UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2013] UKUT 0264 (LC)
LT Case Number: LRX/60/2012

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – reasonableness of service charge – insurance premiums – cross-appeals – section20C of the LTA

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

BETWEEN **AVON ESTATES (LONDON) LIMITED** **Appellant**

and

SINCLAIR GARDENS INVESTMENTS (KENSINGTON) LIMITED Respondent

Re: 7 Castlewood Road,
London
N16

Before: Her Honour Judge Karen Walden-Smith
Sitting at:43-45 Bedford Square, London WC1B 3AS
on 20 May 2013

Mr Justin Bates instructed by Conway & Co for the appellant
Mr Oliver Radley-Gardiner instructed by P Chevalier & Co for the respondent

The following cases are referred to in this decision:
Forcelux Ltd v Sweetman [2001] 2 EGLR 173
Havenridge Limited v Boston Dryers [1994] 2 EGLR 73
Berrycroft Management Co Ltd v Sinclair Gardens Investments (Kensington) Limited (1996) 75 P & CR 210
Williams v Southwark LBC [2001] 31 HLR 22
Triplerose Ltd v Grantglen Ltd [2012] UKUT 204
Daejan Investments Ltd v Benson [2009] UKUT 233
St John's Wood Leases Ltd v O'Neil [2012] UKUT 274
Iperion Investments Corporation v Broadwalk House Residents Limited [1995] 2 EGLR 47
The Tenants of Langford Court (Sherbani) v Doren Limited LRX/37/2000
Schilling v Canary Riverside Development PTE Limited LRX/26/2005
Church Commissioners v Derdabi [2010] UKUT 380 (LC) LRX/29/2011
Arrowdell Ltd v Coniston Court (North) Hove Ltd LRA/72/2005

DECISION

Introduction

1. This is an appeal against the decision of Leasehold Valuation Tribunal (LVT) for the London Rent Assessment Panel promulgated on 18 January 2012.

2. An application for permission to appeal was made to the LVT on 9 February 2012. Permission was granted on 29 February 2012 with the following comments:

> "1. The Tribunal has considered the Respondent's application for permission for leave dated 9 February 2012 to appeal to the Lands Tribunal, and has determined that leave to appeal should be allowed. Notwithstanding this, the Tribunal rejects the criticism, concerning the Respondent's approach to the Application. The Tribunal's observations were that the Respondent, in respect of the Application before the Tribunal had done little to set out the disputed issues.
>
> 2. The Tribunal nevertheless give leave on the question of whether in the light of its findings, the Tribunal were wrong in not granting the Respondent's application under section 20C of the Landlord and Tenant Act 1985.
>
> 3. In respect of the decision on the insurance premium, leave to appeal is given on the question of whether the Tribunal erred in reaching its findings, on a proper construction of the lease, and in considering the relevant law, that save for a 12% reduction, the cost of the insurance was reasonable and payable."

3. The appeal is by way of review and I was greatly assisted by both Counsel for the Appellant and the Respondent, with their helpful written and oral submissions.

The factual background

4. The respondent is the freehold owner of the property known as 7 Castlewood Road, London N16 ("the property"). The property is part of a Victoriam terrace which has been converted into three flats. Each of the flats shares a communal front garden, entrance and hallway. The three flats are each held on a long lease. The appellant is the leaseholder of one of the three flats – Flat A.

5. Each leaseholder is responsible for one-third of the service charge expenses as is set out in clause 3(A) of the Lease:

> *"Pay to the Lessor such annual sum as may be notified to the Lessee by the Lessor from time to time as representing the due proportion of the reasonably estimated amount required*

to cover the costs and expenses incurred or to be incurred by the Lessor in carrying out the obligations or functions contained in or referred to in this Clause and Clauses 4 and 6 hereof and in the covenants set out in the Ninth Schedule hereto for each financial year running from the First day of April in each year to the Thirty-first day of March in the following year and also of any costs and expenses incurred during a previous financial year but remaining unpaid (such costs and expenses being hereinafter together called "the Management Charges") such estimated amount to be payable quarterly in advance on the days for payment of rent hereunder the first payment being a proportionate part for the period from the date hereof to the next quarterly payment date to be made on the execution hereof…"

6. The ninth schedule to the Lease sets out those covenants to be observed by the Lessor at the Lessee's expense. Paragraph 2 of the ninth schedule provides that the lessor is:

"To insure and keep insured (unless vitiated in whole or in part by any act or default of the Lessee) the Block (including the demised premises against loss or damage by fire and such other risks as the Lessor may from time to time consider desirable to the full rebuilding cost thereof and to any extent in excess of such amount and against such other risks as the Lessor may from time to time deem necessary or prudent either through a policy or policies effected and maintained with such reputable insurers as the Lessor shall deem appropriate provided that the Lessor shall on written request give the Lessee details of the policy or policies effected and the risks actually covered and in the event of a claim the Lessor shall lay out such of the insurance monies received as are necessary to satisfy such claim."

