UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2017] UKUT 322 (LC)
UTLC Case Number: LRX/142/2016

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – Service Charge – Repair or Replacement – Windows in large block of flats defective. Cost of replacement significantly more than cost of repair – Experts agreed that replacement was the best solution but not ruling out repair as unreasonable even though windows nearing end of life and repair would not cure all problems. One tenant objected to service charge in respect of anticipated costs on the ground that windows should be replaced and repaired. Ft-T held that replacement was best option and disallowed costs of repair. Appeal allowed. Decision to repair was a reasonable even if not (in the Ft-T's opinion) the best option. The Ft-T had applied the wrong test.

IN THE MATTER OF AN APPEAL AGAINST THE DECISION OF THE FIRST-TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY) MADE ON 27 JUNE 2016, 22 JULY 2016 AND 2 SEPTEMBER 2016.

BETWEEN:

DEHAVILLAND STUDIOS LIMITED — **Appellant**

and

CECILIA PERIES
PAUL VOYSEY — **Respondents**

Re: Flat 12, Dehavilland Studios, Theydon Road, London E5 9NY

Before: **His Honour John Behrens**

Sitting at: Royal Courts of Justice, Strand, London WC2A 2LL
on
20 July 2017

Paul de la Piquerie (instructed by IBB Solicitors) for the Appellant.
The Respondents appeared in person.

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The following cases are referred to in this decision:
London Borough of Havering v MacDonald [2012] 3 E.G.L.R. 49
Waaler v Hounslow LBC [2017] EWCA Civ 45

DECISION

Introduction

1. This is an appeal against part of the decision of the First-tier Tribunal ("the Ft-T") made on 22 June 2016. The decision was amplified in a further decision made on 22 July 2016 when permission to appeal was refused and in a letter sent on behalf of the Ft-T on 2 and 27 September 2016.

2. The application concerned Flat 12 De Havilland Studios a first floor live/work unit which had been converted from a former factory. There were 41 flats within the building. By a lease dated 17 July 1998 Flat 12 was let by DeHavilland Studios Ltd ("DHS") to the Respondents for a term of 125 years from 25 December 1997.

3. The lease contained an obligation in Cl 5 of the 6th Schedule to keep

> Such part of the retained parts … in good and tenantable repair and decorative condition and to repair repaint and redecorate the same as and when the landlord shall deem appropriate.

4. The lease contained provisions for DHS to recover the sums spent by way of the service charge. The Respondents were responsible for 1205/46,355 of the overall costs of DHS in relation to its obligations under the lease.

5. On 10 November 2015 the Respondents issued an application to the Ft-T under s 27A of the Landlord and Tenant Act 1985 in respect of the service charge for 2011 to 2016. There were several issues between the parties but the most important related to the windows. It was not in dispute that the windows were defective. However, there was a considerable dispute as to the consequences of the disrepair. It was DHS's view that the windows could be repaired and that was the solution it proposed. It was the Respondents' view that all of the windows in the building should be replaced.

6. The matter was argued before the Ft-T on 9 and 10 May 2016. In its first decision, the Ft-T decided:

> That the costs to be incurred in respect of repairing the windows are not reasonable. The tribunal considers that replacement of the windows is the most reasonable option.

7. It was not clear if this finding referred to all the windows or simply those of Flat 12. The matter was clarified in the Ft-T's comment on ground 7 of the notice of appeal:

> The application before the tribunal was made by the lessees of Flat 12 and therefore the Tribunal's decision relates to that subject flat only and not the building as asserted by [DHS].

It also commented:

> In reaching its decision the Tribunal took account of both expert reports that said replacement or repair was reasonable. As can be read from its paragraph 17, the Tribunal had regard to [DHS's] own expert opinion on the matter …

8. In a further comment the Ft-T suggested that the cost of the work falls ultimately on the lessee. As there were 41 leases there was confusion as to whether the Ft-T was suggesting that it was not to be apportioned in accordance with the service charge provisions in the lease.

9. In a letter dated 2 September 2016 the Ft-T attempted to clarify matters further:

> The Tribunal's decision relates to the windows of Flat 12 … only as the lessees of that flat were the only applicants before the Tribunal. The Tribunal determined that the replacement of the windows was the most reasonable option.

10. Finally, on 27 September 2016 the Ft-T clarified the position further by stating that the Respondents were only liable to contribute their contracted proportion of those costs within the service charge provisions in so far as they are reasonably incurred by DHS as part of its repairing obligation.

11. DHS were dissatisfied with the result. The cost of replacement was significantly higher than the cost of repair. If it was forced to replace all the windows DHS claimed there was a risk of insolvency.

