Neutral Citation Number: [2017] EWCA Civ 45

Case No: C3/2015/1293

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL, LANDS CHAMBER
LRX/30/2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/02/2017

Before :

LORD JUSTICE PATTEN
LORD JUSTICE LEWISON
and
LORD JUSTICE BURNETT

- -

Between :

	THE LONDON BOROUGH OF HOUNSLOW	**Appellant**
	- and -	
	WAALER	**Respondent**

- -
- -

MR WAYNE BEGLAN (instructed by the Legal Services Dept LB Hounslow) for the **Appellant**
MR GRAHAM COYLE (Lay Representative) for the **Respondent**

Hearing date : 24 January 2017

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Judgment Approved

Lord Justice Lewison:

1. The London Borough of Hounslow owns an estate in Isleworth called the IvyBridge Estate. It consists of 4 tower blocks, 23 four and five storey blocks of flats, 13 houses and a block of sheltered accommodation. It was built in the late 1960s on a landfill site. About 850 residents on the estate are secure tenants and 140 are long leaseholders whose leases were created under the right to buy scheme. Ms Waaler is the lessee of 347 Summerwood Road which is within one of the block of flats (Block U) on the estate. Block U is four storeys high and contains 19 flats. It was originally constructed of concrete load bearing frames, floor and flat roof. It had painted timber windows with double thickness glazing. The flat roof was asphalt covered.

2. Under the terms of her lease both Hounslow and Ms Waaler had obligations. Hounslow's obligations included:

> "(b) That the Council will keep in repair and redecorate when necessary the structure and exterior of the Flat and the Building including the drains gutters and external pipes thereof and will make good any defect affecting

the structure….."

(c) That the Council will keep in good repair and condition all other property over or in respect of which the Lessee has been granted rights under the Second Schedule hereto"

3. Ms Waaler's obligations included:

"(c) Pay to the Council in every Financial year a sum on account of the Service Charge attributable to the Flat in that Financial year demanded by the Council in accordance with the provisions of the Sixth Schedule hereto by equal monthly instalments in advance….."

4. The sixth schedule provides that:

"The Service Charge attributable to the Flat for the Financial Year shall be a proportionate part of the costs or estimated costs….incurred or to be incurred in that year by or on behalf of the Council in connection with the provision of services repairs maintenance or the Council's costs of management and including:-

(a) the costs of complying with the Council's covenant in clauses 5(b) and (c) of this Lease and with any similar obligations affecting any part of the Premises ….

(c) the costs of providing a reasonable reserve to finance future capital costs falling within sub-paragraphs (a), (b) and (c) hereof."

5. Finally, Ms Waaler also had an obligation:

"(e) If and whenever the Council shall make any improvement affecting the Flat or the Premises or any part thereof upon the service of a written demand pay to the Council a fair proportion of the cost of the improvement based on a comparison of the rateable value of the Flat …"

6. By the early to mid 1990s it was clear that significant work was required to the estate and on 18 November 2004, Hounslow served a notice of intention to carry out works to 10 of the blocks. It was stated that the total estimated rechargeable cost was £8,326,139.48 with Miss Waaler's estimated charges being £61,134.01. The works were carried out in phases, those to Block U falling within Phase 7 which was conducted simultaneously with Phase 8. These began on 10 January 2005 and practical completion was achieved on 21 May 2006. The final account with the contractor was signed on 17 December 2007. Four and half years later, on 23 March 2012 a demand was issued to Miss Waaler in the sum of £55,195.95.

7. Ms Waaler and two other lessees applied to the First Tier Tribunal under section 27A of the Landlord and Tenant Act 1985 for a determination of their liability to pay the requested service charge. The FTT held that in substance Hounslow was entitled to recover the claimed service charge. Ms Waaler then appealed to the Upper Tribunal which allowed her appeal in part.

8. The two principal items in issue in the Upper Tribunal were:

   i) The replacement of a flat roof with a pitched roof; and

   ii) The replacement of the original wooden-framed windows with new metal framed units, which in turn required the replacement of the external cladding and removal of asbestos.

