice. Each of them was treated by the council as constituting such a notice. Mr Baker's submission is that under the provisions of the Act only one section 125 notice is served, so that the later notices were not section 125 notices despite purporting to be so, and accordingly in each case it was the original notice that constituted "the Section 125 Notice" within the terms of the lease.

22. I accept that the scheme of the Act is for a single section 125 notice to be served and for a notice under section 128(4) to be served in the event that the tenant requires the price to be determined by the DV. I do not accept Mr Anderson's contention that a notice under section 128(4) must contain the particulars required by section 125(4) (estimates and other information in relation to service charges and improvement contributions), so that, in effect section 128(4) requires the service of a replacement section 125 notice. It seems to me to be clear that, since section 128(4) requires a notice containing the particulars in section 125(2) and (3), there is no requirement that the notice should contain the matters referred to in section 125(4).

23. Nevertheless it is open to the parties to an RTB lease to agree to any provisions in the lease that are not contrary to the statutory provisions. They can agree on provisions that differ from those put forward in the original section 125 notice, and they can in particular agree that different estimates for improvement contributions and a different reference period from those set out in the section 125 notice should apply. Under section 138, where the tenant has claimed

the right to buy and that right has been established and all matters relating to the grant have been agreed or determined, the landlord is required to grant a lease to the tenant (and, by necessary implication, this must be on the terms that have been agreed or determined). When Mr Hyams wrote his letter of 17 October 2003 (which was his notice of intention, as requested in paragraph 8 of the replacement section 125 notice of 18 September 2003), all the terms had been agreed. They were those set out in the notice of 18 September 2003. Mr Hyams could therefore have insisted on a lease that embodied those terms. It was not open to the council unilaterally to alter them. But if a lease does not embody the terms that have earlier been agreed between the parties that earlier agreement will not, in the absence of rectification, override the provisions of the lease.

24. It is, however, the lease itself that falls to be construed; and I accept Mr Blake's submission that, having been granted pursuant to the RTB statutory provisions, each of the leases is properly to be construed in the light of those provisions. In order to apply the terms of the lease a document has to be identified as "the Section 125 Notice". While it is right to have in mind for this purpose the sequential process provided for by the Act and the position of section 125 in this process, it is also right to bear in mind, in my judgment, that it is open to the parties to agree terms other than those in the original section 125 notice. Moreover it must be open to the parties, if they wish, to use the term "the Section 125 Notice" to refer to a notice other than the original one. There can, I think, be no dispute that, if one of the later notices had been annexed to a lease, that would have constituted "the Section 125 Notice" for the purposes of that lease. In view of this it is right in my view to construe the words used in the light both of the statutory provisions and the documents that were served by the parties, or were purported to be served, under those provisions. I can see no justification for confining attention to just one of those documents.

25. In Mr Hyams's case it is clear that at the date of the lease the parties were not in agreement that the original section 125 notice should be treated as having been replaced by a particular later notice. Although the replacement section 125 notice of 18 September 2003 had been the subject of a notice of intention (Mr Hyams's letter of 17 October 2003) a further replacement notice had been served on 26 January 2004. It cannot be said, therefore, looking at the documents that were served, or purported to have been served, under the statutory provisions, that there was agreement that the original notice should be treated as having been replaced by a particular later notice. The consequence, therefore, is that the reference in the lease to the section 125 notice is properly to be construed as a reference to the original notice of 18 October 2002.

26. In Miss Anderson's case, on the other hand, at the time the lease was executed, 17 November 2003, the respondent had served the purported replacement section 125 notice of 4 August 2003; Miss Anderson had indicated her acceptance of this, with the exception of the wrongly-stated purchase price, in her letter of 1 September 2003 (which was her notice of intention, as requested in paragraph 8 of the landlord's notice); and the respondent had corrected the purchase price error by serving a further replacement notice on 4 September 2003. It was not until 21 February 2005, after the execution of the lease, that the respondent wrote to Miss Anderson to say that the reference period should have been the one stated in the original notice. The conclusion, in my judgment, is that at the date of the lease the parties were in agreement in relation to the contents of the notice of 4 September 2003. Looking at the

documents that were served, or were purportedly served, under the statutory provisions, it was that to which the lease referred as "the Section 125 Notice".

