UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2012] UKUT 439 (LC)
UTLC Case Number: LRX/164/2011

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – whether costs of major works and administration charge reasonable and/or reasonably incurred – apportionment – consultation arrangements – capital works programme in accordance with PPC 2000 Contracting Arrangements – s. 20C order – Landlord and Tenant Act 1985 sections 19(1), 20 and 27A - appeal allowed

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

BETWEEN

LONDON BOROUGH OF HACKNEY **Appellants**

and

ZAHRA AKHONDI **Respondent**

Re: 60 Ashenden Road,
London
E5 0DT

Before: The President and P R Francis FRICS

Sitting at: 43-45 Bedford Square, London WC1B 3AS
on 5 October 2012

Amanda Gourlay, instructed by London Borough of Hackney Legal services for the appellant
The respondent did not respond to the appeal

The following cases are referred to in this decision:

Arrowdell v Coniston Court (North) Hove Ltd [2007] RVR 39
Country Trade Ltd v Noakes [2011] UKUT 407 (LC), LRX/118/2010
Forcelux v Sweetman [2001] EGLR 173
Veena v Cheong LRX/45/2000
Garside v RFYC Ltd & B R Maunder-Taylor [2011] UKUT 367, LRX/54/2010 (LC)
Yorkbrook Investments Ltd v Batten (1986) 18 HLR 25
London Borough of Havering v MacDonald [2012] UKUT 154 (LC), LRX/20/2011
Church Commissioners v Derdabi [2011] UKUT 380 (LC), LRX/29/2011

DECISION

Introduction

1. This is an appeal by the London Borough of Hackney from a decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel dated 26 July 2011 on an application made under sections 27A and 20 of the Landlord and Tenant Act 1985 by Ms Zahra Akhondi, the long lessee of a flat, 60a Ashenden Road, London E5 0DT. It determined that certain charges levied by the appellant landlord in connection with repairs and improvement works carried out by it under the service charge provisions were unreasonable and should be reduced. It also granted the lessee's application under section 20C of the Act. The appeal was conducted by way of rehearing.

2. Ms Amanda Gourlay of counsel appeared for the appellant landlord (the respondent before the LVT) and called Ms Harsha Amin, Project Manager, and Mr Gareth Lewis, Estimates Team Leader, who are each employed by Hackney Homes Ltd, an Arms-Length Management Organisation established by the London Borough of Hackney to manage its housing stock. They each gave evidence on the basis of witness statements that they had produced. Further witness statements were received from Mr Carl Levoir of the Technical Services Department, London Borough of Hackney, who had formerly been the project manager at Hackney Homes Ltd responsible for the installation and replacement of controlled door entry systems, and Ms Denise Hill, Electrical Services Manager for Hackney Homes Ltd, who has subsequently taken over Mr Levoir's role. Neither was called. Ms Akhondi did not respond and was not represented.

The Facts

3. Ms Akhondi is the long lessee of the flat, which is a ground floor self-contained one-bedroom unit in a modern 3-storey block of five units (three one-bedroom flats and two bed-sitting rooms) of brick built construction under flat roofs, located in a heavily developed residential area principally comprising streets of two-storey Victorian terraced houses in east London. The flat was acquired under the council's right to buy scheme and is subject to a 125 year lease dated 4 March 2002. The rest of the units in the block have not been so acquired, and the occupants of these are thus direct tenants of the council and have no service charge responsibilities.

4. Under the terms of the lease, the lessee covenanted to pay service charges, the relevant clauses being:

Clause 3, which provides:

"3. THE LESSEE hereby further covenants with the Lessor that the Lessee will at all times during the term hereby granted:

(A) Pay to the Lessor such annual sum as may be notified from time to time as representing the due and proper proportion [in this case 3/12] of the reasonably estimated amount required to cover the cost and expenses incurred or to be incurred … in carrying out the obligations or functions contained in and referred to in this Clause and clauses 6 and 8 hereof and in the covenants set out in the Ninth Schedule hereto…

(B) Pay to the Lessor in respect of major works where it is anticipated by the Lessor that the [charges] may consist of items likely to arise only on an irregular basis such sum as represents the Lessees total contribution (subject to any statutory provision) due or prospectively due as and when expenditure is actually incurred or when the work is complete."