9. The UT held that the FTT were entitled to find that the replacement of the flat roof with a pitched roof gave rise to a recoverable service charge; but were wrong to have held that the replacement of the windows and cladding did likewise. In essence, the UT held that the replacement of the windows and cladding was an improvement. Although the lease gave Hounslow the right to make improvements, and obliged the lessee to contribute to their cost, Hounslow ought to have taken particular account of the extent of the interests of the lessees, their views on the proposals and the financial impact of proceeding. The UT therefore decided that only part of the amount claimed under this head was recoverable and remitted the question to the FTT to determine how much. The decision of the UT is at [2015] UKUT 17 (LC), [2015] L & TR 24.

10. With the permission of the UT Hounslow appeals against the decision relating to the windows and cladding. Ms Waaler, represented by her partner Mr Coyle, seeks permission to appeal against other parts of the UT's decision on the following grounds:

   i) In considering whether costs were reasonably incurred the UT was wrong not to have considered the totality of the costs involved;

   ii) The UT failed to address the question whether Ms Waaler's arguments about the reasonableness of the works to the roof (which was not supported by her expert witness) ought to have been taken into account by the FTT;

   iii) The UT was wrong not to interfere with the FTT's decision refusing to disallow the costs of the proceedings to be recovered through the service charge.

11. The FTT found the following facts about the replacement of the windows and cladding. The windows were not in disrepair although they had an inherent design problem. Two substantial panes of glass were installed in the tilt section of the window which placed an unreasonable strain on the hinges. This was a potential safety issue. There had been hinge failure over the years and although Hounslow had tried to use the hinges taken from other windows in the development, these were no longer available and it was not possible to obtain replacement hinges from the source in Sweden. That had been tried in

earlier phases of the works but it had not solved the problems with the hinges. The FTT seems to have found that equivalent hinges were available at a cost of £140 per pair. But those, if they were the same as the original hinges, would in due course suffer the same problems unless works were done to the windows to lighten the weight. The latter would require removing the windows and replacing them, which would not in the FTT's view have been a simple job, and there would have been the associated scaffolding costs which might require to be in situ longer than just the straight replacement of the whole unit. The removal and replacement of the windows also resulted in the inevitable replacement of the asbestos and the cladding. The cost of the windows was not insubstantial. However, the aluminium window units which were in fact used would have a life span of twice that of the uPVC ones which might have been used at a lower cost.

12. The FTT continued:

> "The question we have to determine is whether the Council's course of action was reasonable, whether the standard of works was reasonable and whether the costs were acceptable. Doing the best that we can on the information that is available to us, which we have to say from the Council's point of view was not as good as it should have been, we have come to the conclusion, albeit with some reluctance, that the Council were reasonable in seeking to replace the windows as a fresh unit and that the cost of replacing the cladding was an inevitable consequence. There is no doubt from the photographs of the development that the replacement of the windows and the cladding has again added to the aesthetic appeal of the black. We bear in mind also that the costs of the windows will also fall to be met by the Council. We were told that there were approximately 1,000 properties of which 140 were leasehold. We accept, therefore, that the upgrading of the windows has incurred substantial costs to the Council and although these may in part have been met by grant monies, the information we have been given is that the grant is repayable. It will also of course avoid the recurrence of problems that have affected the windows with the sheer weight and the hinges and should, therefore, ensure that the future costs are considerably reduced. Having accepted that the windows were to be replaced, the costs that flow with regard to the cladding and asbestos seems to us to be wholly reasonable and were not in truth challenged."

13. The statement that the cost of the windows would be "met by the Council" meant no more than that Hounslow would meet the cost of the windows in the 850 dwellings that were occupied by secure tenants who did not pay service charges rather than long leaseholders who did.