12. The principal ground of appeal was contained in para 18 of the Notice of Appeal. DHS contended that the Ft-T had applied the wrong test. In particular, it had not determined that it was unreasonable for DHS to repair the windows. On the contrary, it had determined that both repair and replacement were reasonable but that in its view replacement was the better option. Such an approach was wrong in law and contrary to authority (subsequently reinforced by a decision of Lewison LJ in the Court of Appeal). On 23 January 2017 the Deputy President granted permission to appeal on this ground commenting that it had a realistic prospect of success.

13. In addition, the Deputy President granted permission to appeal on 6 other grounds which he described as closely related to paras 7, 9, 10, 12, 13 and 14. Some of these are not pursued in the light of the clarifications set out above. A summary of the remaining grounds is:

1. The expert evidence before the Ft-T did not justify a finding that that it was not reasonable to repair the windows.
2. the Ft-T misconstrued the reports by Finnegans and Kindleigh in so far as it thought that they suggested that repair of the windows was unreasonable.
3. the Ft-T reached their decision without conducting a site visit.
4. the Ft-T wrongly considered that there was no evidence to support the contention that most of the lessees would face financial difficulty if required to pay for replacement rather than repair.

5. the Ft-T failed to consider the financial consequences of requiring replacement of the windows rather than repair.

14. On 23 February 2017 the Respondents filed a Respondent's notice settled by Mark Loveday of Counsel. The position taken in the Respondent's Notice may also be summarised:

1. The Respondents admit that the Ft-T applied the wrong test when reaching its decision.
2. The issue of the Respondents' liability (if any) to contribute to the proposed costs of £100,242 should be remitted to the Ft-T for determination.
3. Alternatively, this Tribunal should uphold the decision on alternative grounds. In particular, the findings in the reports of Mr Flowers, Mr Roberts and Mr Miles ought to have resulted in a finding that repair would not remove the defects, would be a waste of money and thus unreasonable.

15. The appeal was listed before this Tribunal on 20 July 2017. DHS was represented by Mr de la Piquerie, the Respondents represented themselves. I had the benefit of a detailed skeleton argument from both sides which amplified the parties' positions. Mr de la Piquerie's position remained substantially the same as contained in the grounds of appeal.

16. Ms Peries appeared to have modified the stance taken by Mr Loveday in the Respondents' Notice. She wanted me to uphold the decision that it was reasonable to replace the windows in Flat 12 and in the building; she wanted me to hold that it was unreasonable save as an interim measure to incur costs of repair either in relation to Flat 12 or the building. I was informed that repairs rather than renewal had taken place to the windows of all the flats save for Flat 12. It was thus Ms Peries' submission that she should not be liable for any part of the £100,242 that had been included in the service charge.

Decision of the Ft-T on reasonableness.

17. In the light of Ms Peries' position it is in my view necessary to determine precisely what the Ft-T did in fact decide on the question whether DHS's decision to repair was unreasonable. Regrettably it must be said that the decision is not clear. Para (1) of the decision reads:

> The tribunal determined that the costs to be incurred in respect of repairing the windows are not reasonable. The tribunal considers that the replacement of the windows is the most reasonable option.

18. There is an obvious tension between the two sentences in this paragraph. The first sentence supports Ms Peries' contention that the Ft-T actually found that it was unreasonable to repair the windows. The second suggests that both methods are reasonable but, in the Ft-T's opinion replacement is the most reasonable.

19. The reasons for the decision are contained in paras 16 to 22. An important consideration was that it was common ground that whilst the window frames fell within DHS's covenant the re-glazing of the windows did not.

20. There is no express finding within the reasons that DHS's decision to repair was unreasonable. However, there are passages in the reasons which would support that view. Thus, in para 19 the Ft-T describes the decision to repair as "a false economy", second in para 19 it describes replacement as "the reasonable option as only this addresses the ongoing design defects". However, there are also passages in the decision and the subsequent clarifications which point the other way.

21. In para 15 of the decision and in the letter of 2 September 2016, the Ft-T again repeated its finding that replacement was "the most reasonable option". In para 17 of the decision and (more clearly) in para 4 of the appendix to the decision on 22 July 2016 the Ft-T noted that both experts recognised that repair or replacement was reasonable; they do not expressly reject that view.

22. I regret that I cannot be confident about the findings of the Ft-T. However, on balance I agree with Mr de la Piquerie and Mr Loveday that the Ft-T found that both replacement and repair were reasonable options but that in its view replacement was the more reasonable.