Clause 6, which is the lessor's covenant to "perform and carry out or cause to be carried out the covenants set out in the Ninth Schedule";

Clause 8 which is the lessor's covenant to "manage the Estate and the Block in a proper and reasonable manner";

NINTH SCHEDULE which contains the lessor's covenants to be observed by it at the lessee's expense including:

"1. To keep in good and substantial repair (and whenever necessary rebuild and re-instate and renew and replace all worn or damaged parts)

(i) the main structure of the Block including…all electrical and other fittings…in the Block…and all doors therein including doors which give access to individual flats and including all roofs and chimneys and every part of the property above the level of the top floor ceilings;

(ii) all…wires cables and conduits and any other services and conducting media and any other thing installed in the Block or serving the Block for the purpose of supplying…electricity…and other usual services…;

(iii) all such parts of the reserved Property not hereinbefore mentioned and additions thereto

5. To manage the Block for the purposes of keeping the Block in a condition similar to its present state and condition

6. To carry out all such other works in respect of the Block or the Estate as are in the reasonable opinion of the Lessor necessary for its proper maintenance and management including works of improvement."

5. On 2 December 2008, Hackney Homes Ltd served a section 20 notice upon Ms Akhondi informing her that the door entry system was to be replaced because it had reached the end of its useful life, advising that the total expenditure for this was estimated at £17,077.48 and that her liability in accordance with the terms of her lease would be £5,001.57. The work was duly carried out with some minor DDA amendments and an invoice was submitted, in the previously

stated sum (despite the actual cost being marginally higher), on 7 September 2009. Subsequently an extended 5 year repayment plan was agreed at a fixed interest rate of 4.5%.

6. Following condition surveys and assessments of the Block in August 2009 a comprehensive programme of works was prepared for 60A-E Ashenden Road under the council's Decent Homes Scheme including re-covering of the roof, repairs and damp eradication, window and door replacements, removal of a small amount of asbestos and redecoration. A section 20 notice in which the extent of the works was set out, and the reasons for it being undertaken explained, was served on the respondent lessee on 28 January 2010 estimating a total cost of works of £96,668.16 of which £2,469.64 related to window renewal at the tenants flat, for which she would be 100% responsible. The total liability for flat 60A was to be £26,628.05. On 12 January 2011, following completion of the works, Ms Akhondi was invoiced in that amount, although it was subsequently reduced on the final account to £19,743.44. Extended payment terms were also offered.

7. Ms Akhondi made application to the LVT on 17 February 2011 for a determination on her liability to pay, and the reasonableness of the service charges. She appeared before the LVT at the hearing on 27 June 2011, where she was assisted by her son, Mr Eslami.

The LVT's decision

8. The LVT considered written and oral submissions from Ms Akhondi and oral submissions from her son. It also heard evidence of fact from Ms Amin, Mr Lewis and Mr Levoir for the council. Mr Eslami said that his mother was dyslexic, and this made it very difficult for her to read any documents that were produced to her. She felt that she had been bullied and harassed by the council throughout the process. The decision recorded the substance of her case as follows:

> "10 The Applicant considered that the entryphone and front door were working well and did not need replacement. Similarly, her windows were satisfactory and did not need to be replaced. She could not comment on the roof as she was on the ground floor and she made no comment on the brickwork repairs. Even if there was work to be undertaken the level of charges at £5,001.57 for the entryphone and front door was excessive and the charge of £26,628.05 for the remaining work was ridiculous, bearing in mind that the Building was a small block of five small flats, two of which were bedsitting rooms.
>
> 11. The Applicant did not think that the method of apportionment was fair. The Respondent uses a calculation based on the number of bed spaces in the Building. There were 12 living spaces and the proportion demanded of the Applicant was in excess of 25% in every case. The cost of the communal works should be shared equally between the flats as each of the occupants gain equal benefit."

9. Before dealing with the Ms Akhondi's substantive case on the front door, the entryphone and the windows the tribunal said this:

"22. The Tribunal noted that the Respondent had undertaken the full consultation programme in accordance with the framework agreement and in accordance with the EU procurement requirements and undertaken the statutory consultation. However, the respondent had totally failed to consider either the nature of the Building, which is a small brick construction with five flats three of which are one bedroom and two of which are bedsitting rooms, or the fact that the Applicant is the sole long leaseholder in the Building. Consideration should have been given to the nature of the properties within the Respondent's portfolio and the cost of works to long leaseholders, rather than simply working in a framework agreement where the differences between the tenure of the residents are ignored.

