

Recovering the Legal Costs of Previous LVT Proceedings?

1. Paragraph 10 of Schedule 12 of the Commonhold and Leasehold Reform Act 2002, provides as follows:

“(1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceeding in any circumstances falling within sub-paragraph (2).

(2) The circumstances are where-

(a) He has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by paragraph 7, or

(b) He has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

(3) The amount which a party to proceedings may be ordered to pay in the proceedings by determination under this paragraph shall not exceed-

(a) £500, or

(b) Such other amount as may be specified in procedure regulations.

(4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by an enactment other than this paragraph.”

2. In *Staghold v Takeda & Takeda* (2005) 47 EG 146, the Claimant landlord sought to recover the costs of previous LVT proceedings through the service charge. The Defendant tenants resisted, arguing, amongst other things, that paragraph 10(4) of Schedule 12 to the 2002 Act precluded such recovery. HHJ Levy QC in the Central London County Court found that Parliament cannot have intended to preclude landlords from recovering their legal costs through the service charge. He ordered the tenants to pay the service charge in full.

3. In November 2005, *Staghold* was confirmed in the Lands Tribunal by HHJ Rich QC in *Canary Riverside Pte Limited v Schilling* (LRX/65/2005) (Unreported, 16th December 2005). The landlord in that case sought to include in the service charge expenditure about £182,000 odd that it had incurred in successfully defending a tenant’s application for a manager to be

appointed. HHJ Rich QC considered the legislative history of the LVT and its expanding jurisdictions, and concluded that the different wording used in the 2002 Act was not intended to produce change the substantive law (which was that such costs could be included in the service charge provided that the service charge provisions in the leases permitted their recovery).

4. The *Canary Riverside* is also notable for a number of other reasons:

4.1. The tenant sought to argue that the definition of “Building Expenditure” which permitted the recovery of legal costs was unfair within the meaning of the Unfair Terms in Consumer Contracts Regulations 1999. The landlord could recover its costs from the tenants through the service charge; the tenant could not, and that created an unfair inequality of arms.

4.1.1. The Landlord’s submission that the LVT had no jurisdiction to consider such issues was rejected; section 27A of the 1985 Act provides, without limitation, that “*an application may be made to the leasehold valuation tribunal for a determination whether a service charge is payable.*” HHJ Rich QC expressed the opinion that the LVT may not be an appropriate forum for the determination of issues such as the voidability of a lease for forgery or misrepresentation, and that if there were concurrent Court proceedings, the LVT ought to adjourn its own proceedings to enable such matters to be determined in Court. If there were no concurrent Court proceedings, then the LVT would have jurisdiction and should determine the issue:

“I can see no basis ... for saying that the LVT lacks jurisdiction to determine any issue not expressly the subject of some other tribunal’s exclusive jurisdiction, if determination of that issue is essential to determining whether “a service charge is payable.” That is the issue which section 27A gives the LVT jurisdiction to determine. That must include any issue necessary for or incidental to such determination... .”

(paragraph 45)

4.1.2. HHJ Rich QC found that the provision was clear and open (and therefore not contrary to the requirement of good faith) and that it was not unfair. He commented that a reciprocal right given to the tenant to be reimbursed by his fellow tenants would be even more unfair.

4.2. HHJ Rich QC commented upon the LVT's attempt to assess the reasonableness of such legal costs included in the service charge (from landlord's costs in the region of £182,000, the LVT were only willing to permit £50,580 to be regarded as relevant costs):

4.2.1. The costs which a costs judge might award as between litigants on a party-to-party standard assessment was "*a starting point as to what a landlord may reasonably incur by way of costs in litigation, which, as between him and the tenants liable for service charges, it is reasonable for him to conduct.*"

4.2.1.1. any challenge to that 'starting point' would be "*limited to the reasonableness of incurring costs on litigation at all*"; and

4.2.1.2. any costs in excess of that 'starting point' "*would need justification having regard to the proper extent of the landlord's discretion in carrying out his functions.*"

4.2.2. In deciding what further costs might be reasonable, the highest that HHJ Rich QC was prepared to countenance was that, when there was doubt as to the reasonableness or otherwise of costs incurred, the presumption that applies in solicitor/client assessments pursuant to CPR48.8(2) might apply. As this would be a case where 'the client' (that is, the paying party) would not have had the opportunity to approve the incurring of the costs, they might "*be assessed on an indemnity basis but are to be presumed to have been unreasonably incurred if they are of an unusual nature or amount*".

