

UPPER TRIBUNAL (LANDS CHAMBER)



UT Neutral citation number: [2009] UKUT 180 (LC)  
LT Case Number: LRX/3/2008

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

*LANDLORD AND TENANT – service charges – LVT wrongly failed to have regard to the evidence – reasonableness of estimates as to likely future expenditure for the purposes of a reserve fund – inadequate evidence justifying full amount of predicted future expenditure – appeal allowed in part.*

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

BETWEEN                                  HYDE HOUSING ASSOCIATION LIMITED                                  Appellant

and

    KATHRYN LOUISE LANE & OTHERS                                  Respondents

Re: 11, 8, 9, 10, 13, 15, 16, 18 & 28 Mountain Ash  
Tilden Road  
Winchester  
Hants SO21 2DW

Before: Her Honour Judge Alice Robinson

Sitting at: 43-45 Bedford Square, London WC1B 3AS  
On 15 September 2009

*Nicola Muir* instructed by Whiteheads for the Appellant  
There was no appearance on behalf of the Respondents

The following cases are referred to in this decision:  
*Forcelux Ltd v Sweetman* [2001] 2 EGLR 173

## DECISION

### INTRODUCTION

1. The Appellant appeals to the Lands Tribunal, with permission, from a decision of the Leasehold Valuation Tribunal for the Southern Rent Assessment Panel (hereafter “the LVT”) dated 19 November 2007 whereby the LVT determined the reasonableness of service charges for the years 2006/2007 and 2007/2008 and in particular that the amount due for anticipated future expenditure under the heading ‘miscellaneous’ in both years was nil.

2. The Respondents are the lessees of a number of flats in a block of 12 flats known as Mountain Ash, Tilden Road, Winchester, Hants SO21 2DW (hereafter “the Premises”), specifically numbers 11, 8, 9, 10, 13, 15, 16, 18 & 28. The Premises were completed in 2006 and form part of a larger development which also includes 15 houses. The Appellant landlord prepared budgets for estimated expenditure for the years 2006/2007 and 2007/2008. These included the sums of £2,986.52 and £5,088.79 respectively for those years as ‘miscellaneous’ items of anticipated future expenditure for the purposes of building up a reserve fund. After protests from the lessees as to the level of increase, by a letter dated 2 March 2007 the Appellant agreed to reduce the figure for 2007/2008 by half to £2,544.39. On 23 May 2007 the First Respondent applied to the LVT for a determination as to the reasonableness of the budgeted service charges claimed by the Appellant for those two years. The other Respondents were joined at their request.

3. On 19 November 2007 the LVT made its decision in respect of 12 service charge items. In respect of the ‘miscellaneous’ item the LVT found the amount for both years should be nil on the grounds that:

“The Tribunal had no evidence to support these figures and accordingly reduced them to nil.” paragraph 14 i.i

Further, when refusing permission to appeal the LVT said this:

“The Tribunal was not directed at the hearing to either the skeleton or the FFT survey report in connection with the miscellaneous charges. The Tribunal takes the view that if parties wish to rely on any documents in support of their case, it is for that party specifically to put forward evidence at the hearing, rather than the Tribunal being required to sift through every page provided in a bundle for use at the hearing.”

The Lands Tribunal granted permission to appeal on 25 March 2008.

4. The Appellant submits that the LVT had evidence before it in the form of a report commissioned from an independent consultant Faithorn Farrell Timms LLP (hereafter “FFT”) as to anticipated future expenditure for the purpose of establishing a reserve fund. That report estimated the life cycle of constituent parts of the Premises and the likely cost of their replacement or repair. This enabled an annual amount to be calculated which would establish a

reserve fund to pay for such work spreading the cost as evenly as practicable over a number of years. The list of items to which this charge relates was set out in a letter from the Appellant to the Respondents dated 20 February 2007. The evidence was referred to in the parties Statements of Case, the Appellant's Skeleton Argument and at the hearing. The Respondents did not dispute the life cycle of any part of the Premises nor the anticipated cost of replacement/repair and did not put forward any alternative figures. Accordingly it was submitted that the 'miscellaneous' charges were supported by evidence and reasonable. Provided the Appellant had acted reasonably in its approach towards establishing a reserve fund and the anticipated cost of works was a reasonable market rate even if not the lowest available price the service charges satisfied section 19(2) of the Landlord and Tenant Act 1985, see *Forcelux Ltd v Sweetman* [2001] 2 EGLR 173 paragraphs 39-41.