14. I do not believe that the following propositions are controversial in the context of contractual liability:

    i) The concept of repair takes as its starting point the proposition that that which is

to be repaired is in a physical condition worse than that in which it was at some earlier time: *Quick v Taff-Ely BC* [1986] QB 809.

ii) Where the deterioration is the product of an inherent defect in the design or construction of the building the carrying out of works to eradicate that defect may be repair: *Ravenseft Properties Ltd v Davstone (Holdings) Ltd* [1980] QB 12.

iii) Prophylactic measures taken to avoid the recurrence of the deterioration may also be repair: *Ravenseft Properties Ltd v Davstone (Holdings) Ltd* at 22, *McDougall v Easington DC* (1989) 58 P & CR 201, 206.

iv) In principle where there is a choice of methods of carrying out repair, the choice is that of the covenantor provided that the choice is a reasonable one: *Plough Investments Ltd v Manchester CC* [1989] 1 EGLR 244.

v) At common law there is no bright line division between what is a repair and what is an improvement: *McDougall v Easington DC* at 207.

vi) The use of better materials or the carrying out of additional work required by building regulations or in order to conform with good practice does not preclude works from being works of repair: *Postel Properties Ltd v Boots the Chemist [*1996] 2 EGLR 60.

vii) Where a defect in a building needs to be rectified, the scheme of works carried out to rectify it may be partly repair and partly improvement: *Wates v Rowland* [1952] 2 QB 12.

15. Legislation controlling the recoverability of service charges was first introduced by the Housing Finance Act 1972. Since then the legislation has gone through a number of iterations; and on each occasion the protection given to lessees has been extended. In its current form sections 18 and 19 of the Landlord and Tenant Act 1985 provide (so far as relevant) as follows:

> "18 (1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent –
>
> > (a) which is payable directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
> >
> > (b) the whole or part of which varies or may vary according to the relevant costs.
> >
> > ……..
>
> 19 (1) Relevant costs shall be taken into account in determining

> the amount of a service charge payable for a period –
>
> > (a) only to the extent that they are reasonably incurred, and
> >
> > (b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;
>
> and the amount payable shall be limited accordingly."

16. Relevant costs are defined by section 18 (3) (b) which provides that:

> "costs are relevant costs in relation to a service charge whether they are incurred, or are to be incurred, in the period for which the service charge is payable or in an earlier or later period."

17. Until an amendment introduced in September 2003 by the Commonhold and Leasehold Reform Act 2002 inserting the word "improvements" into the definition of service charge, the recoverability of the cost of an improvement, where mandated by the terms of a lease, fell outside the statutory code: *Sutton (Hastoe) Housing Association v Williams* [1988] 1 EGLR 56. The overall purpose of section 19 is to ensure that tenants of flats are not required (i) to pay for unnecessary services or services which are provided to a defective standard, or (ii) to pay more than they should for services which are necessary and are provided to an acceptable standard: *Daejan Investments Ltd v Benson* [2013] UKSC 14, [2013] 1 WLR 854 at [42].

18. There is no dispute in the present case that the works carried out by Hounslow were of a reasonable standard. The dispute is whether the cost of the works was "reasonably incurred".

19. As HHJ Robinson pointed out in *Garside v RFYC Ltd* [2011] UKUT 367 (LC) by reference to the speech of Lord Rodger in *Ashworth Frazer Ltd v Gloucester City Council* [2001] UKHL 59, [2001] 1 WLR 2180 at [67]:

> "The test of reasonableness is to be found in many areas of the law and the concept has been found useful precisely because it prevents the law becoming unduly rigid. In effect, it allows the law to respond appropriately to different situations as they arise."

20. The UT held that Hounslow had an obligation to carry out repairs and a discretion to carry out improvements: [39]. This does not appear to have been disputed before the UT. Although Mr Coyle, on behalf of Ms Waaler, applied at the hearing for permission to amend his grounds of appeal to challenge that conclusion we refused it because it was not a point that had been taken before and did not meet the second appeals test. As Mr Beglan accepted where a contract, in this case a lease, empowers one party to it to make discretionary decisions which affect the rights of both parties, the law recognises that the exercise of that discretion gives rise to a potential conflict of interest. That is all the more so where the discretionary decision of one party to the contract imposes a financial liability on the other. The solution which the law has devised in those circumstances is to

restrict the exercise of the discretion to what is rational. The Supreme Court gave extensive consideration to this question in *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661. It was, I believe, agreed by all members of the court that the exercise of a contractual discretion is constrained by an implied term that the decision-making process be lawful and rational in the public law sense, that the decision is made rationally (as well as in good faith) and consistently with its contractual purpose; and that the result is not so outrageous that no reasonable decision-maker could have reached it: [30] (Baroness Hale); [53] (Lord Hodge) and [103] (Lord Neuberger). However, as Lord Hodge pointed out this is a rationality review, not the application of an objective test of reasonableness.