23. It was clear that of the five occupants of the building, the applicant was the only long lease holder. In spite of evidence being given that the respondent consults with long leaseholders and arranges meetings to explain what is happening, the evidence from the applicant was that this did not happen in her case and the tribunal accepts the applicant's evidence that she was not consulted about the extensive works. She has stated that she suffers from dyslexia and, even though the respondent was not made aware of this, there was no reason why more regard could not have been paid to the sole long leaseholder in the building, a single woman who had purchased the flat under the Right to Buy legislation. Although the respondent had followed the required consultation procedure for a borough wide Framework Agreement, the reality is that a single leaseholder of a small flat in a small block would not have had the knowledge or resources to challenge such an agreement within the consultation process.

24. The Tribunal is satisfied that the respondent failed to communicate with the applicant in accordance with their stated practice in order to explain the procedure and warn her of the large sum of money she would be asked to pay. Much of the work the subject of these proceedings was undertaken under the Decent Homes initiative where substantial grants were available to implement the works. The result was that the short term tenants benefited from the works but the sole long leaseholder was obliged to face two very large bills within a short period of time where there was no grant available to her. The respondent is a social landlord and should have regard to the situation of those tenants who purchased under the Right to Buy legislation and find themselves faced with bills well in excess of what they would have had to pay to a private landlord."

10. The LVT said that evidence had been given that the entryphone was obsolete and parts not easily available, if at all. It was therefore not unreasonable for the council to renew it. The tribunal did not consider that the cost for this was unreasonable, although it was on the high side, and the cost was accordingly allowed. It went on, with regard to the door:

"26. However, the Tribunal find that it is not reasonable to incur costs of £10,000 to replace two doors in a property such as the Building and in the Tribunal's view it was not reasonable to install high specification doors in the building, which have the additional security and robustness needed for a large block of flats, when there are a range of doors suitable for a property such as the Building available at a far lower price…The Tribunal considers that more modestly priced doors would have been suitable and therefore disallows half the cost, allowing £5,000."

11. The LVT then turned to the question of fees, recording that the lessee was charged 6% professional fees on the cost of the works, and in addition a 10% charge was made for administration, with the 10% charge also being levied on the professional fees. It said that there could be no justification for charging administration on professional fees and that it was also excessive to charge 16% in fees for "the simple job of installing a new entryphone and two doors". It therefore determined that the professional fees should remain at 6% (on the reduced sum) and that the administration charge should be reduced to 5%, chargeable only on the cost of works.

12. The LVT then considered the costs of the major works, which, as they said, included roof and window replacement and ancillary work. As far as the roof was concerned it said this:

> "29. Although it did not inspect the Building, there were a number of helpful photographs. It was apparent that the Building had a flat roof in three parts but that the replacement of the flat roof would have been straightforward. The photographs produced showed that the roof had been in need of repair and the method selected by the Respondent, namely recover with like for like, was acceptable. However, bearing in mind the nature of the roof the Tribunal finds that the cost of replacement at £16,921.10 is excessive for a small property of the construction of the Building. The tribunal, using its knowledge and experience, considers that a more appropriate sum would be half, namely £8,400."

13. As far as the windows were concerned, the tribunal said (at paragraph 30) that it was more economical to replace the applicant's windows at the same time as the rest of the works were carried out under the Decent Homes initiative, and she would benefit from better security and reduced heat loss. It concluded: "Although the cost was high, the Respondent has followed the correct consultation procedure and the cost of the windows and the remaining works are allowed."

14. However, the LVT considered that the "cost of preliminaries is out of all proportion to what would reasonably be required. This is a small building with no complicating features and [the council] appears to have disregarded this when preparing the estimate". On the basis of the final account, the preliminaries amounted to no less than 34% of the total cost of the work, it was said, and that was out of proportion to the nature of the work being undertaken. The figure was reduced to 15% of the allowed cost of the works. The revised calculation became:

"Total cost of major works charged by council	£71,078.18
Less preliminaries	(£24,368.69)
Net cost of works	£ 46,709.49
Less roof costs disallowed	(£ 8,521.10)
Cost of works allowed	£ 38,188.39
Preliminaries @ 15%	£ 5,728.26
Total cost of works allowed	£ 43,916.65

The applicant's share of this would be £10,979.16 together with professional fees of 6% (£658.75) and administration fees at 5% on the cost of works allowed but not the professional fees (£548.96) to give a total of £12,186.87. Added to the figure the LVT determined as

appropriate under entryphone and door replacement invoice of £3,366.60, Ms Akhondi's total liability became £15,553.47.

