UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – whether costs reasonably incurred – whether LVT should have taken into account financial impact on tenants when deciding whether major works should be phased – appeal allowed – Landlord and Tenant Act 1985 s.19

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

BETWEEN	**(1) MARIE GARSIDE** **(2) MICHAEL ANSON**	**Appellants**
	and	
	RFYC LIMITED **B R MAUNDER TAYLOR**	**Respondents**

Re: 15, 20 & 36 Frognal Court,
Finchley Road,
London
NW3 5HG

Before: Her Honour Judge Alice Robinson

Sitting at: 43-45 Bedford Square, London WC1B 3AS
on 12th September 2011

Edward Denehan instructed by Woolsey, Morris & Kennedy for the Appellants
Gerard van Tonder instructed by Gisby Harrison for the Second Respondent
There was no appearance on behalf of the First Respondent.

The following cases are referred to in this decision:

Ashworth Frazer Ltd v Gloucester City Council [2001] 1 WLR 2180, HL
Forcelux v Sweetman [2001] 2 EGLR 173, LT
Veena SA v Cheong [2003] 1 EGLR 175, LT
Southend-on-Sea Borough Council v Skiggs LRX/110/2005, LT

DECISION

Introduction

1. The Appellants appeal to the Upper Tribunal (Lands Chamber), with permission, from a decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel (hereafter "the LVT") dated 10 March 2010 whereby the LVT decided that service charges sought in respect of major works for the years ending 2009 (£100,000) and 2010 (£538,012) were reasonably incurred as required by section 19(1)(a) of the Landlord and Tenant Act 1985 (hereafter "the 1985 Act").

2. The Appellants are the lessees of flats in The Frognal Estate, Finchley Road, London NW3 5HG (hereafter "the Estate") of which the First Respondent is lessor. The First Appellant is the lessee of 15 Frognal Court pursuant to a lease dated 27 October 1975 for a term of 120 years from 24 June 1969 and also holds the lease of 20 Frognal Court which is sub-let. The Second Appellant is the lessee of 36 Frognal Court pursuant to a lease dated 21 July 1975 for a term of 120 years from 24 June 1969. The Second Respondent is the Manager of the Estate appointed by the LVT on 7 May 2009 pursuant to section 24 of the Landlord and Tenant Act 1987.

3. The Estate comprises 5 blocks containing 54 flats and, in some cases, commercial premises at ground floor level. Historically little maintenance work had been carried out by the lessor leading to neglect as a result of which a number of the lessees applied to the LVT for the appointment of a manager. On his appointment as Manager the Second Respondent took steps to arrange for the outstanding works to be carried out. Initially a figure of £100,000 was added to the service charge in 2009 and when a detailed specification had been prepared and costed a further £538,012 was added to the proposed service charge for 2010. A number of the lessees were concerned about the very significant increase in service charges and their ability to pay the sums demanded. On 26th November 2009 the Second Respondent applied to the LVT for a determination as to whether the service charges for 2009 and 2010 were reasonably incurred. By its decision dated 10 March 2010 the LVT decided that these sums were reasonably incurred.

Submissions

4. The Appellants' case before the LVT was that, although it was accepted works of repair were needed, it was not appropriate to carry the bulk of them out all at once. Rather, the work should be phased so as to spread the increased service charge costs. The amount of service charge being demanded (around £7,600 and £9,000 for the Appellants respectively in 2010 alone) was very substantial. It was said many of the lessees could not afford to pay and some would have to sell their flats in order to be able to do so.

5. In its decision the LVT said:

> "15. The Tribunal does not accept [counsel for the lessees'] argument that consideration of the reasonableness of costs requires consideration of the ability of individual leaseholders to pay those costs. Whilst [counsel] suggested that this was one of the factors behind the legislation he was unable to direct the Tribunal to any evidence which suggested that different classes of leaseholders should be treated differently. In the opinion of the Tribunal the ability of individual leaseholders to pay for required works is not a matter covered under this legislation.
>
> 16. Given that there was no argument as to the reasonableness of the costs, the specification of the works or Mr Maunder Taylor's ability to seek the payments in advance, the Tribunal is satisfied that reasonableness under Section 19 of the Landlord and Tenant Act 1985 relates to the reasonableness of the works themselves and their costs, not to the ability of persons to pay for them."