21. The distinction between rationality and reasonableness was discussed by Rix LJ in *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 116, [2008] Bus LR 1304 at [66]:

> "The concern is that the discretion should not be abused. Reasonableness and unreasonableness are also concepts deployed in this context, but only in a sense analogous to *Wednesbury* unreasonableness, not in the sense in which that expression is used when speaking of the duty to take reasonable care, or when otherwise deploying entirely objective criteria: as for instance when there might be an implication of a term requiring the fixing of a reasonable price, or a reasonable time. In the latter class of case, the concept of reasonableness is intended to be entirely mutual and thus guided by objective criteria … Laws LJ in the course of argument put the matter accurately, if I may respectfully agree, when he said that pursuant to the *Wednesbury* rationality test, the decision remains that of the decision-maker, whereas on entirely objective criteria of reasonableness the decision-maker becomes the court itself."

22. Lord Sumption explored the same theme in *Hayes v Willoughby* [2013] UKSC 17, [2013] 1 WLR 935 where the question was whether a course of conduct was for the purpose of detecting crime. At [14] he said:

> "Rationality is not the same as reasonableness. Reasonableness is an external, objective standard applied to the outcome of a person's thoughts or intentions. The question is whether a notional hypothetically reasonable person in his position would have engaged in the relevant conduct for the purpose of preventing or detecting crime. A test of rationality, by comparison, applies a minimum objective standard to the relevant person's mental processes. It imports a requirement of good faith, a requirement that there should be some logical connection between the evidence and the ostensible reasons for the decision, and (which will usually amount to the same thing) an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse."

23. Both these passages were approved by the Supreme Court in *Braganza*. In my judgment Hounslow's contractual ability to undertake improvements whose cost is to be passed on

to the lessees is constrained by these principles. In my judgment therefore the rationality test applies both to a choice as between different methods of repair and also to a decision whether to carry out optional improvements.

24. That, however, leads on to the next question: is the question whether costs are reasonably incurred within the meaning of section 19 to be answered by reference to an objective standard of reasonableness, or by the lower standard of rationality?

25. If the landlord incurs costs that are not justified by applying the test of rationality, then the costs in question will fall outside the scope of the contractually recoverable service charge. The Landlord and Tenant Act 1985 must have been intended to provide protection against costs which, but for its operation, would have been contractually recoverable. It follows in my judgment that merely applying a rationality test would not give effect to the purpose of the legislation. The statutory test is whether the cost of the work is reasonably incurred.

26. Part of the context for deciding whether costs have been reasonably incurred is the fact that, in principle, the cost of the work is to be borne by the lessees. As Nicholls LJ put it in *Holding and Management Ltd. v Property Holding and Investment Trust plc* [1990] 1 EGLR 65 (not reported on this point at [1989] 1 WLR 1313) when considering whether the most comprehensive (and expensive) of three possible schemes amounted to repair:

> "A prudent building owner bearing the costs himself might well have decided to adopt such a scheme, despite its expense. But what is in question is whether owners of 75-year leases in the building could fairly be expected to pay for such a scheme under an obligation to "repair.""

27. This is emphasised by the definition of "relevant costs" in section 18 (3) (c) which ties the meaning of that expression to a service charge as defined by section 18 (1). In other words no cost is a relevant cost unless it is part of an amount payable by a tenant. When any tribunal considers whether a cost has been reasonably incurred it will always have as its context that, if it has been reasonably incurred, the tenant will have to contribute to it.