5. The appeal was unopposed.

## **DECISION**

6. The Respondents are obliged to pay service charges in accordance with the provisions of clause 7 of a Head Lease which in the case of First Respondent is dated 25 May 2006 and made between Hyde Vale Limited and the Appellant. Clause 7(4)(b) provides:

“The service Provision shall consist of a sum comprising

(b) an appropriate amount as a reserve for or towards such of the matters specified in sub-clause (5) as are likely to give rise to expenditure after such Account Year being matters which are likely to arise either only once during the then unexpired term of this Lease or at intervals of more than one year including (without prejudice to the generality of the foregoing) such matters as the decoration of the exterior of the Building (the said amount to be computed in such manner as to ensure as far as is reasonably foreseeable that the Service Provision shall not fluctuate unduly from year to year)”

7. The FFT report commissioned by the Appellant to estimate likely future expenditure was not available when the 2006/2007 budget was prepared. There was no evidence in the documents to support the estimated expenditure on 'miscellaneous' items or what those items might be for that year. The Tribunal was informed that evidence had been given at the LVT to the effect that the Appellant had guessed the amount based on its experience of other properties. To require a service charge payment of an estimated sum to reflect likely future expenditure for a reserve fund without any supporting evidence as to likely works, the date when they may have to be carried out and their cost is bound to result in a challenge from the lessee(s). In the absence of such evidence there is no basis on which a tribunal can find that the amount is reasonable for the purposes of section 19(2) of the 1985 Act which provides as follows:

“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...”

Nevertheless, the subsequent availability of the FFT report provides some evidence upon which a decision as to reasonableness can be made. I return to this issue in relation to the 2006/2007 service charge after reviewing that evidence, see paragraph 14 below.

8. The FFT report is referred to in the Appellant’s Statement of Case paragraphs 25-28 and 50-52 and the Respondent’s Statement of Case paragraphs 32 and 33 on the question of the reserve fund and ‘miscellaneous’ charges. The Appellant’s Skeleton Argument also dealt with the reserve fund and ‘miscellaneous’ charges in paragraphs 17-19. The FFT report and letter of 20 February 2007 were before the LVT. In fact, it is clear from the LVT decision that they did look at the FFT report on other aspects of the reserve fund and a letter dated 20 February 2008 from the First Respondent to the Lands Tribunal states that the ‘miscellaneous’ figures were discussed at the hearing. In my judgment it was incumbent on the LVT to read the parties Statements of Case and Skeleton Arguments and, where the evidence to which they referred was not immediately clear on the face of those documents, to look at the pages of evidence referred to in the Statements of Case and Skeleton Arguments. Moreover, the LVT stated in paragraph 11 of its decision that:

“The Tribunal heard evidence from the parties, their submissions and considered all the case papers and further documents submitted.”

Therefore the LVT also stated that it undertook this task as well.

9. The ‘miscellaneous’ charges are supported by evidence. Pages 31 to 34 of the Respondents’ bundle before the LVT identifies the constituent parts of the Premises in the ‘miscellaneous’ category, their life cycle, the dates when work on each is anticipated and the anticipated cost of the work. Pages 35 to 39 also identify the material from which the parts are constructed and the quantum involved whether in terms of square metres, length in metres or a number of units. All these pages are from the FFT report. The letter dated 20 February 2007 lists those items included in the ‘miscellaneous’ category and appears on several different pages in the Respondents’ bundle before the LVT.

10. The life cycle adopted for the ‘miscellaneous’ items is mostly 30 years though that of car park markings is 10 years and external lighting 20 years. Some items have a life cycle of 40, 60 or 80 years. Figures are provided for the anticipated future cost of repair/replacement having regard to the construction material and quantum. None of these figures for ‘miscellaneous’ items in the FFT report is or was specifically challenged by the Respondents nor any alternative figures put forward.

11. The figures in the FFT report were generally supported by the LVT which said this in paragraph 13.e:

“The Tribunal generally accepted the evidence available from the FFT report of October although it considered that there are some items which might need review on both cost and frequency. The Tribunal noted the respondent recognised this particularly in relation to provision for scaffolding.”

In fact scaffolding was the only figure the LVT did not accept in the FFT report for 2007/2008, but as the Appellant had halved the figures (see paragraph 2 above) the LVT was satisfied the amount claimed was reasonable. The only other figures the LVT did not accept for 2007/2008 relating to a reserve for future provision were those for emergency lighting (because there was no such lighting) and the TV aerial (because the amount should be shared with the adjoining houses as well). Neither of these two latter points reflect on the frequency or cost of anticipated future works estimated by FFT.