4.2.3. HHJ Rich QC did not criticise the LVT for receiving expert evidence as to how such costs would have been assessed

4.3. In a reminder to landlords everywhere, however, the LVT found that the costs were not payable by the tenant. The service charge machinery required a landlord to notify a tenant of any change to the estimated service charge, before the revised service charge became payable. The landlord had submitted before the LVT that such notification was 'merely a formality'; HHJ Rich QC found that it was a condition precedent to any liability on the part of the tenant, that it had not been satisfied and that the revised service charge was not payable.

The Determination of Set-Offs / Damages for Breach of Covenant to Repair

5. A further illustration of the LVT's expanded jurisdiction was given in *Continental Property Ventures Inc v White* (2006) 16 EG 148. A landlord sought to recover the costs (£55,174 odd) of damp-proofing and redecorating flats 1 and 2 and the communal hall of a block of flats. The LVT found that only £3,000 plus VAT (£3,525 in total) had been reasonably incurred, for two reasons:

5.1. It found that the works to Flat 1 were covered by a guarantee, guaranteed damp-proofing work having been carried out in 1994; and

5.2. It found that the works to Flat 2 were only necessary because the landlord had neglected to carry out repairs to a leaking pipe within a reasonable time. Had the landlord complied with its repairing covenant, the reasonable cost would only have been £3,525.

6. The landlord appealed to the Lands Tribunal.

7. The landlord failed on the guarantee point because it had failed to call any evidence before the LVT on that issue, and therefore could not challenge the LVT's finding that the cost of the works to Flat 1 had not been reasonably incurred.

8. As far as the works to Flat 2 were concerned, HHJ Rich QC disagreed with the reasoning of the LVT. He held that the reasonableness of incurring costs for a repair cannot depend on how the need for the repair arose. If Flat 2 properly needed damp-proofing and decoration works, those works were reasonably incurred even if that need was created by the landlord's prior default. However, he again referred to section 27A, and the LVT's jurisdiction to determine whether a service charge was 'payable'. If, as the LVT found, the landlord's failure (in breach of covenant) timeously to repair the leaking pipe caused the repairs to be more expensive than would otherwise have been the case, then the tenant would be entitled to damages equivalent to the corresponding increase in his service charge contribution. Those damages could be set-off against the service charges payable by the tenant to the landlord under the lease. Accordingly, although the costs of repairing Flat 2 were reasonably incurred, only £3,525 was payable by way of service charge.
9. Finally, HHJ Rich QC quoted at some length from his decision in *Canary Riverside Pte Limited v Schilling*. He emphasised again that, although the effect of the new section 27A was to confer a considerably increased jurisdiction on the LVT, the LVT would have to exercise restraint to ensure that it did not deal with matters that would more properly be dealt with by the County Court. He indicated, however, that he did not see any reason why the LVT should not determine claims for general damages for loss of amenity, or even personal injury, caused by disrepair, when those claims were raised by way of defence to a claim for service charges.

Jurisdiction to Set Down a Timetable for Payment of Service Charges?

10. Section 27A(1) provides that "*An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to- ... (d) the date at or by which it is payable, and (e) the manner in which it is payable.*"
11. Similarly, section 27A(3) provides that "*An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or*

management of any specified description, a service charge would be payable for the costs and, if it would, as to- ... (d) the date at or by which it is payable, and (e) the manner in which it is payable.”