28. Mr Beglan argued that the focus of the inquiry must be on the landlord's decision-making process. What mattered was whether the landlord had acted reasonably in reaching his decision to carry out the works. Where the works in question were works of repair properly so-called the views of the tenants were, he said, immaterial. The views of the tenants were equally immaterial where the works in question contained elements of improvement if their overall purpose was to deal with an underlying defect in the property itself. What was critical was the landlord's decision-making process. If the landlord reasonably takes the view that his proposed course of action is a reasonable way of dealing with underlying defects he need not take account of the tenants' views and the costs will have been reasonably incurred. In deciding that question the FTT should judge the landlord by reference to *Wednesbury* principles (cf. *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223).

29. I cannot accept this argument. Consider a case in which the issue is whether the work in question has been carried out to a reasonable standard. The landlord may have acted

entirely properly and rationally in entrusting the work to a reputable contractor with a good track record. But if, as things turn out, the work is carried out badly then the work will not have been carried out to a reasonable standard, and the leaseholders should not have to pay for it. Whether the costs themselves were reasonable for the works in fact carried out must also, as it seems to me, be decided by reference to an objective test just as that test would be applied to deciding whether a price was a reasonable price. I can see no warrant for applying a different test when the question is whether it was reasonable for the landlord to carry out the works at all. In addition what Mr Beglan proposes is, in effect, a test of rationality and as he accepted that test is already part of the leaseholder's contractual liability. Section 19 must have been intended to protect the leaseholder against charges that were contractually recoverable otherwise it would serve little useful purpose.

30. Mr Beglan submitted that a series of cases established that the focus was on the landlord's decision-making process. Two of them (*Sutton (Hastoe)* and *Postel*) concerned the *contractual* recoverability of service charge. As I have explained, a rationality test is the appropriate test in that context. They do not bear on reasonableness under section 19. None of the remaining cases bind this court, but in any event I do not consider that they support the submission. In *Wandsworth LBC v Griffin* (reported sub nom *London Borough Council v Griffin*) [2000] 2 EGLR 105 the council decided to replace metal framed windows with uPVC double-glazed windows in reliance on cost in use ("CIU") calculations. The Lands Tribunal held that the costs of the works were reasonably incurred. Lengthy consultations took place during which a majority of tenants and leaseholders supported the works. Following the consultation process the council considered four alternative schemes. Following that CIU calculations were made to show which of the four schemes would provide the best value for money over the life of the building. The upshot was that the replacement of the windows offered the best value for money option. Yet further consultations then took place. The Tribunal considered that the works in question were works of repair. The member then considered which of the alternative schemes was appropriate. He said:

> "In order to consider which alternative remedy was appropriate by reference to this test, the appellants prepared CIUs. In my opinion, therefore, the question to be determined under section 19 is whether, considered objectively, the appellants prepared their CIUs in a reasonable manner."

31. However, this was a case in which each of the alternative remedies was objectively a reasonable course of action; and the question for the Tribunal was whether the landlord's choice between them was a reasonable one. That was to be answered objectively. Although it is fair to say that the member considered the process of decision-making, I do not consider that that can be taken to limit the scope of the inquiry.

32. *Forcelux Ltd v Sweetman* [2001] 2 EGLR 173 concerned the recovery of insurance premiums. The member said:

> "[39] In determining the issues regarding the insurance premiums and the cost of major works and their related consultancy and management charges, I consider, first, Mr Gallagher's submissions as to the interpretation of section 19(2A) of the 1985 Act, and specifically his argument that the section is not

> concerned with whether costs are "reasonable", but whether they are "reasonably incurred". In my judgment, his interpretation is correct, and is supported by the authorities quoted. The question I have to answer is not whether the expenditure for any particular service charge item was necessarily the cheapest available, but whether the charge that was made was reasonably incurred.
>
> [40] But to answer that question, there are, in my judgment, two distinctly separate matters I have to consider. First, the evidence, and from that whether the landlord's actions were appropriate, and properly effected in accordance with the requirements of the lease, the RICS Code and the 1985 Act. Second, whether the amount charged was reasonable in the light of that evidence. This second point is particularly important as, if that did not have to be considered, it would be open to any landlord to plead justification for any particular figure, on the grounds that the steps it took justified the expense, without properly testing the market."