6. Before the Upper Tribunal Mr Edward Denehan, counsel for the Appellants, submitted that the LVT's approach was wrong in law. Whether service charge costs are reasonably incurred for the purposes of section 19 of the 1985 Act required two separate questions to be asked. First, was the action taken reasonable? Second, was the cost of the action taken a reasonable amount? There is no restriction in the 1985 Act on the factors which may be taken into account when judging reasonableness which should be given a broad, common sense meaning. There is nothing which prohibits consideration of the financial impact of the service charge costs on lessees being taken into account when deciding whether it is reasonable to carry out the repair works in one major contract or to phase them over a period of time to spread the cost. It was also submitted that the purpose of sections 18 to 30 of the 1985 Act was to protect lessees whereas here they were being unfairly treated first by having to put up with many years of deteriorating standards of maintenance and now by incurring financial hardship, in some cases by selling their flat, to pay for repair work done all at the same time

7. Mr Gerard van Tonder, counsel for the Second Respondent, submitted that if a lessee's ability to pay were relevant to the reasonableness of what work should be undertaken and when, it would introduce an unworkable duty on the lessor (or here, the manager) to make enquiry as to the means of lessees. It would also give rise to the need to make difficult and potentially controversial judgments as to what level of hardship would or would not be acceptable. Where some lessees want the repair work to go ahead in full immediately, the lessor or manager would be preferring the interests of one group of lessees over others. This would introduce unfairness and be contrary to the Second Respondent's duty in paragraph 9 of the LVT order appointing him to act fairly and impartially in his dealings with the lessees. The Second Respondent had been appointed manager by the LVT against the background of historic neglect and had a duty to get on with the repair work, which it was common ground was necessary, with all due expedition. The lessees should have known that a substantial increase in service charges was inevitable. Further, it was submitted that the Appellants had at no stage provided any evidence to support the assertions of financial hardship or as to phasing i.e. as to what works should be carried out in which years. Even if the LVT had taken financial

impact into account, the lack of evidence was such it would have found the service charge costs to be reasonably incurred in any event.

Law

8. The Landlord and Tenant Act 1985, as amended by the Housing Act 1996 and the Commonhold and Leasehold Reform Act 2002, so far as relevant, provides:

> "**18 Meaning of 'service charge' and 'relevant costs'**
>
> (1) In the following provisions of this Act 'service charge' means an amount payable by a tenant of a dwelling as part of or in addition to the rent –
>
> (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
>
> (b) the whole or part of which varies or may vary according to the relevant costs.
>
> (2) The relevant costs are the costs or the estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.
>
> (3) For this purpose…
>
> (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.
>
> **19 Limitation of service charges: reasonableness**
>
> (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period –
>
> (a) only to the extent that they are reasonably incurred, and
>
> (b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;
>
> and the amount payable shall be limited accordingly.
>
> (2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.
>
> **27A Liability to pay service charges: jurisdiction**
>
> (1) An application may be made to a leasehold valuation tribunal for a determination of whether a service charge is payable and, if it is, as to –

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to –

(a) the person by whom it would be payable,

(b) the person to whom it would be payable,

(c) the amount which would be payable,

(d) the date at or by which it would be payable, and

(e) the manner in which it would be payable…"

9. The correct approach towards determining whether service charges have been reasonably incurred for the purposes of section 19(1)(a) has been considered in a number of previous decisions of the Tribunal. In *Forcelux v Sweetman* [2001] 2 EGLR 173 the Tribunal (Mr P R Francis FRICS) stated:

> "39. In determining the issues regarding the insurance premiums and the cost of major works and their related consultancy and management charges I consider firstly [counsel for the appellant's] submissions as to the interpretation of s.19(2A) of the 1985 Act and specifically his argument that the section is not concerned with whether costs are *'reasonable'*, but whether they are '*reasonably incurred'*. In my judgment his interpretation is correct, and is supported by the authorities quoted. The question I have to answer is not whether the expenditure for any particular service charge item was necessarily the cheapest available, but whether the charge that was made was reasonably incurred.
>
> 40. But to answer that question, there are, in my judgment, two distinctly separate matters I have to consider. Firstly the evidence, and from that whether the landlord's actions were appropriate, and properly effected in accordance with the requirements of the lease, the RICS Code and the 1985 Act. Secondly, whether the amount charged was reasonable in the light of that evidence…"

This was considered in *Veena SA v Cheong* [2003] 1 EGLR 175 where the Tribunal (Mr P H Clarke FRICS) said this at paragraph 103:

> "…The question is not solely whether costs are 'reasonable' but whether they were 'reasonably incurred', that is to say whether the action taken in incurring the costs and the amount of those costs were both reasonable. The question in this part of the

> appeal is whether Veena acted reasonably in employing a full-time porter and a part-time cleaner and, if so, whether the amounts charged for those services were reasonable. Both parts of the question must be answered affirmatively for Veena to succeed."