12. In *Southend-on-Sea Borough Council v Skiggs* (2006) 21 EG 132, the tenants sought to argue that those provisions gave the LVT the power to lay down a timescale for the payment of service charges that it has found to be payable, being a timescale otherwise than as provided by the relevant lease(s). The Eastern LVT decided that it did have such jurisdiction. The Council appealed to the Lands Tribunal.
13. HHJ Huskinson allowed the Council’s appeal.
 - 13.1. He held that section 27A conferred on the LVT a jurisdiction to determine what liabilities *actually existed* between the parties; not what liabilities *should exist* between the parties.
 - 13.2. In that context, he noted that when Parliament has wanted to confer on the LVT a jurisdiction to determine what is just and equitable, it has used express words to do so – for example, section 20C(3) which expressly permits the LVT to make “*such order on the [section 20C application] as it considers just and equitable in the circumstances.*”
 - 13.3. Finally, he referred to the legislative purpose of section 27A. Prior to the commencement of section 155 of the Commonhold and Leasehold Reform Act 2002, the LVT only had jurisdiction to determine whether the costs incurred for services or works were incurred reasonably, and whether the services or works were carried out to a reasonable standard. It could not, for example, determine whether a service or work fell within the service charge covenant. The purpose of the new section 27A was to confer on the LVT the jurisdiction to determine the entirety of a dispute that might arise between landlord and tenant, including issues of construction of the lease, and the service charge payable, so that the parties did not have to litigate in the County Court as well. That is, he noted, quite different from conferring a power to adjust those legal rights in such manner as it may consider just and equitable.

Is a Default Judgment a ‘final determination’ within Section 81 of HA1996

14. Section 81 provides as follows:

- “(1) A landlord may not, in relation to premises let as a dwelling, exercise a right of re-entry or forfeiture for failure by a tenant to pay a service charge ... unless it is finally determined by (or on appeal from) a leasehold valuation tribunal or by a court or by an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement that the amount of the service charge or administration charge is payable by him, ...
- (2) The landlord may not exercise a right of re-entry or forfeiture by virtue of subsection (1)(a) until after the end of the period of 14 days beginning with the day after that on which the final determination is made.
- (3) For the purposes of this section it is finally determined that the amount of a service charge or administration charge is payable—
- a) if a decision that it is payable is not appealed against or otherwise challenged, at the end of the time for bringing an appeal or other challenge, or
- b) if such a decision is appealed against or otherwise challenged and not set aside in consequence of the appeal or other challenge, at the time specified in subsection (3A).
- (3A) The time referred to in subsection (3)(b) is the time when the appeal or other challenge is disposed of—
- a) by the determination of the appeal or other challenge and the expiry of the time for bringing a subsequent appeal (if any), or
- b) by its being abandoned or otherwise ceasing to have effect.
- (4) ...
- (4A) References in this section to the exercise of a right of re-entry or forfeiture include the service of a notice under section 146(1) of the Law of Property Act 1925 (restriction on re-entry or forfeiture).
- (5) In this section—
- a) "administration charge" has the meaning given by Part 1 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002,
- b) "arbitration agreement" and "arbitral tribunal" have the same meaning as in Part 1 of the Arbitration Act 1996 (c.23) and "post-dispute arbitration agreement", in relation to any matter, means an arbitration agreement made after a dispute about the matter has arisen,
- c) "dwelling" has the same meaning as in the Landlord and Tenant Act 1985 (c.70), and (d).

(5A) *Any order of a court to give effect to a determination of a leasehold valuation tribunal shall be treated as a determination by the court for the purposes of this section.”*

15. CPR 12 deals with default judgments. It provides:

12.1 Meaning of "default judgment"

In these Rules, "default judgment" means judgment without trial where a defendant—

- (a) *has failed to file an acknowledgment of service; or*
- (b) *has failed to file a defence.*

12.3 Conditions to be satisfied

(1) *The claimant may obtain judgment in default of an acknowledgment of service only if—*

- (a) *the defendant has not filed an acknowledgment of service or a defence to the claim (or any part of the claim); and*
- (b) *the relevant time for doing so has expired;*

(2) *Judgment in default of defence may be obtained only—*

- (a) *where an acknowledgment of service has been filed but a defence has not been filed, . . . ;*

12.4 Procedure for obtaining default judgment

(1) *Subject to paragraph (2), a claimant may obtain a default judgment by filing a request in the relevant practice form where the claim is for—*

- (a) *a specified amount of money;*
- (b) *an amount of money to be decided by the court;*
- (c) *delivery of goods where the claim form gives the defendant the alternative of paying their value; or*
- (d) *any combination of these remedies.*

(2) *The claimant must make an application in accordance with Part 23 if he wishes to obtain a default judgment—*

- (a) *on a claim which consists of or includes a claim for any other remedy; or*

12.5 Nature of judgment where default judgment obtained by filing a request

(1) *Where the claim is for a specified sum of money, the claimant may specify in a request filed under rule 12.4(1)—*

- (a) *the date by which the whole of the judgment debt is to be paid; or*
- (b) *the times and rate at which it is to be paid by instalments.*

(2) Except where paragraph (4) applies, a default judgment on a claim for a specified amount of money obtained on the filing of a request, will be judgment for the amount of the claim (less any payments made) and costs—

(a) to be paid by the date or at the rate specified in the request for judgment; or

(b) if none is specified, immediately.

