UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2017] UKUT 0010 (LC)
UTLC Case Number: LRX/6/2016

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – application by tenants – whether front doors in disrepair and if so whether replacement constituted appropriate means of repair – appeal by landlord against decision of First-tier Tribunal – sufficiency of reasons – appeal dismissed

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

SOUTHWARK COUNCIL

Appellant

and

VARIOUS LESSEES OF THE ST SAVIOURS ESTATE

Respondents

Re: Various Properties on the St Saviours Estate,
London
SE1

His Honour Judge Gerald

The Royal Courts of Justice,
London WC2A

29-30 November 2016

Mr Michael Walsh and Ms Diane Doliveux for the appellant
Mr Sam Madge-Wyld, instructed by Anthony Gold Solicitors, for the respondents

© CROWN COPYRIGHT 2016

The following cases are referred to in this decision:

Post Office v Aquarius Properties Limited [1987] 1 All E.R. 1055

Gibson Investments Ltd v Chesterton Plc (No.1) [2002] EWHC 19 (Ch); [2002] 2 P. & C.R. 32

Waaler v London Borough of Hounslow [2015] UKUT 17 (LC); [2015] L. & T.R. 24

Proudfoot v Hart (1890) 25 Q.B.D. 42

Mancette Developments v Garmanson [1986] Q.B. 1212

Oliver v Sheffield City Council [2015] UKUT 229 (LC)

South Buckinghamshire DC v Porter (No 2) [2004] 1 WLR 1953

English v Emery Reimbold & Strick Ltd [2002] 1 WLR 2409

Lucie M v Worcestershire County Council and Evans [2002] EWHC 1292 (admin)

Flannery v Halifax Estate Agencies Limited [2000] 1 WLR 377

Arrowdell Ltd v Coniston Court (North) Hove Ltd LRA/72/2005

Wales & West Housing Association Ltd v Paine [2012] UKUT 372 (LC)

Red Kite Community Housing Limited v Robertson [2014] UKUT 134 (LC)

Introduction

1. This appeal concerns St Saviours Estate in Bermondsey, London SE1 which comprises twelve blocks of flats constructed by the appellant during the 1960s. Between March 2013 and April 2014 major works were carried out to those twelve blocks which resulted in estimated service charges being raised against all long-leasehold tenants under the service charge provisions of the leases which included, so far as is relevant to this appeal, replacement of the front entrance doors to the flats and also works to the communal fire doors to the blocks.

2. The appellant landlord appeals against the 2nd September 2015 decision ("Decision") of the First-tier Tribunal Property Chamber (Residential Property) ("F-tT") in relation to its findings regarding replacement of the front doors and works to the communal fire doors, the respondents each being owners of eighty flats held by them on long leases granted upon exercise of their right to buy under the relevant legislation, permission to appeal having been granted by this Tribunal on 21st January 2016 at which time directions were also given as to the adduction of further evidence which neither parties have availed themselves of.

3. On 9th May 2013 eighty-eight of the long-lessees of ten of the blocks challenged the estimated costs of the front door replacements and also the works to the communal fire doors as well as many other aspects of the service charge demands on the footing that, so far as is material to this appeal, the replacement of the front doors and works to the communal fire doors constituted improvements (so fell out-with the repairing obligations of the landlord and hence their costs were not recoverable under the service charge provisions) and/or that they were not reasonable under section 19 of the Landlord and Tenant Act 1985 (as amended).

4. By the time the matter came for final determination on 2nd September 2015, the major works programme had been completed, save in respect of a few applicant-respondents who had refused to allow their front doors to be replaced. The F-tT had, on 25th June 2014, upon the application of the appellant, adjourned the original hearing of the estimated service charges until after completion of the works and provision of actual accounts, at which time the F-tT also made further orders for service of further evidence to ensure the matter was hearing-ready.

5. Before the F-tT it was common ground that the front doors to each of the individual flats remained part of the retained land as did the communal fire doors within the common parts so falling within the appellant's repairing covenants, and that the costs of their repair were *prima facie* recoverable under the service charge provisions of the leases, all leases being in common form so far as is material to this appeal. Specifically, by clause 4 of the leases, the appellant covenanted with the respective tenants to "keep in repair the structure and exterior of the Flat… and make good any defect affecting the structure and exterior", which would include the front doors to each flat, and "to keep in repair the common parts of the Building…", which would include the communal fire doors.

6. It was also common ground before me, as it was before the F-tT where both parties relied on similar authorities, as to what constituted "disrepair". In short, both parties agreed that whether a door was in disrepair depended upon whether it was no longer in repair to a standard commensurate with the as-built standard of the original doors. The key authority

relied upon was *Post Office v Aquarius Properties Limited* [1987] 1 All E.R. 1055 where Slade J. said:

> "[A] state of disrepair, in my judgment, connotes a deterioration from some previous physical condition. I would have reached this conclusion even in the absence of authority, but its correctness is shown by the decision of this court… in *Quick v. Taff Ely Borough Council*. As Lawton L.J. there observed: "As a matter of the ordinary usage of English that which requires repair is in a condition worse than it was at some earlier time"."

7. Reference was also made to *Gibson Investments Ltd v Chesterton Plc (No.1)* [2002] EWHC 19 (Ch); [2002] 2 P. & C.R. 32 (repair can require replacement); *Waaler v London Borough of Hounslow* [2015] UKUT 17 (LC); [2015] L. & T.R. 24 (repair may embrace improvement where it falls within a range of reasonable methods of repair open to the party carrying out the repair); and *Proudfoot v Hart* (1890) 25 Q.B.D. 42 as well as *Mancetter Developments v Garmanson* [1986] Q.B. 1212.

8. Whilst the actual cost of replacement of the individual doors was charged directly to each flat whose door was replaced, rather than being apportioned across the whole, the costs of works to the communal fire doors was apportioned across the whole. No issue is taken as to the means of apportionment or their recoverability within the ambit of the service charge provisions of the leases so that it is not necessary to recite those provisions.