10. As to the meaning of reasonable in this context, it was common ground that no guidance is given in the 1985 Act. In *Ashworth Frazer Ltd v Gloucester City Council* [2001] 1 WLR 2180 (a case concerned with whether a landlord had unreasonably withheld consent to assign a lease) Lord Bingham said this at paragraph 5:

> "…Subject always to the first principle outlined above [that reasons for withholding consent must have to do with the relationship of landlord and tenant], I would respectfully endorse the observation of Viscount Dunedin in *Viscount Tredegar v Harwood* [1929] AC 72, 78 that one 'should read reasonableness in the general sense.' There are few expressions more routinely used by British lawyers than 'reasonable', and the expression should be given a broad, common sense meaning in this context as in others."

Lord Rodger also dealt with the meaning of "reasonable" in paragraph 67:

> "The test of reasonableness is to be found in many areas of the law and the concept has been found useful precisely because it prevents the law becoming unduly rigid. In effect, it allows the law to respond appropriately to different situations as they arise…"

He went to say that "it is in each case a question of fact, depending upon all the circumstances".

Decision

11. There was no dispute that the works for which service charges had been demanded are necessary and that that the cost of them is a reasonable amount. The issue between the parties is as to whether the action taken by the Second Respondent in requiring them to be carried out in one contract and paid for in the 2009 and 2010 service charge years was a reasonable decision i.e. the first question identified in *Forcelux* paragraph 40 and *Veena* paragraph 103.

12. It is to be noted that the Second Respondent chose to spread the cost of the works by apportioning £100,000 of the cost to 2009 and the balance of £538,012 to 2010 rather than charging all of it in 2010. When asked why the Second Respondent had done this Mr van Tonder referred to 'spreading the impact.' In addition, works are needed to the lifts and garden which have been put off to another year. When asked why the Second Respondent had chosen not to do these works in 2010 Mr van Tonder said the anticipated cost of the lift works was over £400,000, nearly double what the lessees were being asked to pay in 2010. The unavoidable conclusion is that in deciding when to carry out the works and when to charge for them the Second Respondent was taking into account, amongst other matters, the financial impact of the works on the lessees including the Appellants. Those were perfectly proper decisions for him to take in the exercise of his judgment as Manager.

13. Where an application is made to the LVT which has to decide whether those were reasonable decisions for the purposes of section 19(1)(a), it would seem odd if the LVT cannot take into account the same considerations as the Second Respondent. He is not a capricious landlord, rather an experienced surveyor appointed by the LVT on the application of the lessees (including the Appellants) to manage the Estate. Even well managed properties are likely to require major expenditure from time to time and it is common practice, where the terms of the lease permit, for service charges to be demanded on account over time to establish a reserve fund to pay for such extraordinary expenditure. Paragraph 1.3 of the Management Order in this case permits the Second Respondent to demand service charges on account for such a reserve fund. Mr van Tonder did not dispute that main purpose of a reserve fund is to spread the cost and therefore the financial burden over time so that lessees are not faced with a substantial bill to pay for major works all at once.

14. I accept the submissions of Mr Denehan that there is nothing in the 1985 Act to limit the ambit of what is reasonable in this context so as to exclude considerations of financial impact. In my judgment, giving the expression "reasonable" a broad, common sense meaning in accordance with *Ashworth Frazer*, the financial impact of major works on lessees through service charges and whether as a consequence works should be phased is capable of being a material consideration when considering whether the costs are reasonably incurred for the purpose of section 19(1)(a).

15. In the present case the Appellants squarely raised with the LVT that "the scheme of works required is that which accommodates the truly pressing remedial works, and the means of the tenants on the Estate, with non-essential decorative and other work being phased over a sufficiently long period so as to be manageable in terms of cost by the tenants", paragraph 3.3 of the their Statement of Case in Reply to the LVT. That was an argument which the LVT should have considered on its merits. Instead, as is conceded on behalf of the Second Respondent, in paragraphs 15 and 16 of its decision the LVT held as a matter of law that this was not a relevant consideration.