15. The LVT rejected Ms Akhondi's contention that the method of apportioning the costs between the flats in the block was unfair. It said (at paragraph 34) that the bed space method, which the council had adopted, was one that was used by many social landlords and was a reasonable method in that it reflected the number of people that could legally occupy the individual flats.

16. As to the application under section 20C of the Act for an order to the effect that the costs of the LVT proceedings were not proper costs to be included in the service charge, the LVT determined that on the basis of the council's unsympathetic conduct in respect of the works process and the fact that the tribunal had found in favour of the applicant "to a large extent", it would be appropriate to make such an order.

17. The council's application to the LVT for permission to appeal was granted on 24 September 2011 on the grounds that "the issue appealed against is of wider public interest".

The statutory provisions

18. Section 19 of the Landlord and Tenant Act 1985 provides:

> "19(1) Relevant costs shall be taken into account in determining the amount of service charge payable for a period-
>
> (a) only to the extent to which 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."

Section 20C provides:

> "20C – Limitation of service charges: costs of proceedings
>
> (1) A tenant may make an application for an order that all or 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 by the tenant or any other person or persons specified in the application".

The appellant's case

19. Ms Gourlay pointed out that Ms Akhondi's application to the LVT challenged only the cost of the works. No issue was taken with the need for them, or the standard of works that were carried out. The questions to be answered, therefore, were simply whether the LVT was right to reduce the costs charged under the two invoices and to grant an order under section 20C. Referring to *Forcelux v Sweetman* [2001] EGLR 174, Ms Gourlay said that in that case the Lands Tribunal held that the question of whether or not costs were reasonably incurred was not interchangeable with the question of whether the relevant services could have been obtained more cheaply, which is what the LVT seemed to decide here. It was therefore necessary to consider the evidence as to why the landlord had elected to incur the costs in question, whether its actions were appropriate and from that whether the amounts charged were reasonable.

20. Ms Amin set out the council's approach to the repair and maintenance of its estate under its Decent Homes, capital works programme, details of the building assessments/surveys that were undertaken, the procurement and tendering process, awarding of contracts and appointment of contractors. She explained that all councils within the UK are required by law to comply with the EU Public Procurement Directives for the advertising and award of contracts. The capital works programme had been procured on a Design and Build basis using Project Partnering Agreement/PPC 2000 contracting arrangements which was the government's preferred option for the delivery of major works. Following an extensive evaluation and selection process in which residents' representatives had been fully involved, the council appointed five main "constructors" who oversee panels of approved sub-contractors to undertake specific works. Ms Amin said that by setting up these trade supplier and sub-contractor relationships the council had managed to obtain significant savings and discounts which are passed on directly to tenants. The contractors provided competitive rates for specific jobs and trades (known as "basket rates") which were regularly monitored by the council's team and reviewed annually by external consultants. Where these reviews resulted in savings, these were applied to previously quoted job prices, and savings were then passed on to tenants in the final account. There were also significant economies of scale as the works undertaken to the subject property had been programmed in with other blocks.

21. Specifically in respect of 60A-E Ashenden Road, the 2009/10 benchmarking review of the detailed original cost estimate enabled a reduction in the quoted scaffolding costs of £3,655, an 8% reduction in the cost of concrete repairs and a 5.5% reduction to the window replacement rates. There was also a reduction in the amount originally quoted for asbestos removal as less had been found than was originally anticipated, and similar reductions were made against a number of other individually quoted items where the works required were less extensive than budgeted for. These adjustments, Ms Amin explained, were the reason why the final account to Ms Akhondi was reduced on the major works bill from about £26,600 to £19,700.

22. In response to a question from the Tribunal, Ms Amin explained what was included in "preliminaries". Matters such as the erection of scaffolding, security fencing, site hut and contractors' welfare considerations all came under that heading. Although the cost of scaffolding had appeared high, it had been a complex structure due to the fact that the block's

roofs were on 3 levels. However, reductions from the original price for that element had also been made through the economies of scale that had been achieved elsewhere.

23. Mr Lewis explained the section 20 consultation process in detail. As the LVT accepted that the proper consultation process had been followed for both sets of works, we need say nothing more about his evidence.