7. By an application to the LVT made on 8 July 2011, the respondent applied for a determination of liability to pay service charges in respect of the three flats at the property for the year ending 31 March 2011 and the "on account" payments for 31 March 2012 pursuant to the provisions of section 27A of the Landlord and Tenant Act 1985 (the "LTA 1985").

The LVT Decision

8. The only issue of concern to the Upper Tribunal is that of insurance premiums.

9. The insurance issue (law, evidence and determination) is set out in paragraphs 34 to 51 of the decision letter, and the LVT's determination can be summarised as follows (I will return to the LVT's findings below):

a. both the authorities and the wording of the Lease provide that the lessor has a very wide discretion with respect to the insurance and that, while cheaper insurance, may have been obtained, the respondent's approach (the applicant before the LVT) was not unreasonable (paragraph 47);

b. the appellant (respondent before the LVT) had endeavoured to obtain comparable evidence (paragraph 48);

c. contrasting *Williams v Southwark LBC* [2001] 33 HLR 22, where there had been an "arms length" relationship between the local authority and the insurance provider, the

LVT took issue with the use of a "sister" company where there was little, if any, evidence of market testing the claims handling service (paragraph 49)

d. there was nothing to justify the 12% claims handling fee as there was "little or no information on the level of claims handling [that] has been provided".

10. The respondent [the appellant in this matter] had, in the judgment of the LVT, done "little to set out the issues" and had "to a certain extent sat back". In the circumstances, the LVT declined to make an order under section 20C of the LTA 1985 (paragraphs 52 and 53).

11. The appellant was given permission by the LVT to appeal on the issue as to whether the insurance cost was reasonable (save for the removal of the 12% for claims handling) and whether an order ought to have been made under section 20C of the LTA 1985 thereby prohibiting the respondent from adding the costs at the LVT to the service charge bill.

12. The respondent does not have permission to cross-appeal and makes it clear that, if it were not for the appellant appealing then it would not have been taking the matter any further. However, the respondent does contend that this Tribunal should review the decision of the LVT to remove the 12% claims handling fee as part of the insurance costs. In doing so, the respondent relies upon the decision of the former President in *Arrowdell v Coniston Court* LRA/72/2005 and section 175(4) of the Commonhold and Leasehold Reform Act 2002.

13. The appellant contends that the respondent ought not to be entitled to bring a cross-appeal in this way without first obtaining the permission of the Tribunal so to do.

The Statutory Framework

14. The LVT set out in its decision the relevant provisions of the LTA 1985 as follows:

> s.18 *"(1)…'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."*
>
> s.19 *"(1) Relevant costs shall be taken into account in determining the amount of a service 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."*

s.27A provides that *"(1) An application may be made to a leasehold valuation tribunal for a determination 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

(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 – [the same matters as are set out in (a) to (e) above].

15. Counsel before me, Mr Bates and Mr Radley-Gardiner (neither of whom appeared below, although the respondent did appear by Counsel) have referred me to a number of pertinent authorities – not all of which were referred to the LVT. I will refer to those authorities as I deal with the insurance issues.

The insurance

16. Paragraph 2 of Schedule 9 of the Lease sets out the obligation on the landlord to provide insurance and the issue for the LVT was whether the insurance costs were reasonably incurred in accordance with the provisions of section 19(1) of the LTA 1985. The respondent provided evidence to the LVT that the property was re-valued every four years; that the insurance provided for terrorism cover; and that the insurance also provided for the risks of undesirable sub-tenants. The respondent also provided evidence that there had been a history of subsidence at the property.