(Interest may be included in a default judgment obtained by filing a request if the conditions set out in Rule 12.6 are satisfied.)

(Rule 45.4 provides for fixed costs on the entry of a default judgment.)

(3) Where the claim is for an unspecified amount of money a default judgment obtained on the filing of a request will be for an amount to be decided by the court and costs.

(4) Where the claim is for delivery of goods...

12.11 Supplementary provisions where applications for default judgment are made

(1) Where the claimant makes an application for a default judgment, judgment shall be such judgment as it appears to the court that the claimant is entitled to on his statement of case.

(2) Any evidence relied on by the claimant in support of his application need not be served on a party who has failed to file an acknowledgment of service.

(4) An application for a default judgment may be made without notice if—

(a) ...;

(b) the defendant has failed to file an acknowledgment of service; and

(c) notice does not need to be given under any other provision of these Rules.”

16. There appear to be only two County Court cases on this issue. In *Southwark v Tornaritis* (Unreported, 11th May 1999) HHJ Cox held in the Lambeth County Court that a default judgment was a sufficient determination for the purposes of section 81. More recently, in *Hillbrow (Richmond) Ltd v Alogaily* [2006] CL 347, HHJ Rose declined to follow *Southwark v Tornaritis* and held that a default judgment was insufficient. Which is correct?

17. Does the language of section 81 of the HA1996 fit with CPR 12? There must be a “determination” (section 81(1)), being “a decision” (section 81(3)) “that the amount of the service charge is payable” by the tenant (section 81(1)).

- 17.1. The entering of a default judgment is solely an administrative act by a Court official. Nothing is determined or decided save that the Claimant is entitled to apply for judgment because the conditions in CPR 12.3 have been satisfied (namely the Defendant has failed to acknowledge service in the time allowed).
- 17.2. In the case of a default judgment, neither the Court (nor the Court officer) considers what amount is or is not payable by the tenant. This is decided by the Claimant. CPR 12.4 makes reference to a claim for “a specified sum of money”. The notes at 12.4.3 make it clear that this does not only cover a “debt claim” but also a damages claim where the Claimant has quantified his/her losses. CPR 12 leaves it entirely to the Claimant to decide or determine the amount. All the court (more accurately the court officer) does is give judgment for the amount chosen by the Claimant if an acknowledgement of service is not filed.
- 17.3. Arguably, the language used in section 81 requires some judicial intervention in arriving at the determination of the amount payable. What a landlord is required to do is obtain a determination of the amount of the service charge that is payable. This is a more onerous task than simply obtaining a paper judgment.
- 17.4. Further section 81(5)(A) recognises the difference between a court order and a determination. This supports the argument that a default judgment cannot in itself amount to such determination.
18. Further, section 81(3) requires there to be a ‘*decision*’, either ‘*not appealed against or otherwise challenged at the end of the time for bringing an appeal or other challenge*’, or unsuccessfully ‘*appealed against or otherwise challenged*’. A Defendant cannot *appeal* a default judgment unless it is one of the special categories of default judgment decided by an application under CPR Part 23 and therefore a decision made by a judge. The reason is simple. CPR Part 52 concerns appeals from decisions of a judge (CPR 52.3) and does not cover administrative acts of court officers.
19. Further still, the only *challenge* to a default judgment of this kind is to apply to set aside the judgment. There is no time limit to the setting aside of a default

judgment entered by a court official, although the Court is to consider whether the application has been made promptly. Therefore, in the case of a default judgment under CPR 12.3/12.4(1), it is impossible to know when is the end of the time for bringing an appeal or other challenge (section 81(3)), at which point it is appropriate to serve a section 146 notice.

