LRX/69/2004

LANDS TRIBUNAL ACT 1949

LANDLORD AND TENANT – service charges – metal windows removed in course of repairs to building elevations involving renewal of window sub-frames – metal windows replaced by PVC double-glazed units – held replacements were works of repair – appeal allowed

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

BETWEEN **LONDON BOROUGH OF SUTTON** **Appellant**

and

CHRISTINE DRAKE and KEVIN DRAKE **Respondents**
RONALD DACOMBE and SHIRLEY DACOMBE
TERENCE CANOSA STEELE and SHARON SUZANNE MOHAMED
and
SEMERA KHAN MOHAMED

Re: Flats 22, 24, 28 and 34
Stancliffe House
Benhill Estate, Sutton, Surrey

Before: The President and N J Rose FRICS

Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL
on 14 May 2007

Stan Gallagher, instructed by Fiona Ledden, Executive Head of Legal and Democratic Services, London Borough of Sutton for appellant
Mrs Gwynneth Turner with permission of the Tribunal for the respondents

The following cases are referred to in this decision:

Lurcott v Wakely [1911] 1 KB 905
Plough Investments Ltd v Manchester City Council [1989] 1 EGLR 244.
Brew Bros Ltd v Snax (Ross) Ltd [1970] 1 QB 612

The following further cases were referred to in argument:

Minja Properties Ltd v Cussins Property Group plc [1998] EGLR 52
Reston Ltd v Hudson [1992] 2 EGLR 51
Mason v Totalfinaelf [2003] 3 EGLR 91

DECISION

1. This is an appeal against a decision of the leasehold valuation tribunal for the London Rent Assessment Panel on an application under section 27A of the Landlord and Tenant Act 1985. It concerns two blocks of flats on the Benhill Estate, Sutton, Surrey, a large housing estate owned by the London Borough of Sutton and consisting of 20 blocks of 429 single floor flats and two storey maisonettes. The application was to determine whether the tenants are liable to pay service charges in respect of major works that were in the course of being carried out as Phase I of a building programme of works to the whole estate. The particular matter in issue is whether the replacement of the original Crittall window frames with PVC double glazed units were works of repair within the landlord's repairing covenant in the leases of four of the 49 flats in the two blocks. The LVT determined that the work did not constitute repair, but it granted leave to appeal because, it said, the issue was one of wide practical importance to this and other social landlords and their leaseholders. The appeal was conducted by way of review.

2. All the blocks on the estate are mixed tenure, 180 of the 429 units being let on long leases granted under the right to buy legislation contained in the Housing Act 1985 and earlier enactments. The other 269 units are let on secure and similar tenancies, under which the council as lessor is responsible for structural and external repairs and maintenance without being able to re-charge the costs of these to the tenants. In the subject blocks 23 out of the 44 units were let on RTB leases. The great majority of the leases contain a recital (at clause 1(l)) in the following terms:

> "the service charge referred to in Clause 3 and the Lessor's obligations to repair shall include any improvements which may be carried out by the Lessor (in its absolute discretion) for the purposes of good estate management."

3. The leases of four of the flats, which were granted rather earlier than the others contain no such provision extending the service charge and repairing covenant to improvements carried out by the landlord. Each of the leases contains an obligation on the part of the tenant to pay the service charge and each contains in the Ninth Schedule a landlord's repairing covenant in the following terms:

> "1. To maintain in good and substantial repair and condition (and whenever reasonably necessary rebuild reinstate renew and replace all worn or damaged parts) the following:-
>
> (1) The main structure of the Building including the foundations all exterior and all party walls and structures and all walls dividing the Flats from the common halls staircases landings steps and passages in the Building and the walls bounding the same window frames and all electrical and other fittings in the building (but excluding the internal plaster the window glass and electrical and other fittings inside any individual Flat for which the lessee thereof is responsible under any provisions in his Lease

> corresponding to Clause 4 of the Seventh Schedule) and all doors therein save such doors as give access to individual Flats and including all roofs and chimneys and every part of the Building above the level of the top-floor ceilings."