17. The Lands Tribunal, Mr Paul Francis FRICS, set out the test to apply with respect to whether insurance is "reasonably incurred" in *Forcelux Ltd v Sweetman* [2001] 2 EGLR 173:

> "39. In determining the issues regarding the insurance premiums and the costs of major works and their related consultancy and management charges, I consider, first [counsel'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. First, the evidence, and from that whether the landlord's actions were appropriate, and properly effected in accordance with the lease, the RICS Code and the 1985 Act. Second, whether the amount charged was reasonable in the light of that evidence. This second point is particularly important, as if that did not have to be

considered, it would be open to any landlord to plead justification for any particular figure, on the grounds that the steps it took justified the expense without properly testing the market."

18. In *Havenridge Ltd v Boston Dyers Ltd* [1994] 2 EGLR 73, the Court of Appeal held that the landlord cannot recover in excess of the premium which he has paid and agreed to pay in the ordinary course of business as between the insurered and himself and that it was, therefore, not necessary for the landlord to "shop around"; he will succeed if he effected insurance in accordance with the leases with an insurer of repute. The landlord must prove either that the rate is representative of the market rate, or that the contract was negotiated at arm's length and in the market-place; he will then have acted "properly". Evans J. held:

> "…the question remains, what limits should be placed upon the tenant's obligation to indemnify the landlord. The limitation, in my judgment, can best be expressed by saying that the landlord cannot recover in excess of the premium which he has paid and agreed to pay in the ordinary course of business as between the insurer and himself. If the transaction was arranged otherwise than in the normal course of business, for whatever reason, then it can be said that the premium was not properly paid, having regard to the commercial nature of the leases in question, or, equally, it can be supposed that both parties would have agreed with the officious bystander that the tenant should not be liable for a premium which had not been arranged in that way.
>
> If this is the correct test, as in my judgment it is, then the fact that the landlord might have obtained a lower premium elsewhere does not prevent him from recovering the premium which he has paid. Nor does it permit the tenant to defend the claim by showing what other insurers might have charged. Nor is it necessary for the landlord to approach more than one insurer, or to "shop around". If he approaches only one insurer, being one insurer of "repute", and a premium is negotiated and paid in the normal course of business as between them, reflecting the insurer's usual rate for business of that kind then, in my judgment, the landlord is entitled to succeed. The safeguard for the tenant is that, if that rate appears to be high in comparison with other rates that are available in the insurance markets at the time, then the landlord can be called upon to prove that there was no special feature of the transaction which took it outside the normal course of business…in my view, [that] if the plaintiff proves either that the rate is representative of the market rate, or that the contract was negotiated at arm length and in the market-place, whether literal or metaphorical, he establishes that it was a genuine contract, that he has acted "properly" and that the sum was "properly paid".

19. In *Berrycroft Management Company Limited and Girling and Ors v Sinclair Gardens Investments (Kensington) Ltd* (1996) 75 P&CR 210, the Court of Appeal held that there was no reason to imply into the covenant by the management that there should be a restriction on the landlord's right to nominate either the company or the agency through which the insurance was to be placed. No question arose of the insurance having been arranged otherwise than in the normal course of business or otherwise than through an office of repute. Nor on the judge's findings were the rates proposed to be charged other than market rates. Per Beldam LJ (giving the judgment of the court):

> "No question arises in the present case of the insurance having been arranged otherwise than in the normal course of business nor otherwise than through an office of repute. Nor on the judge's findings were the rates proposed to be charged by Commercial Union other than market rates. That they were higher than the management company could have secured is beside the point. The landlord was not required to give reasons for requiring the insurance to be effected through his agency or with the company chosen. In fact he did give reasons which bore close resemblance to those suggested by Lord Shaw in the case cited."

20. In *Williams v Southwark Borough Council* (2001) 33 HLR 22, Lightman J found that the landlord was not obliged to find the lowest premium payable, but it was sufficient to agree a premium at the market rate or negotiate the insurance contract at arm's length and in the market place.

21. In its decision, the LVT found that there was nothing in the authorities that it had been referred to (as above) that imparted upon the respondent to this appeal, an obligation to shop around or use the cheapest insurance provider (paragraph 37) and further found as matters of fact that the property was re-valued every four years (its current reinstatement value being £523,419.69) and that in addition to the premium of £3,915.18 together with an terrorism cover of £239.07, with the LVT accepting that terrorism cover was a standard and prudent feature of cover in London. The appellant does not seek to challenge the finding that terrorism cover was standard and prudent; it does seek to challenge the total level of the premium which was £4,154.25.