9. The appellant seeks to set aside the F-tT's findings in relation to the replacement of the front doors to the flats and also works to the communal fire doors to the blocks. The respondents, now numbering eighty of the original eighty-eight applicants, seek to uphold the Decision in its entirety. There is no respondents' notice cross-appealing any aspect of the Decision. If there is to be a re-hearing, it was common ground that there will be no further evidence, so that the re-hearing will be based upon the same evidence as the Decision save as to what emerges during the course of cross-examination.

Front door replacements

Background

10. The factual background was not in dispute. As constructed in the 1960s, the front doors were FD20-compliant – *i.e.* each of the front doors to each of the flats was a fire door capable of resisting fire for up to twenty minutes, even though the majority did not need to be a fire door to comply with fire regulations. By way of example, front doors to flats on the ground or upper floors with two means of escape did or do not need to be fire doors in order to satisfy fire regulations but they nonetheless were FD20-compliant. That standard is no longer applicable, the appropriate one now being FD30 – doors which can resist fire for up to thirty minutes.

11. At some time subsequent to exercising their rights to buy, the vast majority of the applicant-respondents or their predecessors replaced the original front doors with new doors, presumably to personalise their dwellings, the remainder installing new locks or letterboxes

within the original doors by drilling holes or enlarging existing apertures in the original doors thereby altering the original front doors.

12. It was conceded before me that the replacement or alteration of the original doors would have amounted to an act of trespass because the tenant would have replaced or made alterations to and then installed new locks or letterboxes within the landlord's retained property, the original doors. There was no suggestion that the landlord had at any stage complained about these acts of trespass or demanded reinstatement.

13. The legal significance of this point, if any, was not ventilated before the F-tT where all parties proceeded on the footing that notwithstanding that the original doors had been replaced or altered, the landlord was obliged to repair them pursuant to its repairing obligations and, if the works constituted "repair" and were reasonable within section 19 of the 1985 Act, their costs would be recoverable under the service charge provisions, from which it must follow that the landlord (and tenant) accepted that the replacement doors were part of the reversion otherwise they would not have fallen within the repairing and service charge covenants of the leases. It being common ground before the F-tT that the standard of repair was that the doors be FD20 compliant, self-evidently neither party took the position that the replacements or alterations affected the standard of repair.

The Decision

14. It is not necessary to refer to the evidence before the F-tT because the appellant accepts that it had been accurately summarised within the Decision, the material parts of which were as follows:

> "29. The directions made following the first hearing in this matter dated 25 June 2014 made specific provision for information in relation to the condition of the front entrance doors. However, despite this specific direction the tribunal had very little evidence of either a documentary nature or witness evidence to assist it in relation to the condition of the front entrance doors and the process which the Respondent went through in considering their condition and the action required.
>
> "30. Both parties made submissions as to the meaning of disrepair but were in agreement as to the relevant case law and the tribunal need not dwell on the meaning of disrepair.
>
> "31. We first considered whether we had any evidence as to whether the doors were in disrepair. We had regard to paragraph 16 of Mr Ottley's witness statement in which he refers to his visual inspection of the front entrance doors and makes no reference to a written record. In his oral evidence however he informed the tribunal that he had walked the estate with the contractor, ground floor doors were said to only have been changed if requested as they had free access, upper floor doors were not replaced if they were in original condition and in good repair otherwise they were changed. On questioning Mr Ottley made it clear that he did not accept the principle of a risk assessment and considered that any alterations to the door meant that the door was no longer fit for purpose and not to FD20 standard. It appeared clear to us that his survey was based on his limited

understanding of what constituted disrepair and its interplay with the relevant fire resistance requirements and his interpretation of the fire resistance standards in force.

"32. We considered that the survey carried out by Mr Ottley was wholly insufficient. In his oral evidence he described the exercise he had carried out as "*I walked around and wrote down as we went which doors should be replaced"*. He did not make any notes to support his findings which would be expected on any thorough inspection and the survey produced by him was retrospective produced to assist the tribunal. It appeared to us that the basis that his interpretation of disrepair was whether the door was in its original FD20 condition. If any alterations had been made which in his view compromised fire safety standards he concluded that the door was in disrepair. This conclusion is supported by his retrospective survey accompanied by photographs which clearly focuses on fire resistance issues rather than those of disrepair. We noted that in particular this retrospective report did not record the alleged defects of doors which were replaced save only in one of two instances but rather included the generic comment "*Non original door not rated to FD20 standard"*.

"33. We then went on to consider whether there were any issues in relation to fire resistance which rendered the door into disrepair. We accepted the evidence of Mr Todd who was clearly an expert in his field in relation to the viability of the original doors. We also had regard to the LGA Guidance the purpose of which was to avoid the wholesale replacement of doors on blocks of this nature. We considered therefore that the doors had not required wholesale replacement on the basis of their fire resistance and that any doors which had alterations were likewise not necessarily in disrepair.

"34. We considered that Mr Ottley's assessment of whether the doors were in disrepair was carried out on a narrow draconian basis and was not based on a full and thorough inspection or any real understanding of the fire resistance requirements. We did not consider his evidence to be credible and it was based on the total absence of notes and recollections based on a large major works project which had taken place over three years ago. We therefore concluded that we could place very little weight on Mr Ottley's evidence in relation to the condition of the doors.

"35. We were of the view that we could not place full reliance on the conclusions reached in Ms Parry's report as she had not carried out a comprehensive survey of the doors. However we did consider that her report did support the Applicants' stance that the condition of the doors overall was not poor. In addition she did provide us with a useful summary of the type of condition survey she would expect to see and the deficiencies noted in the survey carried out by Mr Ottley.

"36. The best evidence before the tribunal in relation to the condition of the doors was the Respondent's own fire risk assessments. Although we were not provided with the assessments in respect of all blocks, of those we had, common conclusions were reached. In all the reports it was suggested that no more than a few doors needed replacing, where there was only one means of escape it was suggested that closers be considered. Although the reports did suggest that the

landlord should consider the wholesale replacement of the doors on any major works project we had no evidence of the process the landlord went through in considering whether the doors needed replacing on any major works project save for the evidence given by Mr Ottley. Given that almost identical concerns were raised in each of the reports we considered that it was reasonable to rely on these conclusions in respect of the estate as a whole.