33. It is true that the member considered the landlord's decision-making process. But the important point is that he did not stop there. He also tested the outcome by reference to what the cost of cover was on the market. In other word's the landlord's decision-making process is not the only touchstone. The outcome was also "particularly important". Indeed in *Forcelux* the Tribunal also considered the question of the cost of other works; and on that topic the member said at [47]:

> "In summary therefore, while there can, in my judgment, be no criticism of the landlords policies and procedures for appointing contractors, I consider the sum involved to be in excess of an appropriate market rate, this view being supported by the lessees contractor's quote against the same specification, of £1,250."

34. Thus although the landlord's decision-making process was not criticised, what mattered was the outcome.

35. In *Garside* the UT listed a number of potentially relevant factors and said at [19]:

> "These are only examples of factors that may or may not be relevant and there may be others to take into account. All are factual issues and matters of judgment for the LVT to weigh up against the hardship of substantial increased costs when deciding on the evidence before it whether the service charge costs are reasonably incurred."

36. This does not suggest that the function of the tribunal is simply to review the landlord's decision-making process. The interests of the tenants are to be taken into account in "weighing up" the relevant factors.

37. 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 Beglan 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.

38. In addition before carrying out works of any size the landlord is obliged to comply with consultation requirements; and the current requirements are those contained in the Service Charges (Consultation Requirements) (England) Regulations 2003. The landlord must (among other things) describe the works proposed to be carried out, and under each of the Schedules to those regulations the landlord must "have regard" to the lessees' observations on his proposals. The obligation to consult goers to the appropriateness of the works proposed by the landlord: *Daejan* at [43]. Although the duty to consult in this context is not a public law duty imposed upon a landlord (see *Daejan* at [52]) nevertheless the concept of what amounts to consultation is well developed in public law (see for example *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213). What this means is that the landlord must conscientiously consider the lessees' observations and give them due weight, depending on the nature and cogency of the observations. In the light of this statutory obligation to consult, it is impossible to say that the tenants' views are ever immaterial. They will have to be considered in every case. This does not of course mean that the lessees have any kind of veto over what the landlord does; nor that they are entitled to insist upon the cheapest possible means of fulfilling the landlord's objective. But a duty to consult and to "have regard" to the lessees' observations entails more than simply telling them what is going to happen. Given that in every case the tenants will have had the opportunity to make observations on the landlord's proposals I do not consider that the landlord has any further positive duty to inquire into the tenants' views. The statutory consultation process is designed to inform the landlord about the tenants' views.

39. Once the landlord has consulted the tenants and taken their observations into account, it is then for the landlord to make the final decision. In considering whether the final decision is a reasonable one, the tribunal must accord the landlord what, in other contexts, is described as a "margin of appreciation". As I have said there may be a number of outcomes, each of which is reasonable, and it is for the landlord to choose between them.

40. The essence of the UT's reasoning on the point raised by Hounslow's appeal is contained in the following passages:

> "[41] At the hearing I asked Mr Beglan whether he considered that different considerations would apply to the assessment of the reasonableness of incurring costs of repairs from that assessment in respect of improvements. He submitted that there is no difference and that the test is the same in either case. I accept that section 19 of the Landlord and Tenant Act makes no express distinction between repairs and improvements. However, in my view the approach must be different. In carrying out repairs a landlord is usually fulfilling an obligation under the lease. Failure to carry out the obligation would mean that he was in breach of

> the lease and vulnerable to an order for specific performance and possibly an award of damages against him. Improvements are a different matter and may simply be a matter of choice. I accept that when one is dealing with works to a building which might be a mixture of repair and improvement that the distinction will be blurred. It is for the landlord to decide how to discharge its obligations and provided it acts reasonably, it is for the landlord to decide how to go about the matter. The tenants cannot complain simply because the landlord could have adopted another and cheaper method of doing so.
>
> [42] However, if a landlord decides to carry out a scheme of works which goes beyond what is required to effect a repair and seeks contributions to the cost from a leaseholder then in my view he must take *particular account of the extent of the interests of the lessees, their views on the proposals and the financial impact of proceeding.* As the President observed in the *Sheffield* case "It does seem to me somewhat surprising…that under the terms of this 125 year lease, if the council are of opinion that a particular improvement is desirable, they are able to carry out the works of improvement and to charge the lessee for them even though the lessee does not want them carried out."
>
> [43] I appreciate that the council has responsibility for its secure tenants. However, it also has a responsibility as a landlord to the leaseholders. I do not underestimate the challenges that are faced by a public authority managing a mixed tenure estate where funding is offered to raise the quality of the housing provided to a decent standard. But in deciding what works to carry out it is not sufficient simply to rely on the right to recover the cost of improvements as a justification in itself for embarking on a scheme of very expensive works." (Emphasis added)