16. I do not agree with Mr van Tonder that to construe reasonable in this way will impose an unworkable burden on landlords or the LVT to make detailed enquiries of a lessee's means. In many cases financial impact could no doubt be considered in broad terms by reference to the amount of service charge being demanded having regard to the nature and location of the property and as compared with the amount demanded in previous years. Reasonable people can be expected to make provision for some fluctuations in service charges but at the same time would not ordinarily be expected to plan for substantial increases at short notice. For example, in this case total service charges for the Estate in recent years are: £63,622.85 (2007), £87,272.62 (2008), £133,816.89 (2009) and £620,776 (2010). The 2010 figure represents a 10 fold increase over 2007 and a 5 fold increase over 2009. If a lessee wishes to put forward a case of particular hardship by reference to their personal circumstances they may do so, though the weight to be attached to such an argument would depend on the cogency of the evidence to support it.

17. However, other considerations will no doubt be relevant and will need to be weighed in the balance when deciding whether major works should be phased and the cost spread over a longer period of time. Where, as here, the lessees do not all agree and some wish the works to be carried out in one contract as soon as possible that should be taken into account. It is inevitable that where not all lessees agree the final decision is likely to please some and not others. That does not mean one lessee or some lessees' views have been unfairly preferred over others, rather they all have been taken into account with all other relevant considerations when reaching a decision.

18. The degree of disrepair and the urgency of the work or the extent to which it can wait are likely to be relevant. These considerations may be important in the context of the present case where there has been a history of neglect, some work at least is urgently required, the local housing authority has served notices requiring work to be carried out and insurance cover has been reduced because of the poor condition of the Estate. Another relevant consideration may be the extent of any increase in the total cost of the works if carried out in phases as opposed to in one contract.

19. These are only examples of factors that may or may not be relevant and there may be others to take into account. All are factual issues and matters of judgment for the LVT to weigh up against the hardship of substantial increased costs when deciding on the evidence before it whether the service charge costs are reasonably incurred. In the light of the paucity of evidence submitted by the Appellants it may be that if the LVT had considered their arguments on their merits it would have rejected them. However, it would not be appropriate for the Lands chamber to seek to second guess the decision of this expert tribunal.

20. It is important to make clear that liability to pay service charges cannot be avoided simply on the grounds of hardship, even if extreme. If repair work is reasonably required at a particular time, carried out at a reasonable cost and to a reasonable standard and the cost of it is recoverable pursuant to the relevant lease then the lessee cannot escape liability to pay by pleading poverty. As the Lands Tribunal made clear in *Southend-on-Sea Borough Council v Skiggs* LRX/110/2005 (a decision on section 27A of the 1985 Act), the LVT cannot alter a tenant's contractual liability to pay. That is a different matter from deciding whether a decision to carry out works and charge for them in a particular service charge year rather than to spread the cost over several years is a reasonable decision and thus the costs reasonably incurred for the purpose of section 19(1)(a) of the 1985 Act.

21. For all these reasons this appeal is allowed and a decision on the Second Respondent's application remitted to the LVT for re-hearing.

22. At the hearing before me an issue emerged unexpectedly as to whether I should make an order under section 20C of the 1985 Act that the costs of these proceedings are not to be regarded as relevant service charge costs. As agreed at the hearing the Tribunal now invites the parties to make any submissions on that issue and this decision will become final only when that has been determined.

Dated 15 September 2011

Her Honour Judge Alice Robinson

Addendum

23. I have received written submissions as to costs from the parties dated 19th September (Appellants) and 15th September (Second Respondent) as well as submissions on behalf of the Appellants in reply dated 20th September 2011. The Appellants apply for the Second Respondent to pay their fees of £590 pursuant to rule 10(6) of the Tribunal Procedure (Upper Tribunal)(Lands Chamber) Rules 2010 (hereafter "the Rules") and general costs of £500 pursuant to rule 10(7)(c) of the Rules on the grounds the Second Respondent has acted unreasonably in defending and conducting the appeal. In addition, the Appellants dispute the Second Respondent's entitlement to recover the costs of these proceedings as service charge costs but in the alternative seek an order pursuant to section 20C of the 1985 Act that the costs of these proceedings are not to be regarded as relevant service charge costs.