"37. We found it somewhat puzzling that the Respondent placed no reliance on its own fire risk assessments and indeed did not refer to them throughout the hearing. We have no details about who had commissioned these reports and their purpose, It was the Respondent's position that Mr Ottley had preferred his own condition survey and had disregarded the assessments although this conflicted with Mr Ottley's oral evidence in which he said that he had not been aware of the assessments.

"38. We were therefore not satisfied that the doors were in disrepair and had required wholesale replacement. Where the fire risk assessments require replacement of specific doors we consider those costs should be allowed. However in cases where the fire risk assessments had recommended the fitting of door closers on specific floors with single direction escape we considered that an allowance should be made to cover this cost. We had no evidence before us in this regard and thus doing the best we could and having regard to our own experience and expertise we allowed the sum of £80 per door. We would ask the Respondent to identify to which doors this will apply having regard to the first risk assessments. We note that Counsel for the Applicants has already produced a summary of the doors attached to his closing submissions. Otherwise where the fire risk assessments are silent or no fire risk assessments were provided we disallow the costs of the replacement front entrance doors in full."

The grounds of appeal

15. The central grounds of appeal were that the F-tT failed to apply the correct test of "disrepair" and erred in concluding that there was very little evidence of the condition of the front doors and the process the appellant went through in considering their condition and the action required (Decision paragraph 29).

16. During oral submissions, this was fleshed out to the effect that not only had the F-tT failed to properly define what constituted "disrepair", but it had wrongly rejected the "overwhelming" evidence of the appellant's witness Mr Ottley who was the only witness who had carried out a door-by-door inspection and assessment of each of the doors in question and its state of disrepair and, further, that the F-tT fundamentally misunderstood the nature of the appellant's case and the test to be applied such that it confused the test of disrepair (whether the replacement or altered doors were compliant with the as-built FD20 standard of the original doors) with the quite distinct but irrelevant question of whether they were compliant with current fire regulations.

17. It was also said that overall the Decision was inadequate because it did not make clear its basis and reasons. In this regard, *Lucie M v Worcestershire County Council and Evans* [2002] EWHC 1292 (admin) Lawrence Collins J said in relation to tribunals:

> "10. First, proper and adequate reasons must be given, so that they are intelligible and deal with the substantial points that have been raised, and the reasons should deal, in short form, with the substantial issues raised in order that the parties can understand why the decision has been reached... Secondly, and as a result of the first principle, the absence of reasons to explain why a case was rejected may make the decision appear irrational... Thirdly, where reasons are inadequate, it is not normally appropriate that the reasons should be amplified on the appeal to the High Court... Fourthly, a decision must be sufficiently specific and clear as to leave no room for doubt as to what has been has been decided…".

18. In *Flannery v Halifax Estate Agencies Limited* [2000] 1 WLR 377, the Court of Appeal said at 381G to 382C that:

> " … The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject matter. Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having no doubt summarised the evidence) to indicate simply that he believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where as here there is disputed expert evidence; but it is not necessarily limited to such cases.
>
> " …This is not to suggest that there is one rule for cases concerning the witnesses' truthfulness or recall of events, and another for cases where the issue depends on reasoning or analysis (with experts or otherwise). The rule is the same: the judge must explain *why* he has reached his decision. The question is always, what is required of the judge to do so; and that will differ from case to case. Transparency should be the watchword."

19. As was put by Lord Phillips MR (as he then was) in *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409:

> "We would put the matter at its simplest by saying that justice will not be done if it is not apparent to the parties why one has won and the other has lost".

20. In *South Buckinghamshire DC v Porter (No 2)* [2004] 1 WLR 1953 the House of Lords, considering the adequacy of reasons for a planning decision, said at paragraph 36:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial

> issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced…".

21. Specifically, in relation to the F-tT, the Deputy President of this Tribunal said in *Oliver v Sheffield City Council* [2015] UKUT 229 (LC) at [54] that:

> "Although it is not necessary for a first-tier tribunal to review all of the evidence and submissions in detail in its decision, it should deal with the substance of the case presented by each party in sufficient detail for the unsuccessful party in particular to be able to understand why her case has been rejected."

Discussion, and decision

22. The central factual question for the F-tT to determine was whether or not any or all of the replacement or altered original front doors were in "disrepair". That the F-tT adopted the test formulated by the appellant – whether each replacement or altered original door was FD20-compliant – is evident from the fact that throughout its review of the evidence adduced and its reasoning, the F-tT accurately referred to that issue and assessed the quality and credibility of the evidence by reference to that test. I refer to the entirety of paragraphs 12 to 28 (which I have not recited) and also paragraphs 29 to 38 (which are recited above).

23. By way of illustration, in paragraph 28 of the Decision the F-tT records that

> "Put simply the [appellant's] position was that the doors on the property "as built" were fire resisting [*i.e.* FD20-compliant]. When they dropped below this "as built" standard they were in "*disrepair*" requiring like for like replacement".

The first sentence records the test of "disrepair"; the second sentence the appellant's case that the method of repair was replacement. Elsewhere, the F-tT carefully draws a distinction between those original doors which had been replaced and those which had been altered, making clear that in either instance it was the appellant's case that they were in disrepair because they were not FD20-compliant by dint of the fact that the original had either been replaced or altered: see for example paragraphs 25 and 28 (which the appellant accepted accurately reflected its case), paragraph 23 (which recorded some aspects of Mr Ottley's evidence) and paragraph 32.

24. Nowhere in the Decision is there any suggestion that there was any dispute about or deviation from that formulation of the test or meaning of "disrepair", as the F-tT stated in paragraph 30 of the Decision. Whilst some tribunals might have more fully set out the test and

recited or summarised the material authorities, where the test is not in dispute it in my judgment is not necessary so to do. Indeed, where, as here, the test can be succinctly and uncontroversially stated and understood by the parties, the setting out of the test at any greater length would have served no purpose and been otiose. Far from dismissing the appellant's test of disrepair (Skeleton paragraph 9.2(iii)), the F-tT adopted and applied it.