Effect

23. In paras 20 – 22 of his skeleton argument Mr de la Piquerie summarised the relevant law citing *London Borough of Havering v MacDonald* [2012] 3 E.G.L.R. 49 and *Waaler v Hounslow LBC* [2017] EWCA Civ 45 at para 37 where Lewison LJ said:

> "In my judgment, therefore, whether costs have been reasonably incurred is not simply a question of process: it is also a question of outcome. That said it must always be borne in mind that where the landlord is faced with a choice between different methods of dealing with a problem in the physical fabric of a building (whether the problem arises out of a design defect or not) there may be many outcomes each of which is reasonable. I agree with Mr Began that the tribunal should not simply impose its own decision. If the landlord has chosen a course of action which leads to a reasonable outcome the costs of pursuing that course of action will have been reasonably incurred, even if there was another cheaper outcome which was also reasonable."

24. In my view the Ft-T has fallen foul of this principle. It has found that both replacement and repair to the windows would be reasonable but it has preferred reinstatement. That it is a course which is not open to it.

Was the Ft-T entitled to find that it was reasonable to repair the windows?

25. Much of the time at the hearing of the appeal was devoted to this issue. Mr de la Piquerie argued that the Ft-T was not only entitled but bound to find it was reasonable. In so far as it

found otherwise this was based on a misinterpretation of the expert reports and/or was wrong. Ms Peries and Mr Voysey each of whom addressed me on different aspects of the case argued that the only possible inference from the reports was that replacement of the windows was the only reasonable solution. In so far as the Ft-T found that repair was reasonable it was wrong to do so.

26. The Ft-T had reports from 2 experts – Mr Flowers, who provided a report on 19 April 2016 on behalf of the Respondents and Mr Miles who provided a report on behalf of DHS in 2012 and who replied to Mr Flowers' comments in a letter dated 5 May 2016. Mr Miles was unable to attend the hearing and the Ft-T decided that it would form its decision on the basis of the reports. Mr Flowers' report was limited to the windows in Flat 12. Mr Miles's report covered the whole building.

27. In addition, the Ft-T attached weight to a September 2012 report from Mr Finnegan which was in the hearing bundle.

28. Mr de la Piquerie started by referring me to Mr Flowers' conclusions in section 7 of his report. After listing the defects in paras 7.1.2 to 7.1.8 he describes repair as "an option" which is complicated by the lease which puts responsibility for glazing on the tenant. He pointed out that there was no cost certainty and no guarantee that further repairs would not be needed in the future particularly as the windows were nearing the end of their life. He referred to the consensus of opinion that replacement was "the best option" and said he concurred with that recommendation.

29. Mr de la Piquerie pointed out that he did not state that it was unreasonable to repair the windows and referred to both as "options". He also questioned whether there was any evidence from which Mr Flowers could refer to the design defects.

30. Mr de la Piquerie then took me to Mr Miles's report. Mr Miles had provided costings which showed replacement windows would cost £550,000 whereas repair would cost £100,242. [The Ft-T appear to have accepted that replacement was 5 times as expensive as repair. However, Ms Peries in her submissions pointed out that the repair costs did not include the glazing. When this was considered the cost to individual tenants was more comparable. In reply Mr de la Piquerie pointed out that the report was concerned with the cost to DHS.]

31. Mr Miles said that repair would give a considerable improvement in what are substandard windows and that deterioration would continue. He pointed out that they do not meet current building standards. He said that replacement would solve most of the queries and bring the windows up to current building regulation requirements.

32. He described giving a recommendation as difficult. He said that the directors had to balance the high cost of replacement now, albeit in phases or whether to repair with the ongoing issues of re glazing and the fact that the windows would continue to deteriorate.

33. Mr de la Piquerie pointed out that Mr Miles did not say that repair was unreasonable. He left it as a choice for the directors of DHS.

34. In para 17 of the decision the Ft-T referred to a passage in Mr Finnegan's report where he said "the windows are of most concern and some will require replacement very soon with the possibility of more year-on-year as they fail". Mr de la Piquerie pointed out that the report recommended replacement of the communal windows and repairs to the flat windows. The windows to Flat 12 were not communal windows and thus the report was actually recommending repair to those windows.

35. Mr Voysey who is an architect took me through the expert reports with considerable care on behalf of the Respondents. He spent most time on Mr Flowers' report. He identified some 20 defects in the windows in Flat 12. I shall not set them out in detail but he showed me photographs of condensation, and blown units. He pointed out that the windows were nearing the end of their natural life. He referred to the comments in paras 6.3.5 to 6.3.8 of the report. Mr Flowers believed that the repairs would not extend the life of the windows, that new windows would comply with current building regulation standards and require very little future maintenance and would eliminate some design flaws. He referred me to a passage in Mr Finnegan's report (para 3.4.2). In that passage, written in 2012, Mr Roberts proposed as an interim measure the repair to the windows but commented that they would need replacing within the next 5 – 15 years. He referred me to a letter written by Mr Eamon Roberts in 2011 who commented on the poor state of repair to Flat 13. However he thought that there might be a temporary solution of "patching up" the windows but that consideration should be given to replacement with up to date modern equivalents.