4. The blocks of flats are system built, with reinforced concrete frames, brickwork end walls, reinforced hardboard cladding to the main elevations at upper levels and pebble-dash or rendered finish masonry panels at ground floor and balcony levels. The original windows and balcony doors are of a metal Crittall type, single-glazed and set in timber sub-frames. A programme of major works to the subject blocks was carried out as part of a rolling programme of works to the estate and began in January 2004. It consisted of concrete repairs (which are not relevant for present purposes) and windows, door and cladding replacement.

5. In its decision the LVT said that the cladding required urgent replacement. With regard to the windows it said:

> "Given that the cladding required urgent replacement, we are satisfied on all the evidence that it was reasonable and sensible to replace the windows at the same time for a number of reasons. In the first place, it is clear that there would be practical problems in replacing the cladding and the windows separately. These could no doubt be overcome, but at additional future cost. In the second place, a quarter of the sub-frames, (though, on the evidence, none or virtually none of the windows themselves), had failed and required replacement. To replace a quarter of the sub-frames would, we are satisfied, have been a costly procedure, requiring scaffolding. In the third place, it is accepted by Mr Lawton and by the tribunal that the double-glazed units which are being installed are virtually maintenance free and therefore will offer significant savings in future maintenance costs. They also offer better thermal and sound insulation and these are also relevant considerations. They are what a significant number of the residents want and, we are satisfied, what nearly all would want if they could afford them."

6. The tribunal then expressed its conclusion on whether the works were works of repair or improvement. It said:

> "We are satisfied that the replacement of the cladding was a repair, because the old cladding had reached, and, indeed, gone beyond its expected lifespan and half of it was already out of repair. The fact that the new cladding is a better product than the old does not prevent the replacement from amounting to a repair. We are equally satisfied that the replacement of the windows with double-glazed units was, in the circumstances of this case, an improvement because almost all the evidence shows that the original Crittall windows were not out of repair. It is true that, in their Prioritisation Report, Dearle & Henderson spoke of 'buckling of metal frames' (see paragraph 8 above), but the oral evidence from both parties suggests that the windows have performed well and that very few had buckled and none had corroded. A significant proportion of the timber sub-frames were out of repair, but they could have been repaired, although this would have been expensive. Had the windows

themselves failed, then their replacement would probably have amounted to a repair, although a repair which contained a significant element of betterment. Since they had not failed, and their frames were capable of repair, then we consider their replacement to be an improvement, although, as we have held, a reasonable one."

7. For the council Mr Stan Gallagher submitted that the LVT's conclusion that, since the Crittall windows had not failed and their frames were capable of repair, their replacement was an improvement adopted too narrow a frame of reference. It focussed on the Crittall metal window frames themselves. The more appropriate element of the building to assess was either the whole of the elevation of the building, or at least the fenestration system, or, more narrowly, the whole of the window furniture, ie the metal window frame, its sub-frame and the join with the cladding. The relevant question was whether the elevation/fenestration system/window furniture taken as a whole were in a state of disrepair. At the very narrowest, in assessing whether there was disrepair, the metal frames and the timber sub-frames should be considered as a composite whole because they were so closely attached. Alternatively, if the windows were properly to be considered in isolation, although when in situ they were not in disrepair, once taken out, with their glass broken to effect removal of the screws holding them in place, they became in disrepair and dealt with on this basis.

8. Mr Gallagher relied on *Lurcott v Wakely* [1911] 1 KB 905, and in particular on this passage from the judgment of Buckley LJ at 923-4:-

> " 'Repair' and 'renew' are not words expressive of a clear contrast. Repair always involves renewal; renewal of a part; of a subordinate part. A skylight leaks; repair is effected by hacking out the putties, putting in new ones, and renewing the paint. A roof falls out of repair; the necessary work is to replace the decayed timbers by sound wood; to substitute sound tiles or slates for those which are cracked, broken, or missing; to make good the flashings, and the like. Part of a garden wall tumbles down; repair is effected by building it up again with new mortar, and, so far as necessary, new bricks or stone. Repair is restoration by renewal or replacement of subsidiary parts of a whole. Renewal, as distinguished from repair, is reconstruction of the entirety, meaning by the entirety not necessarily the whole but substantially the whole subject-matter under discussion. I agree that if repair of the whole subject-matter has become impossible a covenant to repair does not carry an obligation to renew or replace. That has been affirmed by *Lister v Lane* (1) and *Wright v Lawson* (2) But if that which I have said is accurate, it follows that the question of repair is in every case one of degree, and the test is whether the act to be done is one which in substance is the renewal or replacement of defective parts, or the renewal or replacement of substantially the whole. It is with such limitations as these that the language in the cases which have been cited to us must be read."