24. Ms Gourlay submitted that the LVT had wrongly interpreted or had misapplied the law in a number of ways. Firstly, the tenant had neither filed nor served a particularised statement of case or any evidence, so that the council could not know which elements of the major works were under challenge. In continuing with the hearing and making findings the LVT proceeded with an application where no prima facie case had been made.

25. Secondly, the LVT failed adhere to the three requirements set out in *Arrowdell v Coniston Court (North) Hove Ltd* [2007] RVR 39. In that case, whilst acknowledging that it was entirely appropriate that, as an expert tribunal, the LVT should use its knowledge and experience to test and, if necessary, reject evidence that is before it, the Tribunal (the President and Mr N J Rose FRICS) said, at paragraph 23:

> "… but there are three inescapable requirements. Firstly, as a tribunal deciding issues between the parties, it must reach its decision on the basis of evidence that is before it. Secondly, it must not reach a conclusion on the basis of evidence that has not been exposed to the parties for comment. Thirdly, it must give reasons for its decision."

In *Country Trade Ltd v Noakes* [2011] UKUT 407 (LC), LRX/118/2010 the Tribunal (HH Judge Gerald), having referred to *Arrowdell* and other authorities, said:

> "14. It is not in my judgment the effect of the above-cited authorities that the LVT must accept the evidence of the landlord without deduction if there is no countervailing evidence from the tenant…
>
> 15. The LVT does not have to suspend judgment or belief and simply accept the landlord's evidence. It is entitled to robustly scrutinise the evidence adduced by the landlord (and, of course, the tenant) which, after examination, it is entitled to accept or reject on the grounds of credibility…
>
> 16. The difficulty comes where the LVT accepts that 'some' work has been done but does not accept that the 'rates' or 'charges' claimed are reasonable or credible or justified but there is no other comparative or market evidence… of what those rates or charges might be…
>
> 17. In those circumstances, the LVT is entitled to apply a robust, common sense approach and make appropriate deductions based on the available evidence (such as it is) from the amounts claimed always bearing in mind that it must explain its reasons for doing so. The circumstances in which it may do so will depend on the nature of the issues raised and service charge items in dispute, and will always be a question of fact and degree. In some instances, such as insurance premiums, it will be very difficult for the LVT to disallow the

> landlord's claim in the absence of any comparative or market evidence to the contrary. In other cases, such as gardening, cleaning or such like, the position might be different where the nature and complexity of the work is fairly straightforward. It is only where the issue is finely balanced that resort need be had to the burden of proof."

In this case, Ms Gourlay submitted, the LVT failed to comply with the three inescapable *Arrowdell* requirements on issues where the nature, cost and complexity of the works could not simply be assessed in a "common sense" way when looking at issues like "gardening, cleaning and the like".

26. Ms Gourlay said that the LVT recorded that there had been no competitive tender process specifically relating to the block in which Ms Akhondi's flat was situated as the work had been the subject of an approved framework agreement covering the whole of the Hackney estate, and that a cartel was appointed to deliver a borough wide contract. It was accepted that the use of the word "cartel" might have been unfortunate and it was not seriously being suggested that, on the strict interpretation of the word, there had been any illegal price fixing or collusion. It was pointed out that the LVT had accepted that the tender process for the framework agreement had been competitive, and it had acknowledged that the proper consultation process under section 20 of the Act had been followed with the applicant in respect of both sets of works. It was thought that, by paragraph 22 of its decision, the LVT had in mind that the council should have considered the nature of each of its blocks, and where a building was small should perhaps enter into individual contracts rather than rely upon the framework agreement which might be more appropriate for larger blocks. Ms Gourlay submitted that there was no evidence before the LVT that any such savings could be made and the decision had not taken into account either the extra administrative costs that such an exercise would have entailed, or the fact that any economies of scale would have been lost.

27. On the question of the cost of replacement doors, which the LVT had arbitrarily reduced by 50%, there was no evidence upon which the finding that there were "far lower priced doors" could be based. Similarly, with the roof repairs and recovering, there was no evidence to support the LVT's conclusion that the repairs "would have been straightforward" and such a statement was all the more surprising when the tribunal admitted that it had not even carried out a site inspection. It did not identify the knowledge and experience it had used in coming to its conclusions, and failed to give the parties the opportunity to question or respond to it.