25. Pausing here, the F-tT plainly understood what the factual question was: was there evidence upon which it could properly be determined that any or all of the replacement or altered original doors had dropped below the FD20 standard or rating – or, using shorthand, were not FD20-compliant? That implicitly, as the F-tT well-understood, required evidence of a door-by-door assessment: again, as will become clear, that was the approach which the F-tT explicitly took throughout its Decision.

26. What evidence was there that the replacement or altered doors, or any of them, were not FD20 compliant and therefore were in disrepair? The appellant's submission before the F-tT and this Tribunal was that the only evidence of disrepair was from Mr Ottley who was the only person who had carried out a door-by-door inspection *and assessment* so that his evidence should have been accepted as being "overwhelming". Given the force with which this submission was made before me, it is necessary to examine the basis upon which the F-tT rejected his evidence with some care, merely observing at this stage that this submission is misconceived.

27. Mr Ottley stated that he had carried out a door-by-door inspection and assessment, and exhibited a photograph of nearly (but not) all of the eighty-eight doors in question which visually established or proved that the originals had either been replaced or altered by addition of locks or enlarged letterboxes. Next to each of the replaced doors he wrote the same rubric, or commentary, that it was "not original door; not rated to FD20 standard". A similar approach was adopted in respect of the altered doors to the effect that because they had been altered they were not FD20 compliant.

28. This one-line commentary was shorthand for, and encompassed, two distinct points: first, a factual statement that the original door had been replaced by a new one (or altered); followed by, secondly, an assertion or conclusion that because it was not the original (or had been altered) it was not FD20 compliant. Whilst the first purely factual statement was not challenged and was accepted by the F-tT, what was required, and what the F-tT was alive to, was the need for some explanation or evidence as to why and how Mr Ottley had reached his conclusion that simply because the original had been replaced or altered it was no longer FD20 compliant and was therefore in disrepair.

29. This case is distinct from the fairly typical type of disrepair, such as a broken window pane, where the photograph of itself proves the fact of disrepair (broken pane) and method of repair (replacement pane). What was required, and what the F-tT was looking for, and indeed any tribunal or court would be looking for, was the reasoning or rationale or explanation, possibly supported by contemporaneous notes, from Mr Ottley as to what he had observed on inspection and assessment of each of the doors so that it could understand and evaluate why he had reached the conclusions he did. It would also be interested to know what, if any, relevant

expertise and understanding Mr Ottley possessed to support his conclusions and assist him in his assessment of each of the doors.

30. In that respect, Mr Ottley's evidence, far from being "overwhelming", was found to be wanting by the F-tT. Not only had he adduced no further evidence of contemporaneous notes of his findings on inspection or reasoning for his conclusions despite having been invited to do so as long ago as 25th June 2014 (*vide* Decision paragraph 29); but in cross-examination he accepted that he was not an expert in fire resistance (see Decision paragraph 20), from which it necessarily followed that he did not have the expertise to, and was himself unable to conclude based on any relevant expertise, that mere replacement or alteration of an original door rendered the replacement or altered door non-FD20 compliant.

31. Not having carried out a "thorough inspection" *i.e.* a door-by-door *assessment*, and not having the requisite expertise to do so, the F-tT found his approach to be too "narrow [and] draconian" such that it could not justify a "wholesale replacement" of the relevant doors (Decision paragraphs 34 and 33 respectively), by which it meant replacement of virtually all of the replacement and altered doors as had been proposed and, by the time of the hearing, in fact done by the appellant. In point of fact, Mr Ottley had not carried out an individual *assessment* of each door but had simply taken one photograph of the exterior of each door and then stated that because it was not the original or had been altered it was not FD20 compliant. That, of course, is a non-sequitur because it does not follow from the fact that an original door has been replaced or altered that it is not or is no longer FD20 compliant: it might be, or it might not be, depending on the evidence.

32. In contrast to Mr Ottley's bald assertions was the evidence of the fire resistance experts Mr Todd and Mrs Parry, the combined effect of which was, it was common ground before me, that non-destructive assessment of each door could have been carried out so as to determine whether or not it was FD20 compliant. Not wishing to further labour the point, not only had Mr Ottley not carried out any such assessment of any of the doors, but he did not have the relevant expertise. Indeed, as the F-tT observed in paragraph 31 of its Decision, he had rejected the idea that each door could be individually assessed, no doubt because he did not have the relevant expertise so simply did not know or understand how the doors could be FD20 assessed without destruction (setting fire to it).

33. The F-tT went on to further illustrate the severe limitations of Mr Ottley's evidence, noting that he did not appear to understand the interplay of disrepair with the relevant fire resistance requirements and fire resistance standards (Decision paragraph 31). When read with the rest of the Decision, particularly paragraph 32, what the F-tT was here saying was that just because an original door had been replaced did not mean that it was in disrepair; whether it was in disrepair depended upon whether it still met or could be FD20 rated; that question could be determined by non-destructive assessment by an expert, which Mr Ottley was not; and Mr Ottley did not seem to understand any of this or the interrelationship between disrepair and fire resistance requirements and standards in force – which is in recognition of the fact that the 1960s standard had changed – or appreciate that the substance of the FRA reports were relevant because whilst they were commissioned for statutory and regulatory compliance reasons, their substance was at least in part concerned with the fire resistance qualities of the doors (as to which, see further in paragraphs 38 to 42 below); and it was wrong to simply assert

that just because it was not the original door or had been altered that it was no longer FD20 compliant.

34. In short, the simple answer to the appellant's submission (Skeleton paragraph 9.2(iii)) that Mr Ottley "was the only witness who had reviewed every door and assessed its condition, using his knowledge, experience and expertise" is that his *inspection* was inadequate, he had not *assessed* any of the doors and did not have the necessary expertise, knowledge or experience to do so.