24. The Second Respondent has not commented on the Appellants' application for costs. The Second Respondent submits that there is no automatic expectation of a section 20C order by a successful tenant and an order will be made where the landlord has behaved improperly or unreasonably. The Second Respondent's decision to make the LVT application was entirely reasonable given the disagreement by lessees about the phasing of the major works and he was entitled to defend the LVT decision.

25. In my judgment it would not be appropriate to order the Second Respondent to pay the Appellants' costs. In the light of the disagreement by lessees as to the phasing of the major works proposed by the Second Respondent and the non payment of service charges it was entirely reasonable of the Second Respondent to apply to the LVT for the issue as to whether the service charge costs were reasonably incurred to be determined. The Second Respondent's case before the LVT was that as Manager he had a duty to carry out the works which were needed and the cost of the works was reasonable. He also submitted that there was no evidence from the Appellants to substantiate the claims of financial hardship or as to what alternative phasing was appropriate. There is no evidence that he argued that financial hardship was not a material consideration in determining whether the costs were reasonably incurred which appears to have been a decision taken on the LVT's initiative. I do not consider the Second Respondent is responsible for the LVT's decision which has necessitated this appeal.

26. The fees would have been incurred in any event, including those for the hearing. The issue raised is a novel one of wider importance than just this case and it is unlikely that the Tribunal would have agreed to the written representation procedure even if the appeal had not been opposed. As to general costs, these can only be ordered under rule 10(7)(c) if the Second Respondent acted unreasonably in defending or conducting the proceedings. I do not consider that is the case. The mere fact the Second Respondent sought to defend the appeal is not of itself unreasonable. This was not a case where the defence was unarguable nor do I consider that the submissions raised irrelevant points.

27. It is not for me to decide whether the costs of the proceedings may be recovered as service charges whether pursuant to the leases or management order, only whether to make the section 20C order. Section 20C (as amended) so far as relevant provides:

> "(1) A tenant may make an application for an order that all of any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation tribunal, or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable…
>
> (2) The application shall be made-
>
> …
>
> (b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;
>
> (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
>
> …
>
> (3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances."

28. The authorities are usefully summarised in *The Church Commissioners v Derdabi*, unreported, Upper Tribunal (Lands Chamber) LRX/29/2011 in which the Tribunal, His Honour Judge Gerald, said at paragraph 19:

> "Where the tenant is successful in whole or in part in respect of all or some of the matters in issue, it will usually follow that an order should be made under s.20C preventing the landlord from recovering the costs of dealing with the matters on which the tenant has succeeded because it will follow that the landlord's claim will have been found to have been unreasonable to that extent, and it would be unjust if the tenant had to pay those costs via the service charge."

The Tribunal went on to identify other issues that may be relevant depending on the case: proportionality, conduct and other circumstances.

29. I have already found that the Second Respondent's decision to defend the appeal was not unreasonable for the purposes of rule 10(7)(c) of the Rules such that he should pay the Appellants' costs. However, he did not have to defend the appeal and in doing so he took the risk that he might lose. The appeal has wholly succeeded and in my judgment it would be unjust if the lessees were required to pay the Second Respondents costs of the appeal through the service charges. The fact that the Second Respondent is a Manager rather than a lessor is immaterial. I do not consider it is necessary to make a positive finding that the Second Respondent has been unreasonable in order to make the order and I note the reference to the landlord having been found to have been unreasonable in *The Church Commissioners* case above was in the context of the decision which the LVT has to make as to whether service charge costs were reasonably incurred. That was not the issue in this appeal which was concerned purely with a point of law on which the Second Respondent squarely lost.

30. However, as to the Second Respondent's costs of the LVT application, no application was made to the LVT for an order under section 20C. In my judgment, section 20C makes it clear that any application has to be made to the tribunal before which the proceedings to which the costs relate were taking place. Subsection (1) refers to costs incurred in connection with proceedings before a specific tribunal and subsection (2) requires the application to be made to that tribunal. Only the tribunal to which the application is made can determine it, subsection (3). That would not prevent the Upper Tribunal from dealing with costs incurred before the LVT if the LVT's decision under appeal included a section 20C order but I do not consider it confers jurisdiction on the Upper Tribunal to determine an application relating to LVT costs that was never made in the first instance to the LVT.

31. For all these reasons

(1) I make no order for costs.

(2) I order that all of the Second Respondents costs incurred in connection with the proceedings before the Upper Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charges payable by the lessees of the Estate.

Dated 7 October 2011

Her Honour Judge Alice Robinson