22. Mr Mark Kelly, who gave evidence to the LVT, provided evidence that the respondent used its own insurance agency (a sister company to the managing agent operating an "arms length" agency) to deal with claims management and that a broker was used by that insurance agency, which broker "market tested the insurance premium, and confirmed the insurance for the coming year". The LVT found that: it was standard practice to use A rate or higher insurance providers; that, as a result of the leases not containing a provision prohibiting sub-letting, there had to be insurance to cover potential difficulties of occupants being from a group which attracted a higher than normal premium; and that the property had a significant history concerning subsidence.

23. The LVT set out the evidence it heard with respect to comparables (I will return to this) and (as set out above) reached the following findings:

(i) that while cheaper insurance may have been obtained, the approach taken by the respondent to this appeal is not unreasonable given the wording of the lease which the LVT held to give a very wide discretion in terms of the coverage which the leaseholder may obtain in terms of insurance;

(ii) that the LVT took issue with the use of a sister company in circumstances where there is little if any evidence of market testing the claims handling service, and found that there was nothing which justifies the 12% handling fee so that the cost of the insurance should be reduced by 12%.

Challenge to the insurance premium

24. The appellant contends that the LVT erred in failing to determine that the level of insurance premiums were not reasonably incurred (in terms of section 19 of the LTA 1985) save for the 12% claims handling.

25. The appellant sets out that there was no meaningful evidence before the LVT as to how the insurance had been market tested and that the comparables provided by the respondent (incorrectly referred to in paragraph 44 of the decision as being comparables provided by both parties when in fact they were only from the respondent) were not provided from the broker but were internet-search quotations: "go compare" provided a nil quotation; "Simply Business" provided a quotation but with the block being given a higher valuation of £679,772, and a greater loss of rent cover (20% rather than 10%); and "The Business Octopus" provided two sets of quotations: one for a range of £1,634.70 to £3,196.48 and the other with a range from £1,634.70 to £13,889.75, the complaint being that the company was again quoting for too high a value and therefore not proper comparables.

26. The appellant relies upon its own quotation from Reich Insurance dated 8 November 2011. This provides a total premium of £1,011.60 for a property valued at £523,420. The quotation provides confirmation that the insurers had had sight of the up to date claims history (information the appellant complains had only been provided a few days before the hearing and therefore limited the appellant's ability to provide a comparable) *"along with the loss adjuster's confirmation that all subsidence related issues have now been fully and professionally dealt with and there is no further or future risk of such a claim."* Significantly, the quotation continues *"Prior to any Subsidence related cover being provided Insurers will require sight of a structural engineers report, which is standard industry practice."* The quotation does not, therefore, deal with subsidence-related cover being provided.

27. The appellants contends that the LVT did not have evidence before it that could support the respondent application for a determination that the insurance was reasonably incurred. The respondent contends that the evidence provided by the appellant does not support the contention that the LVT could only have concluded that £1011.60 was reasonably incurred and that the appellant is seeking to challenge primary findings of fact.

28. The limits to the role of the Upper Tribunal on a review hearing are clearly set out by Carnwarth LJ (as he then was) in *Daejan Investments Limited v Benson* (2010) P & CR 116:

> "…we remind ourselves that we are reviewing their decision, not substituting our own judgment. It is common ground that we can only interfere if the LVT has gone wrong in principle, or left material factors out of account, or its balancing of the material factors led to a result which was clearly wrong."

Further, in *Triplerose v Grantglen Limited & Cane Developments Ltd* [2012] UKUT 0204 (LC) I reiterated that it is a matter for the LVT to come to decisions on issues of fact and it is a matter for them to determine between conflicting evidence: it is only if there is a leaving out of material factors or taking into account matters which are not relevant that the Upper Tribunal will interfere.

29. In my judgment, the appellant is seeking to ask this Tribunal to interfere with the LVT's findings of fact, without there having been any error on the LVT's part either in leaving out material factors or taking into account immaterial matters. In my judgment, there are criticisms that can be made with respect to the evidence put before the LVT by both the appellant and the respondent: the appellant as the insurance cover did not provide for subsidence, an issue that had plainly been a problem for the property – at least in the past; and the respondent's evidence was not that from their broker, but from the internet, and gave a greater value to the property than that which had been quoted for the insurance in fact obtained.