35. The appellant's answer to this somewhat fundamental evidential problem was to seek to persuade me that simply by stating that the original door had been replaced or altered so was not FD20 compliant and was therefore in disrepair was sufficient to shift the evidential burden of proof to, or back to, the tenant applicant-respondents so that it was for them to adduce evidence that the doors were FD20 compliant which they had not done so that Mr Ottley's evidence should have been accepted. If that were so, it would lead to the unsustainable proposition that the F-tT would have to have treated Mr Ottley as having carried out an assessment and given reasoned evidence and explanation for his conclusions which he had not done and could not do by reason of his lack of expertise. It would also give rise to what in my judgment would be a surprising proposition that a person obligated to keep property in repair can determine that the property is in disrepair without understanding or being able to explain why he has concluded that it is in disrepair.

36. Putting those observations, which are sufficient to deal with this submission, to one side, the appellant's counsel relied upon various expositions of the shifting of the burden of proof back and forth between parties, referring to it as a "revolving door", and relied upon what was said by HH Judge Rich in *Schilling v Canary Riverside* LRX/26/2005. Those submissions and observations are, in my judgment, not material to this case. Rather, this was a fairly typical case faced by courts and tribunals on a daily basis in which decisions are and have to be reached on the basis of incomplete or unsatisfactory evidence. As was said by Sedley LJ in *Daejan Investments Limited v Benson* [2011] EWCA Civ 38 [2011] 1WLR 2330 at paragraph 86:

> "Lastly, I would add a word to what Lord Justice Gross says in §76(ii) about the burden of proof. It is common for advocates to resort to this when the factual case is finely balanced; but it is increasingly rare in modern litigation for the burden of proof to be critical. Much more commonly the task of the tribunal of fact begins and ends with its evaluation of as much of the evidence, whatever its source, as helps to answer the material questions of law. In nine cases out of ten this is sufficient to resolve the contest. It is only rarely that the tribunal will need to resort to the adversarial notion of the burden of proof in order to decide whether an argument has been made out, and tribunals ought in my view not to be astute to do so: the burden of proof is a last, not a first, resort."

37. This is precisely what the F-tT did. Having made some observations on Mr Ottley's evidence, the F-tT went on to consider whether there was any other evidence relating to fire resistance to support the proposition that any of the doors were in disrepair, as is stated in Decision paragraph 33. It then went on to further explain why Mr Ottley's evidence and his

approach was not credible (Decision paragraph 34), and that Mrs Parry was of no assistance either as she had not carried out a door-by-door assessment back in November 2013. It is no answer, as the appellant sought to persuade me, that the applicant-respondents could have carried out such an assessment because precisely the same can be said of the appellant, but with more force: the appellant was the obligor so could or should have adduced evidence to fill this lacuna in their evidence, especially bearing in mind that the case had been on foot since 9th May 2013 and further evidential directions had been given on 25th June 2014 which the appellant had not availed itself of.

38. The final substantive leg of this argument was that the F-tT should not have relied upon the FRA reports which, it was submitted, were of no evidential weight because they had been prepared by an unknown person who had not attended for cross-examination and who had prepared the reports for the wholly different exercise of determining whether the blocks were compliant with current fire regulations whose focus of attention was not upon the disrepair of the individual doors but on the means of escape from principally the upper floors of the blocks so, it was submitted, could not be relevant to the question of whether or not the doors were FD20 compliant. Putting this in a slightly different way, it was the appellant's case that these reports should have been ignored because they were not addressed to the question of whether or not the doors were FD20 compliant but to the more general question of whether or not they complied with current fire regulations as, I was told, had been explained to the F-tT.

39. Pausing here for a moment, if this submission were correct, it would follow that the only appropriate course would have been for the F-tT to hold that there was no or no sufficient evidence that any of the doors were not FD20 compliant so that the appellant should have been disallowed any expenditure in relation to these doors because there was no or no sufficient evidence that they were in disrepair. In other words, *contra proferens*, the consequence of this submission is that the F-tT should have dismissed the appellant's claim in relation to the doors.

40. Be that as it may, I am unable to accept this submission. The F-tT was faced with the task of having to decide whether or not the replacement and altered doors were in disrepair which was to be determined by reference to the question of whether or not they were FD20 compliant because, it was accepted, that was their as-built standard. Whilst that was the primary focus of attention, it does not follow that the F-tT was not entitled to take into account and consider what the purpose and effect of the original doors being FD20 rated was, namely, to provide fire resistance of up to twenty minutes to enable residents of other flats to escape.

41. Whilst it is correct that the FRA reports did not explicitly state that the doors which were found to have insufficient fire resistance characteristics or qualities were not FD20 compliant, no doubt because that standard was no longer applicable at the time when these reports were commissioned and that that was not the purpose of the reports, it in my judgment is perfectly reasonable and appropriate for the F-tT to have regard to these reports to see whether or not they shed light on the question of whether the doors were adequate to provide fire resistance of up to twenty minutes. To hold otherwise would be to lose sight of the fact that the actual question of real practical import which the F-tT was addressing its mind to was whether each or any of the eighty-eight doors were sufficient, and therefore in sufficient repair, to resist fire for up to twenty minutes.

42. By accepting that the front doors to those flats identified in the FRA reports as not being of sufficient fire resistant standards were in disrepair, the F-tT was implicitly accepting and finding that they were in disrepair because they did not provide fire resistance of up to twenty minutes. This was not to answer a different question or, as the appellant's counsel submitted (Skeleton, paragraph 4.9), was not to confuse the issue of disrepair with that of meeting current fire regulations or standards, but to understand the nature of the actual issue of disrepair to be determined – was there any evidence that the replacement or altered doors were not capable of resisting fire for up to twenty minutes? – and to use the available evidence to answer that question.

43. The fact that the F-tT's findings were confined to those front doors of the flats identified in the FRA reports was a function of the state of the live evidence adduced by the appellant and applicant-respondents. Putting this another way, neither party had adduced live evidence to support any finding that any door was or was not FD20 compliant. Therefore, the F-tT could not find on the basis of that evidence that any of the doors were or were not FD20 compliant. However, there was evidence in the form of the FRA reports which indicated that some of the doors were not sufficiently fire resistant, and the F-tT accepted that evidence in its entirety. The FRA reports were of course only focused on the doors which actually needed to be fire doors *per se* for fire regulation purposes (broadly, those on a floor with only one means of escape or close to a means of escape on floors with multiple means of escape), not on those doors which did not need to be fire doors for fire regulation purposes – which, as a matter of fact, was the vast majority of the eighty-eight doors.