20. The context in which section 81 was enacted was to provide additional protection to lessees. It is a fetter on the right to forfeit. Permitting default judgments to amount to a “final determination” does not protect the lessee as much as if a judicial determination was required.
21. Parliament has consistently encouraged the use of the LVT. The other forms of “determination” that are permitted by section 81 are determination by the LVT or by an arbitrator. It cannot be overlooked that there is no similar provision for default judgment in the LVT or in arbitration. Further, permitting default judgments to amount to a “determination” will not only lead to injustice but will also encourage landlords to seek to avoid the LVT and proceed in Court.
22. Section 168 of CLRA2002 prevents service of a section 146 notice unless an LVT, Court or Arbitral Tribunal *has finally determined that the breach has occurred*. An order of the Court determining that a breach (e.g. subletting, alteration, breach of user covenant) has occurred could not be made by way of default judgment obtained by merely filing a request for judgment. Such relief does not fall within the categories of claim for which judgment in default can be entered save on an application under CPR 23. It would be illogical for there to be a different regime for breach of covenant to pay service charges rather than some other form of breach.
23. So how can a landlord be sure that he has obtained a final determination?
 - 23.1. Seek a determination from the LVT;
 - 23.2. Make an application under CPR 12.4(2) by way of Part 23 application;
or
 - 23.3. Issue part 8 proceedings with a short witness statement in support. On the return date the judge can either determine it or if genuinely disputed give directions for trial or transfer to the LVT.

Are Joists part of the ‘Main Structures’ of a Property?

24. In *Malborough Park Services Ltd v Rowe* [2006] EWCA Civ 436, the Court of Appeal was concerned with the definition of the ‘main structures’ of the property. The property in question was a two-storey maisonette. The ground floor, and the ceiling above the first floor were constructed from concrete. However, the intermediate floor was of timber construction. The timber floor was deflecting, causing cracking in the wall of the first floor maisonette.
25. If the joists were not strengthened, then there would, in due course, be a partial collapse of the timber floor/ceiling, which would reduce the natural support for the party walls partitioning the maisonettes from their neighbours. If the joists fell within the definition of the ‘main structures’ of the property, then they fell to be repaired by the landlord, and the costs of such repair would be recovered through the service charges payable by all the tenants of the development. If they did not fall within the definition of the ‘main structures’ of the property, then they fell to be repaired by Mr and Mrs Rowe, who were the tenants of the flat on the ground and first floors of the maisonette, and whose demise expressly included ‘... *the ceilings and floors thereof and the joists and beams on which the floors are laid together...*’.
26. The landlord argued that the joists were wholly within the demise to Mr and Mrs Rowe, and could not constitute part of the ‘main structure’ of the property for the repair of which the landlord was reasonable. The landlord also argued that the policy enshrined in the leases was that each tenant would be responsible for all aspects of the unit comprised within his lease. He also relied on *Toff v MacDowell* [1993] 69 P&CR 535, in which Evans Lombe J held that in the context of the lease of a basement flat the landlord’s obligation to repair the ‘main structure’ did not extent to the floor between the two flats.
27. Neuberger LJ (as he was then) delivered the Judgement of the Court of Appeal. He found that the landlord’s first argument required the implication of a qualification to the definition of ‘main structures’ excluding parts within the Rowe’s demise. As such a qualification was neither obvious nor necessary, there were no grounds upon which to imply it. Further, such a

qualification would not sit well with various other terms of the lease, as a consequence of which the landlord's second argument also failed. Finally, the Court of Appeal reminded the landlord that all such cases turn on the construction of their own leases. The Rowe's lease was different to that in *Toff v MacDowell*, and such cases turning on construction of individual leases should not be followed slavishly.

28. Neuberger LJ reasoned that, as a matter of normal usage, the joists must be part of the structure of the building. The issue was whether they constituted part of the 'main structure' and that was, to some extent, a matter of impression. They performed a structural function (in providing support to the party walls), and would be regarded by any ordinary person as an essential part of the building. For that reason, he agreed with the Judge below that they were part of the 'main structures' of the building.

Refusal by the Lands Tribunal of Permission to Appeal?