30. The LVT was dealing with the evidence it had before it and properly directed itself to the relevant and correct law, setting out the principle that the landlord is not obliged to shop around to find the cheapest insurance. So long as the insurance is obtained in the market and at arm's length then the premium is reasonably incurred. There is nothing to suggest that the insurance was arranged otherwise than in the normal course of business, and the appellant did not seek to adduce evidence to support such a contention. The appellant's complaint is that it might be possible to obtain a cheaper rate, but it is not for the landlord to establish (as has been expressly found in *Berrycroft)* that the insurance premium was the cheapest that could be found in order for the costs to have been reasonably incurred. The words "properly testing the market" used by Mr Francis in *Forcelux* in 2001 does not in anyway detract from the decisions of the Court of Appeal in *Berrycroft* and *Havenridge* that the landlord must prove either that the rate is representative of the market rate, or that the contract was negotiated at arm's length and in the market-place.

31. I therefore decline to interfere with the LVT's finding with regard to the premium as asked for by the appellant. That is not, however, the end of the matter as the respondent is using this appeal to "piggy-back" their own argument that the LVT was wrong to say that the 12% claims-handling fee was not reasonably incurred.

32. The respondent did not seek permission to cross-appeal, and the appellant objects to the appellant seeking to challenge a finding from the LVT without having first obtained permission to cross-appeal.

33. In *Arrowdale v Coniston Court (Hove) Limited* LRA/72/2005 the then President set out the lacuna created by the Lands Tribunal Rules 1996 which meant that a cross-appeal could not be made unless the other party had made an application and received from the LVT leave to appeal well within the prescribed 21-day period. George Bartlett QC said it was important to note the power of the Lands Tribunal on appeal as conferred by section 175(4) of the Commonhold and Leasehold Reform Act 2002 which provides that: "On the appeal the Lands Tribunal may exercise any power which was available to the leasehold valuation tribunal." So that, in terms, the power of the Tribunal is limited by reference only to the power of the LVT in determining the application that was before it. Thus, said the President:

> "… the injustice that would result from there being no provision for cross-appeal in either the LVT Regulations or the Lands Tribunal Rules can be mitigated by virtue of the provision in section 175(4)…It is a matter for the Tribunal's discretion, and clearly the Tribunal would only exercise the power to make a determination more adverse to the appellant than that of the LVT if it was fair to do so."

34. An application for permission to appeal out of time can now be made by virtue of the provisions of regulation 21(6) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 ("the 2010 Rules"), so that the fundamental difficult of a potential cross-appellant being prevented from making an application for permission to appeal is removed.

35. I do not accept, as is contended for by the appellant, that *Arrowdale* is no-longer good law. The provisions of section 175(4) of the 2002 Act still apply and the power of the Tribunal is limited by reference only to the power of the LVT. However, there is now provision for the making of a cross-appeal out of time and, while the 2010 Rules make it clear that part of the overriding objective is to enable the Tribunal to deal with cases fairly and justly which includes "avoiding unnecessary formality and seeking flexibility in the proceedings", this does not, in my judgment, cover the situation in this particular case where the respondent is seeking to cross-appeal on a point which it does not have permission to do.

36. Permission to appeal and cross-appeal is necessary in order to prevent the Upper Tribunal from being over-burdened with unmeritorious appeals. If a party could properly bring any matter before the Tribunal without first obtaining permission of either the LVT or the Tribunal to cross-appeal that would drive a "cart and horses" through the procedures and result in the need for permission to cross-appeal being removed in practice. It could also lead to arguments that the appealing party, having been given permission to appeal on a particular point, could raise other points, without permission having been granted, on the basis that the same would be "avoiding unnecessary formality and seeking flexibility in the proceedings." The LVT and the Tribunal are careful in ensuring that only those matters which have a realistic prospect of success are allowed to proceed to appeal. It is an important part of the management of the Tribunal's work that permission stage exists and it would be wrong for parties to consider they can circumvent that requirement.

37. Consequently, I do not consider that the respondents are entitled to argue that the 12% claims management fee was wrongly found not to have been unreasonably incurred and the respondent's fail on this point.

38. Having made that finding it is, of course, not necessary for me to deal with the arguments on this point but, for purpose of completeness, I will do so.

39. The respondent's first contention is that the LVT was raising a new point of its own volition which was not raised by either of the parties, and thereby took the respondent by surprise.