44. That, however, does not mean that these reports should not or could not be relied upon in respect of the front doors to flats which they did assess as not being capable of sufficient fire resistance. All it means is that the F-tT's findings of disrepair were necessarily confined to those doors which were identified as needing to be repaired to ensure that they provided sufficient fire resistance – after all, the reports had been prepared for the appellant and, so far as I am aware, no-one challenged the veracity or reliability of their content. The fact that, as the appellant's counsel submitted, these reports were produced for a different purpose – compliance with fire regulations – is not on point: that is to confuse the purpose of the reports with their substance, which was an assessment of the front doors to flats, including those which by law needed to be fire resistant, and found some of them to provide insufficient fire resistance. Whether or not that was to a higher or different standard than FD20 is not clear from the FRA reports. However, even if it was, it seems to me to be of no materiality because the F-tT was entitled to take a practical approach to evaluation of the evidence before it, and the only parties adversely affected by using the FRA reports, the applicant-respondents, make no complaint: they are perfectly content to abide by the F-tT's findings and have issued no respondent's notice.

45. Drawing these strands together and contrary to the appellant's submissions, properly understood, it was the F-tT, not the appellant or Mr Ottley or the applicant-respondents, who approached the issue of disrepair on a door-by-door basis as best it could on the basis of the available evidence before it. Conscious of the absence of any such evidence from Mr Ottley (who had not individually assessed the doors and did not have the relevant expertise) or Mrs Parry (who had the expertise but had not individually assessed the doors), they relied on the only available – or "best" – evidence, such as it was, which was that contained in the FRA

reports. That, in my judgment, is a tribunal properly reaching findings of fact based on the totality of the available evidence.

46. What in my judgment the appellant's case reveals is a confusion between the issue of disrepair, and the issue of trespass. Had the appellant been suing in trespass, replacement of the replaced or altered original doors with ones precisely matching the originals on a like-for-like basis in terms of appearance and design would have been appropriate. However, by relying upon the repairing covenant, the appellant implicitly accepted or adopted those doors as being or being treated as being part of its reversion from which it follows that the doors would only have to be repaired if it could as a matter of fact be established that they were in disrepair i.e. no longer FD20 compliant and, if so, what the appropriate method of repair was (replacement, or something less than replacement). This might well explain why Mr Ottley simply asserted that because the originals had been replaced or altered they had to be replaced with like-for-like original-equivalents. The alternative is, as the F-tT found, that he did not understand the concept of disrepair in this context – whilst what constitutes "disrepair" is for the F-tT to determine, if a witness does not have any such understanding it is not surprising that his evidence will be rejected.

47. In respect of the doors which were not found to be in disrepair, it was not necessary for the F-tT to, and the F-tT did not, go on to consider whether or not the method of repair (replacement of all) constituted "improvements" or whether the method of repair or their costs were reasonable. It did however describe "wholesale replacement" – by which it meant replacement of virtually all of the doors with new ones – as not being justifiable. Whilst the appellant's counsel rightly submitted that the method of repair was within the discretion or remit of the obligor, the appellant, that issue did not arise in respect of those – the vast majority – doors not found to be in disrepair.

48. In respect of those doors which were found to be in disrepair, the F-tT implicitly found that all that was reasonably required was the addition of door closers which did not constitute "improvements": no complaint about this finding is made by the applicant-respondents. It went on to allow £80 per door, implicitly regarding that as being the reasonable cost of repair: Decision paragraph 38. No complaint of this is made by the applicant-respondents, but in oral submissions, and obliquely referred to in his Skeleton, the appellant's counsel argued that this was an arbitrary figure imposed by the F-tT without having first ventilated its proposed allowance for comment by the parties and their respective witnesses so was procedurally irregular and impermissible. Because this did not form one of the grounds of appeal, it is not necessary for me to deal with it, but I shall make some observations in relation to it later.

49. For completion, there were a few altered doors where Mr Ottley recorded slightly more detail about what he found, such as warping and the removal of Georgian wire window panes which, I am told, Mr Todd accepted might alter their fire resistance and therefore FD20 rating. These did not form a material part of the appellant's appeal, no doubt because they were confined to perhaps a dozen or so doors and were overshadowed by the fact that Mr Ottley assumed that the doors were not FD20 compliant and had carried out no individual assessment of the various specific matters recorded, again, no doubt, because he did not have the necessary expertise to do so. I therefore consider these matters no further.

Other fire protection works

Background

50. The communal fire doors within the stairwells formed part of the retained property subject to the appellant's repairing covenant and were replaced or repaired and some works was done to other parts of the communal areas. The issue here was whether or not all or some were in disrepair and if so whether the method and cost of repair was reasonable within the meaning of section 19 of the 1985 Act.

The grounds of appeal

51. The appellant submits that the F-tT was wrong to conclude that there was very little evidence of the condition of the communal fire doors and then to allow an arbitrary figure of 50%. The appellant contends that this aspect of the Decision was a procedural irregularity because the F-tT should have ventilated its proposed allowance before the parties so that the views or comments of the parties and their respective witnesses could have been obtained.

The Decision

52. In relation to the communal fire doors, and having summarised the relevant evidence in paragraphs 39 to 43 which I do not here recite but should be referred to, the F-tT said:

> "44. We noted that the majority of the stairwell doors protected the stairwells and although Mr Hoare had recommended they did not need to be replaced without assessment some were noted to be in very poor condition and badly damaged.
>
> "45. We had very little evidence in relation to these fire protection works but considered we could place reliance on the Respondent's own fire assessments. There were indications that some of the doors were in poor condition requiring replacement whilst others required repair. We concluded that some of the works may not have been required had a full survey been carried out. We would stress that we found ourselves in a very difficult position evidentially and both parties could have done more to put relevant evidence before us. However doing the best we could with the evidence before us we allowed 50% of the fire protection costs across all of these further elements."