29. *R (Sinclair Investments (Kensington) Limited) v The Lands Tribunal* [2006] HLR 11, started as a service charge dispute between a landlord, Sinclair Investments (Kensington) Limited, and its tenants. The service charge item in dispute was damp-proofing works. The LVT considered the lease and held that if the works constituted repairs they would be chargeable by the landlord to the tenants through the service charge machinery, but if they were improvements then they would have to be borne by the landlord. The LVT found that damp-proofing to the walls of the basement flat were repairs, but that the works to the access lobby were improvements. The relevant costs recoverable through the service charge were therefore reduced by about £10,000.
30. The landlord sought to appeal on the grounds, firstly, that the LVT had misconstrued the service charge provisions which permitted the recovery of the costs of improvements and not just repairs, and secondly, that, in any event, the works to the access lobby were repairs. The landlord's application for permission to appeal was refused by the LVT. The application was renewed to the Lands Tribunal, but was again refused (by a surveyor member

of the Lands Tribunal). The landlord issued judicial review proceedings of the Lands Tribunal's refusal of permission to appeal.

31. Section 3(4) of the Lands Tribunal Act 1949 provides that “*any party aggrieved by the decision [of the Lands Tribunal] as being erroneous in point of law may ... appeal ...*” and section 3(11) states that, in England & Wales, such an appeal is to the Court of Appeal.
32. The matter was heard by Sullivan J. He found that the Lands Tribunal's refusal of permission to appeal was not a decision susceptible to appeal to the Court of Appeal, but that it was a decision susceptible to judicial review. What test should be applied to such judicial review applications?
33. Sullivan J considered the efficacy of the system of seeking permission to appeal as a check on the correctness of decisions of the LVT. He decided that it was an adequate system for reviewing the merits of the first instance decision and provided adequate protection against the risk that the LVT acted without jurisdiction or fell into error – even though applications to the Lands Tribunal for permission to appeal were almost always made only on paper, and might be considered by a non-lawyer. Accordingly, he decided that the same principles should apply to refusals by the Lands Tribunal of permission to appeal as apply to refusals by a Circuit Judge of permission to appeal.
34. Those principles were set out in *R (Sivasubramaniam) v Wandsworth County Court* [2003] 1 WLR 475 and *Gregory v Turner* [2003] 1 WLR 1149. The effect of those cases is that judicial review should only be granted in *exceptional circumstances*. But what constitute exceptional circumstances? In this context, an old public-law distinction between errors of law that entail an absence of jurisdiction (in effect, matters that the Judge was not entitled to get wrong) as opposed to errors of law that are within the jurisdiction of the Judge (in effect, matters that the Judge was entitled to get wrong) applies. The distinction has been swept away in other areas of public law, but it remains as far as Courts are concerned. There will be an absence of jurisdiction when there has been a gross and obvious irregularity of procedure, amounting to a failure to observe one of the fundamental principles of natural justice. There

was no such irregularity here, and Sullivan J dismissed the application for judicial review. The landlord appealed again to the Court of Appeal.

35. The Court of Appeal agreed that the Lands Tribunal's refusal of permission to appeal was not susceptible to appeal to the Court of Appeal, but was a decision susceptible to judicial review. They also agreed, following *R (Sivasubramaniam) v Wandsworth County Court* [2003] 1 WLR 475 and *Gregory v Turner* [2003] 1 WLR 1149, that judicial review would only be granted when there were exceptional circumstances.
36. It followed that, even if the Lands Tribunal was plainly wrong in law to refuse permission to appeal, that would not alone be enough to seek judicial review; it would also have to be established that the error was sufficiently grave to justify the case being treated as exceptional. The "*possible example*" given by Neuberger LJ was:

"if the Lands Tribunal, despite being aware of the position, refused, without any good reason, permission to appeal on a difficult point of law of general application, which had been before a number of different LVTs which had taken different views on it, and which cried out for a definitive answer in the public interest. In that connection, it seems to me that one could say that it was not so much the point of law itself which justified judicial review, but more the failure of a public tribunal to perform its duty to the public, as well as what one might call its duty to the parties in that particular case."

37. Neuberger LJ also made it clear that the issue of proportionality is significant. He drew attention to the fact that the sum at stake was £10,000, and the costs of a one-day appeal to the Lands Tribunal were likely to be as much. He concluded that:

"even if the Lands Tribunal's decision to refuse permission to appeal would otherwise have been wrong (which it may well have been), if one confines oneself to asking whether the LVT misinterpreted or misapplied the law, in my judgment once one takes proportionality into account, it renders the argument that

the decision was “obviously wrong” untenable. For the avoidance of doubt, I am not saying that, once one takes proportionality into account, it was necessarily right to have refused permission to appeal; merely that it renders it impossible, in my view, to contend that the refusal was obviously wrong in law.”

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