40. The respondent relies upon the decision of HHJ Robinson in *Sadd v Brown* [2012] UKUT 438 (LC), where she referred to the decision of the Court of Appeal in *Thinc Group v Armstrong* [2012] EWCA Civ 1227 that for a court or tribunal to determine a dispute on the basis of a case not put forward by a party or not raised by the court or tribunal is unfair and not permissible so that:

> "the LVT was not entitled to hold that insurance premiums were not recoverable under the Lease without at least referring the issue back to the parties for their comments which it did not do. It should be observed that this is yet another example of the LVT taking a point not

sought to be pursued by the party in whose favour the decision was taken and without giving either party an opportunity to deal with it resulting in an appeal that should not have been necessary."

41. In substance, the respondent says that having taken the respondent by surprise in raising this issue it is, nonetheless, trite to say that insurance requires someone to handle claims (and reliance is placed upon *Williams v Southwark LBC* (2001) 33 HLR 22) and that, in this case, there was evidence before the LVT that there had been a significant claims history (with respect to subsidence).

42. In the circumstances, the respondent contends that the LVT was procedurally wrong to raise the issue and that, having raised the issue, they ignored the evidence adduced which supported a claims handling payment of 12%.

43. In response, the appellant contends that the evidence before the LVT was adduced orally and, as it was not reduced to writing (and LVT proceedings are not recorded) there is no evidence before the Tribunal as to what questions were asked, and answers elicited, other than the record contained in the LVT decision and the determination that there was "little or no evidence of claims handling" so that the matter ought not to be re-opened.

44. In my judgment, even if the respondent was entitled to appeal this finding (which in my judgment it is not, having failed to seek or obtain permission to cross-appeal), this is not a matter where it can be said that there has been a procedural failure on the part of the LVT. The respondent was aware that the appellant was challenging the reasonableness of the insurance premium and therefore could expect to be challenged upon any part of that premium. This appears to be a challenge with respect to a factual finding of the LVT and, while I appreciate the respondent's position that it would not have made the challenge had the appellant not sought to challenge the finding as to the reasonableness of the insurance premium (save for the 12%), that does not make this a proper challenge.

45. I therefore also decline to interfere with the LVT's finding that the 12% claims handling should not be allowed, thereby reducing the insurance claim. I primarily decline to interfere as I do not consider that the respondent was entitled to be heard on this point, having not obtained permission to cross-appeal. Even had they done so, I would not have interfered with this factual finding.

Section 20C

46. Section 20C of the LTA 1985 provides:

"(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 … leasehold valuation tribunal, or the Upper Tribunal … 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.

(2) …

(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."

47. The appellant contends that the LVT erred in determining that, in all the circumstances of this matter, it would not be reasonable to grant a section 20C order. The appellant also seeks a section 20C order with respect to the hearing before the Tribunal but acknowledges that application is dependant upon the decision as to success on the appeal, and also the decision with regard to the correct way to deal with a section 20C application.

48. The first point to note, is that the making of a section 20C order is entirely discretionary and is very widely worded: the LVT or Tribunal "may" make an order "as it considers just and equitable in the circumstances". An appeal against the granting or refusal of making such an order must therefore establish that the LVT was acting in a perverse or irrational manner in the exercise of its discretion. The exercise of the discretion is not the same as the court's costs discretion under the provisions of CPR order 44.

49. In *St John's Wood Leases Limited v Joann O'Neill* [2012] UKUT 374 (LC), HHJ Gerald and Mr Rose FRICS set out, in a detailed judgment, various authorities that had dealt with the issue as to when the discretion ought to be exercised to make a section 20C order. Starting with *Iperion Investments Corporation v Broadwalk House Residents Limited* [1995] 2 EGLR 47, 49 Peter Gibson LJ said:

> "The obvious circumstances which Parliament must have been taken to have had in mind in enacting section 20C is a case where the tenant has been successful in litigation against the landlord and yet the costs of the proceedings are within the service charge recoverable from the tenant… To my mind, it is unattractive that a tenant who has been substantially successful in litigation against his landlord and who has been told by the court that not merely need he pay no part of the landlord's costs, but has had an award of his costs in his favour should find himself having to pay any part of the landlord's costs through the service charge. In general, in my judgment, the landlord "should not get through the back door what has been refused by the front": *Holding & Management Ltd v Property Holding & Investment Trust plc* [1989] 1 WLR 1313, at p 1324 per Nicholls LJ."

50. Moving on to the decisions of the Upper Tribunal (Lands Chamber) or its predecessor, the Lands Tribunal, these following judgments were referred to.

