LVTs and the Upper Tribunal (Lands Chamber)

Some key cases from 2010

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Service charges; deemed admissions

Shersby v Grenehurst Park Residents Co Ltd LRX/142/2007

The appellant held a lease of a flat in a former mansion house. The wider estate comprised 17 such flats and a number of freehold houses and mews cottages. In total there were 40 residential units. All the units were obliged to contribute to the costs of repairing the main structure of the mansion house but, for the first five years of the lease, the service charge was capped by virtue of an agreement between the developer and the tenants.

It subsequently became clear that the cap could not be maintained as it was not sufficient to allow for the collection of any reserves. The freeholder house owners were not happy with this and pointed to the apparent unfairness of obliging them to repair not just their own homes but also the mansion.

The respondent – as freeholder and manager under the leases – was minded to move towards a scheme whereby the leaseholders would pay increased service charges. The lease did provide for the service charge percentages to be varied and the issue was whether or not the respondent had lawfully done so.

The appellant contended that it had not done so. In particular, he argued that the obligation to contribute towards the mansion was a collective obligation on both the leaseholders and freeholders and that the lease made no provision for dividing costs into separate "pots". There were also sound policy reasons against construing a generous power of alteration to the respondent, if only because leaseholder were entitled to certainty regarding their proportion of the overall expenses. In addition, a subsidiary issue arose as to payment of insurance premiums.

The Upper Tribunal (Lands Chamber) dismissed the appeal. The lease entitled the respondent to vary the percentages payable if "in the opinion of the Manager" it was appropriate to do so. This had to be a genuine and bona fide opinion. The task of the Tribunal was to determine whether the respondent reached a lawful and reasonable decision. It was not the task of the Tribunal to substitute its own view but to ensure that the decision taken as one within the range of reasonable decisions.

The respondent took legal advice on the issue and advice from a surveyor. It gave detailed and careful consideration to the matter and came to a clear view. It was a bona fide decision. The fact that a different decision was possible was immaterial.

The insurance premiums had been paid between 1997 and 2004 and, in addition, had not been challenged at the time, whether in correspondence or in previous LVT proceedings between the parties. The charges had been admitted within the meaning of s.27A(4), Landlord and Tenant Act 1985 and were not capable of challenge in the LVT. In addition, premiums since 2004 were payable as charged.

Service charges; s.20B; QLTA; Qualifying works

Paddington Walk Management Ltd v Governors of Peabody Trust [2010] L&TR 6

The Paddington Basin is a large development which comprises five linked blocks of flats. The Defendant held, *inter alia*, 79 flats in the development which it let on shared ownership leases and assured tenancies. The Claimant was a party to the relevant lease, as the manager responsible or the collection of service charges and discharge of the usual covenants (repairing, etc). The dispute involved five issues:

(a) the ability of the Claimant to recover, in 2008/09, service charges which should have been paid in 2005 but which, owing to a delay in preparing the relevant accounts, had not been demanded;

(b) whether three year contracts for building maintenance services were qualifying long term agreements; (QLTA)

(c) whether a management agreement or a term of 12 months and then subject to three months notice was a QLTA;

(d) if the contracts were QLTAs, was the service charge recovery capped at £100 per contract or per flat?

(e) whether window cleaning was "qualifying works".

On August 17, 2005, the then managing agents for the claimant had sent a service charge demand based on estimated service charges for the period to December 31, 2005. It was not until August 21, 2006 that it was discovered that there was discovered that the August 2005 demand was significantly short of what the actual expenditure was and the shortfall was demanded in August 2007.

The problem for the claimant was that s.20B, Landlord and Tenant Act 1985 requires service charges to be demanded within 18 months of being incurred, or, if that is not possible, the leaseholder must be notified (within the same period of time) that the costs have been incurred.

The claimant sought to argue that s.20B, 1985 Act didn't prevent a subsequent correction of an error. The 2005 demand was erroneous and had later been corrected. The judge rejected that argument; the purpose of s.20B was to finalise service charge contributions; errors had to be corrected within the 18 month period. The demand in August 2007 was outside of the 18 month period. Correspondence from 2006, when the

error was discovered, was not sufficient to constitute notification within the 18 month period because it did not actually refer to any costs that had been incurred, but merely raised the probability that the 2005 demands were erroneous.

As regards the consultation provisions, the building contracts were QLTAs; they were entered into after the defendant had been granted their lease, the fact that the defendant had not yet granted any sub-lease was irrelevant. However, the contract with the managing agents was not as it was not an agreement for a term of more than 12 months, rather, it was an agreement for 12 with a notice period.

Because the building contracts were QLTAs that had not been consulted on, recovery was capped at £100 *per sub-tenant of the defendant* (i.e. £7,900) and not merely £100 payable by the defendant, as the actual tenant of the claimant. Whilst the judge did not find this an easy matter, she was swayed by the fact that the sub-tenants were entitled to apply for a determination of the reasonableness of their service charges, as against both the claimant and defendant (*Oakfern v Ruddy* [2006] 3 EGLR 30, CA).

Window cleaning was not qualifying work; qualifying work meant "building works" which is not what one would usually consider window cleaning to be.