9. It was, said Mr Gallagher, a matter for the landlord to decide how to repair the failed timber sub-frames and the failed cladding (and the metal windows themselves, if account were taken of the disrepair that had resulted from their removal). He relied in this respect on *Plough Investments Ltd v Manchester City Council* [1989] 1 EGLR 244. There at 246, Scott J said this:

> "Provided proposed works of repair are such as an owner who had to bear the cost himself might reasonably decide upon and provided the works constitute 'repairs' within the meaning of that word in the fifth schedule covenant, the tenant is not, in my judgment, entitled to insist upon more limited works or cheaper works being preferred."

10. Mrs Gwynneth Turner, a founder member of the Benhill Residents Association, who appeared for the respondents with permission of the Tribunal, said that she occupied a flat on another part of the estate under a lease that excludes the tenant's liability for the cost of improvements. She said that certain items of disrepair had been caused to some extent by the appellant's failure to maintain the buildings properly over the previous 35 years. Nevertheless during that period only a very small proportion of the Crittall windows on the estate had needed replacement. The appellant's list of repairs and maintenance for 1996 to 2004 contained only six references to window repairs, all of them minor.

11. Although it is the case that it is a question of degree as to whether particular works can be said to constitute a repair (see in particular *Lurcott v Wakely* supra, *Brew Bros Ltd v Snax (Ross) Ltd* [1970] 1 QB 612, per Sachs LJ at 640F) what is in our judgment inescapable in the present case is that the removal of the Crittall windows and their relocation must be seen as comprehended in the works of repair that were accepted as being necessary. They had to be taken out and they (or replacements) had to be put back as a necessary part of the works to replace the cladding and the window sub-frames. The cost of taking them out and putting them back would clearly be part of the costs of repair. They were unavoidably damaged in the process of removal, so that the cost of restoring the damage would also be part of the costs of repair. The approach of the LVT in paragraph 64 of its decision – that, since the Crittall windows were not themselves out of repair when in situ, their replacement constituted an improvement – was, in our view, incorrect since it failed to take into account that it was necessary to deal with the windows as part of the works of repair. The LVT did not address itself to the question whether, given that the windows had to be dealt with as part of the works of repair, it was reasonable to replace them with new double-glazed units as an alternative to making good the damage that they had suffered in removal and then securing them in place again.

12. Mr Gallagher sought to contend that the LVT's conclusion that the replacement of the Crittall windows with the double-glazed units was reasonable was a conclusion that would have applied if the LVT had considered that dealing with the windows was part of the works of repair. However, in paragraph 55, where the tribunal accepted that the double-glazed units were virtually maintenance free and would offer significant savings in future maintenance costs, as well as better thermal and sound insulation, it was clearly considering these matters in relation to the reasonableness of installing the units as improvements. We have no doubt that if the tribunal had thought that use of the double-glazed units was capable of constituting repair it would have wished to consider the comparative costs of the alternative options and would have considered the question of reasonableness in the light of this. It is not possible to say that, if the LVT had addressed the repairs issue correctly, it would have found that the use of the double-glazed units was reasonable.

13. The appeal must accordingly be allowed, and that part of the decision holding that the replacement of the windows was an improvement and not a repair is quashed. It will be for the LVT to resume its consideration of the application and to address the question whether, despite the fact that the windows were not in disrepair when in situ, their replacement with new double-glazed units, as opposed to making good the damage to them and putting them back, was reasonable. The LVT has already considered the question of historic neglect, a matter raised by Mrs Turner before us.

Dated 22 May 2007

George Bartlett QC, President

N J Rose FRICS