27. Thus in Mr Hyams's case the section 125 notice for the purposes of the lease was that served on 18 October 2002; the reference period began, as stated in that notice, on 18 November 2002; and the lease was granted on 30 March 2004. In Miss Anderson's case the section 125 notice for the purposes of the lease was that served on 4 September 2003 (as a corrected version of the one served on 4 August 2003); the reference period began, as stated in that notice, on 28 July 2003; and the lease was granted on 17 November 2003. Although in the latter case the reference period was stated to begin shortly before the date of the notice, Mr Anderson made clear that he took no point on this. It is therefore unnecessary for me to consider whether it is open to a landlord to specify a reference period beginning before the date of the section 125 notice (although I rather think that it cannot do so) or the consequences if it does.

28. The result, therefore, is that each lease, in this way, included "provision for improvement contributions to be payable in respect of costs incurred in a period before the grant of the lease," so that the initial period begins with the beginning of that period (see paragraph 16C(4) of Schedule 6 to the Act). Each appellant is therefore liable in respect of "costs incurred" during this period in relation to the improvements specified in the section 125 notice.

29. As far as the quantification of the appellants' liability is concerned, neither of them challenges the £499.28 relating to the underground refuse system, but they each dispute liability for the £3,937.23 for external and environmental work. In her evidence Miss Hunt produced the invoices which the respondent had received and paid under the external work contract. These had not been before the LVT. They constitute the evidence of what, for the purposes of paragraph 16C(4), were the costs incurred by the respondent in respect of this category of improvements during the reference periods. The invoices, there is no dispute, reflected seven stage payments due under the external work contract and a final payment. They were as follows:

1.	11 November 2002	£49,400.00
2.	9 December 2003	£68,400.00
3	10 January 2003	£57,950.00
4.	18 February 2003	£68,400.00
5.	10 March 2003	£58,100.00
6	11 April 2003	£17,500.00
7	27 May 2003	£5,616.16
8	30 March 2004	£8,323.49

30. Mr Anderson, whose submissions Mr Hyams adopted, submitted that for the purpose of paragraph 16C(4) costs were incurred at the date of each invoice in the sum referred to. Mr Baker submitted that, since this was a single project, the amount due under it was a single overall sum and it was this that constituted the costs incurred. The costs were not finally

incurred until the end of the contractual period. Both Miss Anderson and Mr Baker relied on *Capital and Counties Freehold Equity Trust Ltd v BL plc* [1987] 2 EGLR 49, in which His Honour Judge Paul Baker QC, sitting as a judge of the High Court, construed "incurred" in a lease to be synonymous with "expended" or "become payable". In my judgment, the appellant's submissions on this issue are correct. The amount in each invoice became payable on the date stated in that invoice, and I cannot see on the evidence before me how it could fail to constitute costs incurred at that date. The invoices are acknowledged to be for work done and certified under the contract. The contract itself was not produced, so that there is nothing to indicate that the liability for the amounts in the invoices were qualified in any way.

31. The consequence is that the liability of each of the appellants in respect of the external work is to be calculated on the basis of the payments that were due and paid during the relevant reference period. For Mr Hyams this is all the payments with the exception of number 1, which ante-dated 18 November 2002. The total of the other payments in £284,339.55; and Mr Hyams's liability is for 1/95th of this, £2,993.04. Miss Anderson's reference period begins on 28 July 2003, so that she is only liable in relation to the final payment, £8,332.49; and her liability, 1/95th of this, is therefore £87.61. In addition to these amounts each appellant is liable for a contribution to the costs of the underground refuse system (£499.28), and this amount is not in dispute. Putting these amounts together Mr Hyams's liability is £3492.32 and Miss Anderson's £586.89.

32. I would add two things. Firstly, the LVT in its decision pointed out that the appellants were not being asked to pay any more than the amounts specified in the original notices while, on the other hand, the prices had been determined in the light of the contribution that had been specified, so that the respondent would lose out if they were not payable. On the merits there is undoubtedly force in this point, but it seems to me so clear that the respondent entered into Miss Anderson's lease on the basis of the later reference period that the only possible conclusion is the one I have reached.

33. The second matter is that the problems in this case have arisen, as the respondent readily acknowledges, by its use of the same form for the section 128(4) notices as for the section 125 notices. This led it to assume, wrongly, that it was serving a further section 125 notice and had to address afresh the reference period. It is important when serving notices under these somewhat complex provisions that landlords should ensure that they are related to the relevant statutory provision and contain correct information.

34. I determine Mr Hyams's liability at £3,492.32 and Miss Anderson's at £586.89. The appeals are allowed to this extent.

Dated 14 November 2006

George Bartlett QC, President