Discussion, and decision

This appellant's submission was based principally upon the three-part test formulated by the then President *Arrowdale Ltd v Coniston Court (North) Hove Ltd* LRA/72/2005 at [23]:

> "It is entirely appropriate that, as an expert tribunal, an LVT should use its knowledge and experience to test, and if necessary to reject, evidence that is before it. But there are three inescapable requirements. Firstly, as a tribunal

deciding issues between the parties, it must reach its decision on the basis of evidence that is before it. Secondly, it must not reach a conclusion on the basis of evidence that has not been exposed to the parties for comment. Thirdly, it must give reasons for its decision."

53. In the context of a service charge dispute, it was said in *Wales & West Housing Association Ltd v Paine* [2012] UKUT 372 (LC) that:

> "18. With no material provided by either party on the question of reasonableness the LVT decided to reduce the amount payable in respect of the management charge by, as it put it, "applying our knowledge as an expert tribunal". No part of that "knowledge" had been put to Mr Goodwin. That was manifestly a procedural error. If it had been suggested to him that a particular commercial landlord had charged a particular amount on a particular estate, he might have been able, if he was aware of the relevant facts, to say whether a useful comparison in this respect could be made. If he was not aware of the relevant facts, and was not given the opportunity of investigating them, the LVT would have had no evidence on the matter.
>
> "19. The approach to be adopted in situations like those in the present case, and the errors to be avoided, were made clear by the Lands Tribunal (the President and N J Rose FRICS) in *Arrowdale Ltd v Coniston Court (North) Hove Ltd* [2007] RVR 39."

54. This was expanded upon in the more recent authority of *Red Kite Community Housing Limited v Robertson* [2014] UKUT 134 (LC) where this Tribunal gave a fuller exposition of the position:

> "20. The LVT, and now the First-tier Tribunal (Property Chamber), is an expert Tribunal. The knowledge and experience of an expert Tribunal inform its decision making. It is wholly appropriate that an expert Tribunal measure the evidence and submissions before it when reaching its determinations. The fact that it is an expert Tribunal that is considering a case of itself enhances that decision making. However, the question in this case is whether the Tribunal either erred in adopting an over-reliance on its knowledge and experience or alternatively whether it failed to give sufficient reasons explaining its decision and in particular whether it failed to explain the extent of its reliance on its own knowledge and experience.
>
> "21. Ultimately this is a question of fairness. The scope of an expert Tribunal's ability to rely on its own knowledge and experience will vary from case to case. It is not possible to say exactly how an expert Tribunal should approach every type of case, as the possible variations of circumstance are too numerous. However, the guidance given by the President in *Arrowdell Ltd v Coniston Court (North) Hove Ltd* [2007] RVR 39 is a good starting point. Therefore if a Tribunal is making a decision on the basis of either factual or expert evidence, it must make its determination on the basis of the evidence given by the parties. If the Tribunal is aware of other specific evidence which conflicts with what has been put to it by the parties, then the Tribunal must tell the parties about that evidence and ask for their

comments. This is a different matter from the application of the Tribunal's knowledge and experience to the task of weighing the evidence before it.

"22. If the Tribunal receives evidence but decides to reject that evidence because in its knowledge and experience, the evidence is out of line from the norm, then it must decide whether, as a matter of fairness and natural justice, the parties are entitled to be informed of its view and to be given an opportunity to comment or to provide further evidence. This is so whether the Tribunal has evidence from both of the parties or just one of the parties. It is so whether the parties are represented or not. In considering how to achieve fairness and whether or not to seek comments from the parties before proceeding to apply its knowledge and experience, there are a number of factors a Tribunal should take into account:

"(a) The quality of the evidence before it. If comprehensive and cogent evidence is provided then it will be more difficult for a Tribunal to depart from that evidence without first airing its concerns with the parties.

"(b) The extent of the difference between the evidence presented and the Tribunal's view. Therefore if, for example, the Tribunal considered that a management fee was excessive and was minded to cut it down by a large percentage, then the obligation to notify the parties of its view would be more onerous than if any reduction was minimal.

"(c) Whether both parties have produced evidence and/or made representations. In some cases before the Tribunal, both parties will have presented evidence and have had an opportunity to test their opponent's evidence in cross-examination. In many other cases either only one party might present evidence or only one party might appear. In many cases there will be an inequality of representation. All of these factors may have an impact on how the Tribunal relies on its knowledge and experience. Where there is an evenness between the parties, the Tribunal can be more confident in applying its general knowledge and experience (as occurred in the Alford case above). However, even then, a Tribunal would not be entitled to make a significant departure from the ambit of the evidence received without first giving the parties an opportunity to comment. Where there is an unevenness between the parties, the Tribunal has to be even more careful and must ensure that in applying its knowledge and experience that it is not acting in any way unfairly…".

55. Properly read, the kernel of the F-tT's decision is that on the basis of the limited information before it, it was unable to accept the evidence of Mr Ottley and was not satisfied with that adduced by the applicant-respondents so had little alternative but to accept the FRA reports reinforced by its own inspection of the blocks when they noted that some communal fire doors were in such a poor state that they needed replacement (contrary to the applicant-respondents' evidence) and some required repair only (contrary to Mr Ottley's evidence). Taking all of those factors into account, the F-tT allowed 50% of the fire protection costs as representing the reasonable cost of reasonable repairs to these items.

56. Having been taken to the material parts of Mr Ottley's evidence and their exhibits and also that of Mr Hoare's evidence on behalf of the applicant-respondents, in my judgment the F-

tT was entitled to reach the conclusions it did as to paucity of the evidence, also bearing in mind that the Decision must be read as a whole, from which it is plain that Mr Ottley was not an impressive witness and lacked the appropriate level of expertise. Whilst the F-tT does not expressly say that in this part of the Decision, it in my judgment is reasonable to infer that the F-tT was again finding that not only had Mr Ottley not carried out a communal fire door-by-door assessment, and likewise in respect of the other matters covered under this heading, but that he did not have the relevant expertise to make such an assessment. The F-tT was, for similar reason to those already adumbrated regarding the front doors, permitted to adopt the content of the FRA reports attenuated by its own inspection.