41. Mr Beglan criticises this self-direction on the basis that the UT has applied a different test to improvements on the one hand and repairs on the other. He argues that the clear statutory intent is that the same test should be applied both to repairs and improvements.

42. I agree with Mr Beglan that the same *legal* test applies to all categories of work falling within the scope of the definition of "service charge" in section 18. But the application of the same legal test does not mean that the legal and factual context applicable to one category of works rather than another can be ignored. That is the point that Lord Rodger made in *Ashworth Frazer*. There is, to my mind, a real difference between works which the landlord is obliged to carry out on the one hand, and work which is an optional improvement on the other. When the lessee enters into an obligation to pay for the cost of keeping the structure and exterior of the flat and the building in repair it is possible to form a view about what kind of works will be involved, and consequently what the scale of cost is likely to be. However, in the case of an obligation to contribute towards the cost of discretionary improvements it would be quite impossible for the lessee to form any idea of the extent of his potential liability. It is one thing to require the lessee to contribute towards the cost of works which can, at least in a general sense, be identified in advance and quite another to require the lessee to contribute towards the cost of works

whose scale and extent are unknown and unknowable. The UT did not decide that a different legal test was applicable. What it was addressing was whether different considerations came into the assessment of reasonableness in different factual situations. I see nothing wrong with that.

43. In principle, therefore, I agree with the UT. There are, however, a number of points that need to be made. First, as I have said there is no bright line difference between repairs and improvements. Although Mr Beglan suggested that the UT had drawn such a line, I do not think that on a fair reading of the decision as a whole it did. Paragraph [41] recognises in terms that in some cases the line may be blurred. The contrast that the UT drew was between the discharge of obligations on the one hand and the carrying out of discretionary improvements on the other. Second, neither the decision of the UT nor the decision of this court is part of the statute. Observations, even if of a general nature, made in a judgment are not to be construed as if they were. Third, there is a spectrum of different factual situations which may give rise to different considerations and situations in which different weight should be given to common considerations. A number of examples of discretionary improvements were discussed in argument. At one end may be a case like this one in which improvements were carried out in order to eradicate the future possibility of failure of the windows due to a design defect in the original building. In the middle may be an improvement designed to benefit all tenants, such as the installation of security measures (e.g. CCTV or keypad locks) where none had existed before. Further along may be improvements which will benefit some but not all tenants (such as the creation of a childrens' play area). And at the other extreme might be something of purely aesthetic interest such as the installation of a water feature to beautify the estate. The relevance of the lessees' views and the financial impact on them may be given greater weight the further along the scale one goes.

44. Mr Beglan argued that the three factors which the UT said the landlord must consider would lead to an undesirable degree of uncertainty about what contributions would be recoverable under a service charge; and that the three criteria were open to substantially subjective judgments.

45. The first of the factors identified by the UT was the extent of the interests of the lessees. I cannot see that this gives rise to any difficulty at all. The extent of the lessees' interest is measured by the remaining unexpired terms of their leases. This is the same factor as that to which Nicholls LJ referred in *Holding & Management* when considering contractual recoverability. The second factor is the views of the tenants. As mentioned the landlord has a statutory duty to consult the lessees, and that entails having regard to their observations. So the duty to consult and to the duty to take account of the lessees' views is already present in the statutory scheme. The only difference is that the UT said that the landlord should take "particular" account of those views where the works are optional improvements. I do not see why that should raise any practical problem. The landlord is not *bound* by the lessees' views but where it is exercising a discretionary power at the lessees' expense it makes sense that the lessees' views should be more influential than in a case where the landlord is doing no more than complying with its obligations. The third of the criteria is that the landlord must take into account the financial impact of the works. It is important to stress that the UT was not saying that the landlord should investigate the financial means of particular lessees. That would indeed have been both impractical and intrusive. However, in broad terms the landlord is likely to know what kinds of people are lessees in a particular block or on a particular estate.