51. First, in *The Tenants of Langford Court (Sherbani) v Doren Limited* LRX/37/2000 His Honour Judge Rich QC set out the principles upon which the discretion under section 20C should be exercised:

> "28. In my judgment the only principle upon which the discretion should be exercised is to have regard to what is just and equitable in all the circumstances. The circumstances include the conduct and circumstances of all parties as well as the outcome of the proceedings in which they arise…

30. Where, as in the case of the LVT, there is no power to award costs, there is no automatic expectation of an Order under s. 20C in favour of a successful tenant, although a landlord who has behaved improperly or unreasonably cannot normally expect to recover his costs of defending such conduct.

31. In my judgment the primary consideration that the LVT should keep in mind is that the power to make an order under s.20C should be used only in order to ensure that the right to claim costs as part of the service charge is not used in circumstances that make its use unjust."

52. In *Schilling v Canary Riverside Development PTE Limited* LRX/26/2005 His Honour Judge Rich QC said in cases where the LVT had not exercised its discretion to order that the landlord pay the tenant's costs on the basis that it had acted improperly or unreasonably:

"13….When therefore I referred in paragraph 30 of my Decision (in *Langford Court v Doren)* to a "landlord who has behaved unreasonably" I meant more than, for example, its being found that some costs had not been unreasonably incurred so as to entitle the tenant to a declaration under section 19 of the Act of 1985. The *ratio* of the *[Doren]* Decision is "there is no automatic expectation of an Order under s. 20C in favour of a successful tenant. So far as an unsuccessful tenant is concerned, it requires some unusual circumstances to justify an order under s.20C in his favour.

14… Weight should be given rather to the degree of success, that is the proportionality between the complaints and the Determination, and to the proportionality of the complaint, that is between any reduction achieved and the total of service charges on the one hand and the costs of the dispute on the other hand."

HHJ Gerald referred to one of his earlier decisions, *The Church Commissioners v Dedebai* [2010] UKUT 380 (LC), in which he set out the various issues that the LVT may wish to consider in determining whether it is appropriate to make an order under section 20C. Insofar as that judgment might be seen to prescribe the matters that the LVT ought to take into account, thereby super-imposing the various headings set out CPR 44.3, I do not consider that would be the correct interpretation of the judgment. Whether a section 20C order is made is entirely discretionary and to be ordered to ensure that the right to claim costs as part of the service charge is not used in circumstances that make its use unjust. An LVT is not to undertake (as HHJ Gerald put it) a "mini taxation" exercise.

53. While section 20C itself permits an order to be made with respect to all "or any" of the costs, in my judgment a section 20C order should only be made where it would be unjust for the landlord to include all, or any part, of the costs in the service charge. It is, ultimately, a matter for the LVT to exercise its discretion. The LVT may wish to look at the degree to which the tenant succeeded in its complaints, the conduct of the parties, and the degree of success on the issues, the eventual determination as to whether such an order ought to be made is one for the LVT to make exercising its own judgment having heard all the evidence and submissions. It would be an error to equate the exercise of that discretion with the more formulaic exercise that must be undertaken if costs are to be awarded in the civil courts pursuant to the provisions of part 44 of the Civil Procedure Rules.

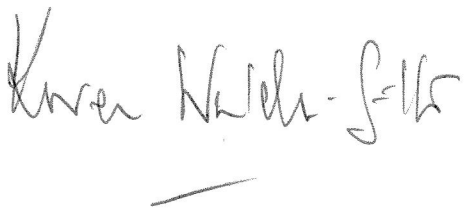
54. I do not accept that, in this case, the LVT has erred in the exercise of its discretion by not making a section 20C order and it would be wrong for this Tribunal to interfere with the exercise of that discretion, where it clearly had in mind the behaviour of both parties and the degree to which the appellant (the respondent to that application) had succeeded in its dispute.

55. Further, I do not consider that there are any valid grounds for granting a section 20C order with respect to the costs of this appeal hearing.

Conclusion

56. For the reasons set out in detail above, I uphold the LVT's decision and do not allow the appeal with respect to the level of the insurance premium nor with respect to the exercise of the LVT's discretion in refusing a section 20C order. With respect to the issues raised by the respondent, in my judgment that matter ought to have formed an application for permission to cross-appeal and the respondent has neither sought nor obtained permission to cross-appeal and must therefore fail. In any event, the challenge to the LVT's decision with respect to the reduction of the insurance premium by 12% is not well-founded.

Dated: 30 May 2013



Her Honour Judge Walden-Smith