Service charges; QLTA

Paddington Basin Developments Ltd and others v West End Quay Estate Management Ltd [2010] EWHC 833 (Ch)

The claimant was the leaseholder of a plot of land. Part of that land was demised to a third party, which built three blocks of flats on their part of the land. The flats were then sub-let to individual tenants. The defendant was a management company under the residential leases. The residential tenants had covenanted to pay service charges to the defendant, and, included within the service charges was any sums which the defendant had to pay to the claimant. That was important because the defendant had agreed with the claimant that it should provide certain services (fire alarm, security etc) for the benefit of the whole development, and the defendant would pay a fair and reasonable proportion of those costs.

It seems that the claimant and defendant could not agree what a fair and reasonable proportion was. In particular, the defendant argued that there was an implied term that it should not have to pay more than it could recover from the residential tenants. It went on to argue that the maximum that it could recover was £100 per tenant, because the agreement with the claimant was a QLTA and had not been consulted on (or dispensation granted). The claimant denied both of these assertions. The High Court ordered that there be a trial of the preliminary issue as to whether or not the contract between the claimant and defendant was a QLTA.

The Court held that the agreement was a QLTA. Statute defined a QLTA as being (i) an agreement, (ii) entered into by or on behalf of the landlord, which (iii) was for a term of more than 12 months. All three of these features were met in the present case. The claimant and defendant were clearly in a contractual relationship for the provision of certain services. The defendant had a right to collect service charges and, so, was a landlord (as against the residential tenants) under s.30, 1985 Act and the agreement was for a minimum term of 25 years.

The claimant argued that this was an absurd conclusion. Lewison J disagreed. What the claimant was really doing was saying that, in some circumstances, it might be difficult for the defendant to consult its tenants, but that (a) was a matter for them and (b) was why the LVT had a power to dispense with the consultation requirements.

Liability of subsequent freeholders; build quality; liability of managers

In *Peverel OM Ltd v (1) Peverel Freeholds Ltd (2) MacKenzie and others* [2010] UKUT 137 (LC) the issue was whether the costs of roof works were reasonably incurred for the purposes of s.19(1), Landlord and Tenant Act 1985.

Barratt Homes Ltd had converted a block from offices into flats in c.2000. Long leases were then sold to, *inter alia*, the second respondents and the freehold to the first respondent. The appellant was the manager under the leases. In c.2002, the roof began to suffer from water penetration and, when minor repairs were ineffective, major works were carried out in 2007. These cost c.£37,000, which the appellant intended to recover from the second respondents.

The second respondents applied to the LVT, arguing that they were not liable to contribute to the costs because the appellants should look to Barratt Homes for the costs; it was their roof and they who should pay. The LVT agreed, finding that the roof had failed because of faulty workmanship or preparation when converting the property and it was a breach of a "duty of care" by the appellant not to pursue Barratt.

The appeal was allowed. There was no evidence that the appellant – which was, after all, only the manager, had any cause of action against Barratt. It was only obliged to maintain the property and had no contractual relationship with Barratt; there was no basis to find that any contractual claim could be maintained. Likewise, a tortious claim failed for similar reasons; there was no relationship between Barratt and the appellant under which Barratt owed a duty of care to provide a sound roof and, even if there was, it was not foreseeable that such a defect would cause loss to the appellant. It would not be fair, just and reasonable (as to which, see *Caparo Industries v Dickman* [1990] 2 AC 605) to impose a duty on the appellant to sue.

The second respondents contended that the appellant was, in effect, agent for the first respondent and the first respondent could have sued in respect of the roof. HHJ

Robinson was dubious; the conversion works were done – and the leases granted – prior to the sale of the freehold the first respondent. The usual rule was that the first respondent took the land as it found it, alleged defects and all.

In *City of Westminster v Fleury and others* [2010] UKUT 136 (LC), the question was, again, whether the costs of roof repair works were reasonably incurred, within the meaning of s.19(1), Landlord and Tenant Act 1985. The LVT had – agreeing with the leaseholders – found that the cost of various roof repairs was not reasonably incurred because the method of repair – total recovering rather than patch repair – was unreasonable and, hence, the cost too high.

The authority argued that, if a reasonable surveyor could reasonably form the view that the roof needed to be recovered, then it was not open to the LVT to find that pursuing such a course of action was unreasonable. This was not accepted by the Upper Tribunal. The question was whether the particular decision in question as a reasonable one. The fact that a surveyor might have recommended it was important, but not determinative. The weight to be attached to that evidence would depend where in the range of reasonableness the recommendation lies.

On the facts of the case, the surveyor for the respondents had accepted that one could recover the whole roof, but had suggested that this was "at the very far end" of the range of reasonableness. The LVT had agreed with this and, in the light of all the evidence, this was a conclusion that it was open to the LVT to reach.

However, in reaching such a decision, the LVT did appear to have erred in looking at the likely costs involved; it had thought that the cost of patch repair would be considerably cheaper, but the evidence had not necessarily supported such a conclusion.

In particular, the past costs were not a reliable guide to future costs. This, together with some other discrepancies in the manner in which the LVT had dealt with the evidence, meant that the matter was therefore remitted for further consideration by the LVT.

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