12. In its Statement of Case before the LVT the Respondents raised a number of points about the FFT report. In paragraphs 25 to 28 they question why the budget figures for the reserve fund total £12,490.80 per annum (see page 71 of the Respondents’ bundle) whereas the total of £723,895 divided by 60 years amounts to £12,064.92 per annum (see page 34 of the Respondents’ bundle). These figures are not comparable. £723,895 is the estimated total cost of the future works but the service charge is based on the ‘projected requirement with VAT’ (my emphasis). Those figures are set out in the penultimate column on page 34. It should be noted however that the total projected requirement with VAT divided by 60 years is more than the budget figure of £12,490.80 on page 71. I return to the reason for this in paragraph 13 below.

13. Paragraph 52 of the Respondents’ Statement of Case also asks why the 2007/2008 budget figure for ‘miscellaneous’ items is £5,088.79 (then halved to £2,544.39) (see pages 71 and 83 respectively of the Respondents’ bundle) whereas the Appellant’s Statement of Case paragraph 32 refers to different figures of £6,244.99 and £6,724.49. Again, neither party is comparing like with like. The figure of £6,244.99 relates to the annual amount required to build up the reserve fund for all items shown in the FFT report (including ‘miscellaneous’ ones) but halved as shown on page 83 of the Respondents’ bundle. The figure of £6,724.49 is a typing error and should read £6,774.27. It is the annual amount required to build up the total reserve fund with VAT for ‘miscellaneous’ items only, see page 34 of the Respondents’ documents.

14. However, this gives rise to the question, why is the figure of £5,088.79 included in the initial budget for ‘miscellaneous’ items for 2007/2008 instead of the £6,774.27 set out in the FFT report? This is nowhere explained in any of the documents. The Tribunal was informed that some of the items listed in the FFT report relate to works to the estate as a whole of which the Premises but also the houses form part. Accordingly the houses should bear a share of those costs. This appears to be perfectly reasonable as a matter of principle but the Appellant was wholly unable to explain how the figures in the FFT report had been adjusted to arrive at an annual amount of £5,088.79 for ‘miscellaneous’ items. Therefore it is not possible to be satisfied that the figure of £5,088.79 is a reasonable one. However, it is clear that the majority of the anticipated works relate to the Premises alone and that only some items under headings such as ‘boundaries/areas’ and ‘drainage’ could also benefit the houses. Even though there are 15 houses and 12 flats, on any view half of the total cost would be a reasonable amount to

reflect the proportion of 'miscellaneous' items from the FFT report properly attributable to the Premises. If the Appellant wishes to claim the full amount of £5,088.79 in future years it will have to justify how that figure is derived from the figure of £6,774.27 in the FFT report taking account of any proportion of expenditure which the houses on the estate should bear.

15. Returning to the 2006/2007 budget, given that the amount claimed in 2007/2008 is a sum derived by dividing the total cost by 60 years and then halving it, if that figure is a reasonable one then it would at the very least be a reasonable figure to claim in other years. In stating this it is not intended to limit recovery of £5,088.79 in future years if that figure can be justified. Accordingly, even though there is no evidence to support the figure of £2,986.5, a figure of £2,544.39 would be a reasonable one. In arriving at this view I consider the LVT was wrong to state in paragraph 13.d of its decision that reasonableness can only be considered as at the date of the demand and not with the benefit of hindsight. Where one is dealing with estimates of future expenditure evidence may subsequently emerge which sheds light on whether a figure is a reasonable one. The tribunal is not required to shut its eyes to the evidence and assess the sum for 'miscellaneous' items as nil on the grounds that at the time of demand there was insufficient evidence to support the reasonableness of the figure demanded when the Appellant has subsequently obtained an expert's report which identifies what a reasonable sum would be.

16. It follows from the above that the LVT erred by stating that there was no evidence to support the claim for 'miscellaneous' items and failed to take into account the evidence which was before it. If the LVT had taken that evidence into account the only proper decision it could have reached on the evidence is that a reasonable sum for 'miscellaneous' items of anticipated future expenditure for the purposes of building up a reserve fund for both the years 2006/2007 and 2007/2008 would have been £2,544.39. The appeal is allowed to this extent.

17. There was no application for costs.

Dated 17 September 2009

Her Honour Judge Alice Robinson