28. In connection with the LVT's conclusions on fees, Ms Gourlay submitted that Mr Lewis had explained orally how these were calculated and the reasons why the 6% professional fees were included when calculating the overall administration fee of 10%. That evidence had not been recorded in the decision and thus it appeared that the LVT's decision to disallow an administration charge on the professional fees was not made on evidence which it had considered and furthermore, had given no reason or justification for its conclusion. Likewise with the reduction of administration fees from 10% of the overall contract cost to 5%, there had been no evidence that those fees were excessive. It had simply no justification for that arbitrary decision.

29. Turning to preliminaries, once again there had been no evidence before the LVT as to the circumstances by which these might be calculated as a percentage of the total contract cost, and no reasons were given for so doing other than the concern that, as an overall proportion of the contract cost, the preliminaries element was "far too high". Evidence had been produced in support of each and every constituent part of the £24,369.89 that was charged against this job. In taking the percentage approach the LVT had thus failed to apply the correct test per *Forcelux* and as recorded in *Veena v Cheong* LRX/45/2000 where the Tribunal (Mr P H Clarke FRICS) said:

> "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."

It was submitted that the LVT failed to consider the amount of the preliminaries in the light of the council's accepted decision to appoint a main contractor to do the works, and, secondly, it applied a test of proportionality that concluded that because they seemed disproportionate to the total cost of the works, they must also be unreasonable.

30. Turning to the LVT's criticisms of the council's conduct and particularly its treatment of the applicant, Ms Gourlay submitted that the tribunal had incorrectly applied the relevant law. Although it had accepted (at paragraph 22) that "[the council] had undertaken the full consultation programme in accordance with the framework agreement…and undertaken statutory consultation", it went on in paragraphs 22 & 23 to give extensive consideration to the personal circumstances of Ms Akhondi because she was the sole long leaseholder, and a single woman who had bought her flat under the right to buy legislation.

31. Ms Gourlay referred to *Garside v RFYC Ltd & B R Maunder-Taylor* [2011] UKUT 367, LRX/54/2010 (LC) in which the Tribunal (HH Judge Alice Robinson) said:

> "14…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)."

However, Ms Gourlay said, though capable of being a material consideration, the financial position of the tenant was just one of all the circumstances capable of consideration by the LVT. The judge had continued:

> "16… 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 upon 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…

> 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 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…the LVT cannot alter a tenant's contractual liability to pay."

32. No deductions from the cost of the works, Ms Gourlay said, were expressly attributed to the lessee's personal circumstances, but it was to be inferred that the LVT's observations informed and affected its subsequent assessment of whether the council had reasonably incurred costs under section 19 of the Act. That was an incorrect application of section19 and the *Garside* principle which require examination of each item of cost incurred and the reasons for it being incurred, rather than a general overview of the fairness of asking a tenant to pay.

33. Further, whilst there was no grant available to the lessee, the tenant was offered a raft of options to spread payment. Although it was accepted that the council had not spoken personally to Ms Akondhi, it had by definition consulted properly under section 20, and she had therefore had due warning of the amounts of money involved. Her marital status and gender were of no relevance and neither was the fact she had bought the property under the right to buy scheme; the council had no responsibility to long lessees who had started off as social tenants, other than the requirement for a disclosure of information and some protection for a limited period of time conferred by sections 125-125C of and Schedule 6 to the Housing Act 1985. Finally, there was no evidence whatsoever that the bills sent to the tenant were "well in excess of what they would have had to pay to a private landlord".

34. As to section 20C, it was submitted that the LVT had erred in the exercise of its discretion in granting the lessee's application. The originally estimated sums totalled some £31,600, which was reduced to approximately £24,700 on the final account. The LVT determined that Ms Akhondi should pay £15,553.47 for the two sets of works, ie just over half the estimated sum, and over half of the final account. Nevertheless the effect of the LVT's section 20C decision was to deprive the council of any of its costs whereas it could have made a partial section 20C order to reflect the council's partial success. Therefore, it was neither just nor equitable to grant the s.20C application.

Conclusions

35. We agree generally with Ms Gourlay's submissions. The LVT evidently felt great sympathy for Ms Akhondi faced as she was with a demand for service charges totalling over £30,000, but in seeking to assist her it went, in our judgment, well beyond its powers. There is no objection to a tribunal seeking to assist a landlord or a tenant in order to understand what their case is. Indeed it may well be important that it should do this. It is not, however, for a tribunal to create for a party a case that it has not advanced; and, to the extent that it sees fit to raise questions that may fairly be said to be within the ambit of the party's case, it must follow the *Arrowdell* requirements to ensure that the other party has a fair opportunity of dealing with

them. Fundamentally, of course, it must only reach conclusions that are open to it on the evidence before it.