Lessees of flats in a luxury block of flats in Knightsbridge may find it easier to cope with a bill for £50,000 than lessees of former council flats in Isleworth. This accords with the view of the UT in *Garside* at [16] in which it was said:

> "In many cases financial impact could no doubt be considered in broad terms by reference to the amount of service charge being demanded having regard to the nature and location of the property and as compared with the amount demanded in previous years. Reasonable people can be expected to make provision for some fluctuations in service charges but at the same time would not ordinarily be expected to plan for substantial increases at short notice."

46. I do not consider that the UT has erred in law in formulating these criteria. Mr Beglan also invited this court to give guidance for the future. I think that it would be unwise to attempt to do so. Although I am fully aware of the desirability of predictability in the law and practice, and appreciate that landlords want to avoid the risk of non-recovery of costs incurred in good faith, the open textured nature of a test of reasonableness makes it dangerous even to attempt to be prescriptive. Factual situations are almost infinitely variable, and different considerations will come into play in different circumstances. Parliament has deliberately chosen an open ended and flexible test, and has left all factual determinations to the good sense of the FTT.

47. To put it no higher, the UT made no error of law which would entitle this court to intervene. I would therefore dismiss the appeal.

48. I turn to the application for permission to cross-appeal. There is first a jurisdictional hurdle to overcome. First, an appeal may only be brought on a point of law. Second, where permission to bring an appeal against a decision of the UT is sought, and the UT was itself sitting on appeal, the Court of Appeal can only grant permission to appeal if the appeal either raises an important point of principle or practice or there is some other compelling reason for the appeal to be heard by the Court of Appeal: Tribunals Courts and Enforcement Act 2007 s 13; Appeals from the Upper Tribunal to the Court of Appeal Order 2008.

49. The first argument was that the UT ought to have considered the totality of Ms Waaler's service charge bill. As it emerged during the course of Mr Coyle's oral address what he was arguing was that some form of phasing of the works ought to have been considered. In fact the FTT did consider that question. It decided (at [55]) that there would have been no benefit in splitting up the contract and (at [54]) that the lessees had had ample time in which to put aside money to meet the eventual bill. These were (a) questions of fact for the FTT and (b) in any event did not raise any important point of principle or practice.

50. The second argument was that the UT failed to address the question whether Ms Waaler's arguments about the reasonableness of the works to the roof (which was not supported by her expert witness) ought to have been taken into account by the FTT. The first difficulty with this point is that Ms Waaler chose not to give evidence before the FTT. The only evidence called on behalf of the lessees was the expert evidence. Thus any argument that Ms Waaler wished to advance would have been unsupported by

evidence. The second difficulty was that the argument that Ms Waaler wished to advance was never identified to us. So it was impossible to conclude that this point raised any point of law, or any important point of principle or practice.

51. The third argument was that the UT was wrong not to interfere with the FTT's refusal to direct, pursuant to section 20C, that Hounslow's legal costs should not form part of the service charge. The UT did, however, direct that the costs of the appeal to the UT should not form part of the service charge; so what was in issue was solely the costs before the FTT. The difficulty with this argument is that the UT remitted the case to the FTT without itself making any factual determination. So whether Ms Waaler will ultimately succeed in reducing her service charge bill is impossible to say at this stage. We did however point out to Mr Coyle that if Ms Waaler were to succeed at the resumed hearing it would be open to the FTT to make a direction under section 20C in relation to the costs of the resumed hearing. Mr Coyle appeared content with that and did not advance this ground any further.

52. For these reasons we announced at the hearing that we would refuse Ms Waaler permission to cross-appeal.

Lord Justice Burnett:

53. I agree.

Lord Justice Patten:

54. I also agree.