57. On proper analysis, what the F-tT then did was take a broad brush approach and allow 50% of the claimed expenditure. This is not, as the appellant's submitted, a case of a tribunal making an arbitrary decision based upon no knowledge or expertise other than its own. Rather, it was a tribunal identifying the broad thrust of the factors it had taken into account, and upon that basis concluding that only 50% was allowable. Whilst other tribunals might have adopted a more detailed approach, going through each and every of the communal areas and making specific findings in relation to each and every part of those areas, that would most likely still have resulted in a broad percentage allowance because it is not in the nature of these sort of cases that a detailed mathematical calculation is possible. In my judgment, it is permissible for a tribunal to take a broad brush approach in a case such as this. In short, the 50% allowance represented the end-result of its evaluation of the available evidence, including its own site inspection: it was not, as the appellant's counsel sought to persuade me, a figure plucked out of thin air.

58. Looking at the position more generally, there is, in my judgment, a danger of reading the above-cited authorities out of context, and too literally. Generally, it is the function of the F-tT to reach a decision on the basis of the available evidence. Sometimes, during the course of evidence or submissions, it appears to the tribunal from its own knowledge or expertise that methodology or costs figures are open to question or challenge, in which case it is appropriate for that to be ventilated for comment by those appearing before it. But that is quite different from the situation where, as here, the evidence having closed and the hearing concluded, the tribunal withdraws to deliberate and evaluate the evidence and make its decision. At that stage, the tribunal is entitled to take a broad brush, robust approach to conclude, as here, that only 50% should be allowed. Sometimes, again, as here, in relation to the door closers, it reaches a conclusion that all that is required is the simple and straight-forward solution of installation of door closers whose costs are relatively modest and are invariably well within the knowledge and expertise of the tribunal but in respect of which there has been no specific evidence. In that situation, the tribunal is entitled to take an equally broad brush and robust approach and apply what, based on the evidence which it has heard as to what needs to be done and from its own knowledge and expertise, is an appropriate figure, or allowance – the alternative would be either to refuse any allowance (which, depending on the circumstances and amount involved, might seem harsh) or invite further evidence and/or submissions (which, again depending on the circumstances and amount involved, might be time-consuming, cumbersome and wholly out of proportion to the issues and/or amount at stake).

59. *Arrowdale* and the other authorities referred to above are primarily concerned with the first situation. They are not, save in exceptional circumstances, perhaps where a large amount of money or a material departure from that which has been adduced or argued before it is

intended, appropriate to the second situation. The reasons for this are two-fold. First, it is a fundamental principle of the administration of justice that there be finality: in the adversarial system, it is for the parties to adduce evidence and the tribunal to reach its decision based on that evidence such as it is albeit that, with an expert tribunal, it is permitted to some extent to rely upon its own knowledge and expertise. Secondly, and leading on from that, if, after deliberation and before release of its decision, a tribunal were to feel obligated to issue its "preliminary" findings for further evidence or submission, the process would become unnecessarily cumbersome, time-consuming and costly and run the risk of giving parties a second bite at the cherry not to overlook the adverse impact on other court users' access to and utilisation of the services of the F-tT.

60. Thus, it would only be in exceptional cases that a tribunal would, during the course of its deliberations, feel constrained to first ventilate what it was proposing to decide before final determination even in circumstances where it was, as here, proposing to make relatively modest allowances in respect of discrete items, such as the door closers, rather to invite further evidence or submissions on such matters. As was said in *Red Kite*, the approach to be adopted is very much a matter of the exercise of discretion by the tribunal. This is not to offend the requirement of fairness, but to approach the matter in a practical and robust manner which results in finality in circumstances where the issue or amount at stake is modest when compared to the time, inconvenience and costs of inviting further evidence or submissions and then reconvening – the only alternative being a refusal of any allowance at all which, of course, the tribunal would be fully entitled to do.

61. Finally, it will follow from what I have already said, that had the £80 per door closer allowance been a ground of appeal, I would have dismissed the appeal because that is precisely the sort of decision the F-tT is equipped to make. Whether or not there was any specific evidence adduced before the F-tT as to the costs of installing door closures, having reached the conclusion that that was the most appropriate and reasonable means of repair, the F-tT was faced with refusing any allowance at all or, based on its own site inspection and consideration of all of the evidence before it and using its own knowledge and expertise, taking a robust and practical approach and permitting a modest allowance. I would therefore have rejected the submission that the F-tT should have reconvened or first invited further evidence or submission in relation to the costs of installing door closers.

62. What is also to be borne in mind here is that even though the parties had, by order of the Deputy President of 21st January 2016, been granted permission to adduce further evidence, the appellant has not done so from which it follows that there is no evidence before this Tribunal to indicate that the £80 closer allowance was unsustainable – in other words, there is no evidence that, had that been a ground of appeal, that figure was unsustainable. Given that, as I have already said, the appellant's counsel stated that there would be no further evidence, setting aside this aspect of the Decision would serve no purpose, noting that the applicant-respondents are content with and do not cross-appeal in respect of the £80 closure costs.

63. The only final point, which is an extension of the point just made, is that if the appeal had been allowed in its entirety and there had been a re-hearing, there would have been no further evidence adduced – no doubt because the vast majority of the eighty-eight doors have been replaced and therefore can not now be assessed. The reconvened tribunal would therefore

have been faced with the situation that there would be no evidence, apart from the FRA reports, as to whether or not the replacement or altered doors were FD20 compliant, a *fortiori* had the FRA reports been excluded as the appellant sought to persuade me. Given that that is so, it is difficult to see what the purpose of any rehearing would have been as the only conclusion which could be reached would be that there was no or insufficient evidence of disrepair. That alone, in my judgment, would have been sufficient to refuse a rehearing.

Conclusions, and one final point

64. For those reasons, I dismiss the appeal.

Dated 12 January 2017

His Honour Judge Gerald