36. Ms Akhondi's case had been threefold. Firstly she had contended that the entryphone, the front door and the windows did not need replacement. The LVT expressly rejected this contention in relation to the entryphone and the windows, and it did so implicitly in relation to the doors. Secondly, Ms Akhondi had said that the charges for the entryphone and the front door were excessive and that the charges for the remaining work were "ridiculous, bearing in mind that the Building was a small block of five small flats, two of which were bedsitting rooms". It does not appear that her contentions were any more elaborate than this or that she sought to provide any evidence in relation to them. The LVT nevertheless concluded that there were four respects in which the costs were not reasonable. We will consider these shortly. Ms Akhondi's third contention was that the method of apportioning the costs between the flats in the block was unfair, but the tribunal concluded that it was not.

37. The four respects in which the LVT held that the costs were not reasonable were in relation to the doors, the administration charge, the roof and the preliminaries. It was only the first of these that had even been mentioned by Ms Akhondi, and her contention was simply that the charges were excessive. It was no doubt open to the LVT to consider the cost of the doors, but it took it upon itself to make an arbitrary reduction of 50% in the cost allowed on the basis that "more modestly priced doors would have been suitable". There was, however, no evidence before it as to the cost of alternative types of door, and, if it had information itself about this, it failed to put it to the council's witnesses or otherwise enable the council to comment upon it. In this respect the decision was based on no discernible evidence and was procedurally unfair.

38. We do not think that it was appropriate for the LVT, on the basis only of the applicant's assertion that the charges for the remaining work were ridiculous, to single out for reduction particular elements of the costs. Its treatment of the cost of the roof repairs was, in our view, particularly unfortunate. It did not carry out an inspection of the building, but relied instead on photographs that had been produced. Its conclusion that, "bearing in mind the nature of the roof" the cost of replacement was excessive for a small property of such construction and that "using its knowledge and experience" a more appropriate sum would be half, was one that it reached on the basis of no evidence, apparently without the matter having been put to the council for comment, and with reasons that were manifestly inadequate. It was a purely arbitrary reduction. Moreover (a consideration that applies also to the preliminaries) it appears to have reached its conclusion on the assumption that the works could have been carried out at lower cost outside the framework agreement, an assumption that is unexplained and apparently at odds with its conclusion in relation to the windows and other works, which it allowed because "Although the cost was high, the Respondent has followed the correct consultation procedure".

39. The question of the administration charge was one, it appears, that the LVT did raise with the council at the hearing. Its decision does not, however, record the council's case on this and its reasons for rejecting that evidence and for its conclusion that the 10% was excessive are unexplained.

40. As far as the preliminaries are concerned, the LVT reduced the amount for these from 34% to 15% on the basis that the building was small with no complicating features. In making this determination, which appears to have been a wholly arbitrary one, it gave no reason other than that the preliminaries element was "far too high". The works were, however, carried out within the framework agreement, in relation to which, as the tribunal had observed, the correct consultation procedures had been followed. It does not appear that it considered how the council might have had the works done outside this agreement. Nor was there any evidence to suggest that, if it had been able to do this, the overall costs in relation to this building would have been less.

41. Underlying the LVT's conclusions appears to have been the view that the council should have ensured that costs lower than those that were actually incurred should have been incurred because the tenant was a right to buy lessee, and possibly also because she was a single woman who suffered from dyslexia and to whom the council should previously have explained the proposed works and their cost. None of these matters can in our view, however, affect the issue that the LVT had to decide, namely whether the cost of the works was reasonably incurred.

42. The LVT in our judgment reached conclusions that were not open to it on the evidence before it and its decision was in addition vitiated by procedural errors. Having heard the council's evidence we are satisfied that it was reasonable for them to carry out the works and to do so under the framework agreement. There is nothing that would suggest that, even if they had been able to carry out the works outside the agreement, lower costs would have been incurred. The appeal must accordingly be allowed. We determine that the amounts payable in respect of the entryphone and doors is £5001.57 and the amount payable for the external works is £19,743.34. Since we are allowing the appeal it is clear that the appeal in relation to section 20C must also be allowed, and the LVT's decision on this is therefore quashed.

Dated 10 December 2012

George Bartlett QC, President

P R Francis FRICS