36. Neither side referred me in any detail to Mr Miles' letter of 5 May 2016 in which he commented upon and criticised some of the conclusions in Mr Flowers report. It is clear that there were areas of disagreement between them. He summarised the position in subpara v)

> In relation to paragraphs 6.3.1, 6.3.2 and 6.3.5 there are reports prepared by me following a survey of the majority of the flats where I was asked to consider the options to repair or replace. A preliminary report was submitted to the Directors and later having obtained quotations from potential main sub-contractors for the two alternatives together with a price for the scaffolding a second report was submitted detailing the alternatives. A further consideration was that with scaffolding available the property be redecorated externally and any external repairs with the exceptions already mentioned, being included. Ideally replacement would be considered as the way forward, however the cost implications were considerable and replacement would have been approximately 4 times greater than the repair option. The Directors decided that the cost of replacement at this time was too great and the repair option was the way forward.

Discussion

37. It has to be borne in mind that this appeal has been directed to proceed by way of review rather than re-hearing. Thus, whilst I can review the findings of the Ft-T, I must not substitute my own view of the facts unless I am satisfied that the Ft-T erred in law in reaching its factual conclusions. That is a relatively high hurdle for an appellant to surmount.

38. For the reasons I have given the Ft-T decided that the decision to repair the windows was not an unreasonable decision by the Directors even though (in its view) the better decision would have been to replace the windows.

39. In my view this was a decision that was open to the Ft-T on the material before it and I would not disturb it on appeal. I have summarised the material to which I was referred but the main matters which have influenced me include:

1. Neither expert suggested that a decision to repair was an unreasonable option even though both regarded replacement as the better option. Mr Finnegan also prepared a specification which referred to repair for the windows of the individual flats. Neither expert gave oral evidence at the hearing. Thus there was no cross-examination.
2. There is no doubt that replacement of the windows is a significantly more expensive option than repair. It is true, as Ms Peries pointed out, that individual tenants would have in addition to fund the glazing and this would reduce the differential from the figures suggested in the reports. Even so there is still a significant difference in cost and this is a matter the Directors were entitled to take into account. This is a case where DHS is a company where all the shareholders and directors are owners of flats within the building. Its assets are limited and comprise moneys in the reserve funds.
3. Whilst it is true that there was clear evidence that the windows were near the end of their life they were not at the end and there was a suggestion that repair would extend their life by up to 15 years.
4. It is true that repair of the windows would not give as good a result as replacement. However, it was common ground that it would substantially improve the position and, as Mr de la Piquerie pointed out the end result would not necessarily be in breach of the landlord's covenant. As he also pointed out there was no real evidence of a design defect in the windows. The suggestions in Mr Flowers' report were not borne out by evidence.

40. It follows, in my view, that the alternative ground in the Respondent's Notice settled by Mr Loveday and the Respondents' cross appeal fail.

Relief

41. It follows in my view that DHS is entitled to a declaration that the decision of the Directors of DHS to repair (rather than replace) the windows of Flat 12 was a reasonable decision and DHS is entitled to recover the reasonable cost of the repair via the service charge.

42. In view of the fact that the appeal has succeeded there is, in my view no basis for an order under s 20(C) of the Landlord and Tenant Act 1985.

43. There remains, however, one further issue – the reasonableness of the sum of £100,242 in respect of the anticipated cost of the repairs. In the course of her submissions Ms Peries made a number of criticisms of this sum. She criticised the lack of detail in the estimates, she criticised the use of PCs (provisional costs) in the estimates. She described a PC as a guess. In general terms, she submitted that there was inadequate information to determine if the sums claimed were reasonable.

44. A number of points can be made. First it appears from paras 14 and 22 of the decision that these (or similar) points were raised before the Ft-T. Second it is clear from para 14 that the Ft-T chose not to deal with the issues. Third, under cl 9(3) of the lease DHS was entitled to include within the service charge

> "a sum by way of reasonable provision for anticipated expenditure in respect thereof as [DHS] may in its absolute discretion allocate to the year in question as being fair and reasonable in all the circumstances"

45. Fourth, under s 19(2) of the Landlord and Tenant Act 1985 where the service charge is in respect of anticipated expenditure no greater sum than is reasonable is recoverable.

46. Fifth, despite the suggestion of Ms Peries, it is plain that this Tribunal cannot possibly deal with the issue. The material is simply not before it. Thus, my provisional view is that it will have to be determined by agreement or remitted to the Ft-T for determination.

47. I am, however, reluctant to remit it to the Ft-T for a number of reasons. First the amount of money involved would appear to be disproportionate to the costs involved. As noted above Flat 12's proportion is 1205/46,355. The Respondents' contribution is thus of the order of £2,600. In view of the admitted state of repair it seems highly unlikely that the Ft-T would reduce this by more than a few hundred pounds at the most. It was, after all an anticipated expenditure.

48. Second, the work has been carried out to the remaining 40 flats. Thus, the accuracy of the estimate can be tested.

49. It would in my view be far better if the parties could agree a sum in respect of the anticipated expenditure. In all the circumstances, I propose to adjourn the question of whether to remit the matter for a period of 8 weeks. The parties will have 5 weeks to attempt to agree a figure for the anticipated cost. If after 5 weeks the parties have failed to agree the figure each party will have a further 14 days in which to make written submissions to this Tribunal (serving a copy on the other party) as to the appropriate directions for this Tribunal to make to enable the issue to be resolved and a further 7 days to reply to any submissions made by the other party. I will then determine the matter on paper.

50. If the parties are able to reach agreement they should notify this Tribunal immediately.

ADDENDUM

51. In accordance with the normal practice of this Tribunal the draft decision was sent to the parties and they were invited to make suggestions as to typographical or other obvious errors. On 9 August 2017 the Respondents sent to the Tribunal a 4 page letter setting out what they described as their concerns about specific issues raised in the Draft Decision. As this went considerably further than suggestions about "typographical or other obvious errors", I invited comments from DHS. On 4 September 2017 DHS's solicitors sent brief submissions settled by Counsel in reply. I propose to treat the application as an application to review my decision.

52. There are 6 alleged areas of concern; the first relates to the grounds of appeal which related to the original grounds of appeal. However, events moved on after this document was drafted. In particular, the F-tT made it clear that its decision related only to Flat 12. As pointed out by Counsel for DHS it was then unnecessary to argue against a finding that had not been made. There is nothing in this point and no prejudice was caused to the Respondents. There is no basis for any claim for wasted costs.

53. The second bullet heading relates to DHS's claims to insolvency. This point is not understood. I noted in para 39.2 above that the assets of DHS were limited but this was only one of the reasons I gave for the conclusion that the Ft-T's decision should not be disturbed.

54. The third point relates to the definition of repair and I have been asked to elaborate on my decision. I regret it is no part of my function to provide legal advice. My function was to decide whether the decision of the F-tT was wrong in law.

55. The next 3 points seek to present new evidence not before the Tribunal. As Counsel points out my function was to review the case based on the material before the F-tT. However the fact (if it be so) that the actual cost of the repairs was more that the prediction of £100,242 will make it very difficult for the Respondents to argue that the sum claimed under cl 9(3) of the lease was unreasonable. In those circumstances I would urge the Respondents to agree the sum claimed rather than have the matter returned to the F-tT.

56. In all the circumstances I decline to review my original decision.

Dated: 5 September 2017

John Behrens

His Honour Judge Behrens

UPPER TRIBUNAL (LANDS CHAMBER)

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DECISION

1. Since the decision was sent out I have received a number of emails from the Respondents challenging my decision on a number of grounds. I prepared an addendum in which I set out my reasons for refusing to review my decision. I shall not repeat my reasoning here save to note that in para 55 I declined to consider new evidence.

2. I have now received a number of further emails including a document entitled "Grounds of Appeal". I have read that document. I do not consider that it raises any points of law which have realistic prospects of success before the Court of Appeal. Nor do I consider that it is an appropriate case for the Court of Appeal to admit evidence that was not before the F-tT. In those circumstances I propose to refuse permission to appeal. If the Respondents wish to pursue an appeal against my decision they will have to make an application direct to the Court of Appeal.

3. It is now clear that, despite my encouragement in paras 47 – 49 of the decision for the parties to reach an agreement on the anticipated cost no agreement will be reached. Furthermore, the procedure I set out in para 49 has not resolved the issue. In those circumstances the matter is remitted to the F-tT to determine the reasonableness of the sum of £100,242 in respect of the anticipated cost of the repairs.

4. If, however, the Respondents make an application to the Court of Appeal this order is stayed pending the determination of the appeal.

John Behrens

21 November 2017