3387

London Leasehold Valuation Tribunal File Ref No.	LON/00AN/LSC/2007/0033

Leasehold Valuation Tribunal: reasons

Landlord and Tenant Act 1985 section 27A

Landlord and Tenant Act 1987 section 24

Address of Premises		The Committee members were
17 Chelsea Crescent, Chelsea Harbour, London SW10 0XB		Mr Adrian Jack Mr Frank Coffee FRICS Mr Eric Goss

The Landlord: **Chelsea Harbour Ltd**

The Tenant: **Mr Stuart Allan Goldenberg**

Procedural

1. By an application received by the Tribunal on 5th February 2007 the tenant sought the determination of service charges claimed by the landlord in the calendar years 1999 to 2006.

2. Subsequently on 24th July 2007 the tenant applied to the Tribunal for the appointment of a manager pursuant to section 24 of the Landlord and Tenant Act 1987.

3. Both applications were heard on 6th and 7th August 2007. The tenant appeared in person with his assistant Mr Pope. The landlord was represented by Mr Edward Peters of counsel. Instructing him were Norton Rose, solicitors. Ms Holmes, a partner, and Ms Sanchez-Blanco, a trainee appeared from that firm. Mike Gray and Andrea Rose, respectively the estate manager and the finance director came from the landlords. Mr Tanuta, Mr Channing and Mr Davies of the managing agents, Gross Fine, also attended.

4. At the outset of the hearing, the tenant explained that he was very deaf. He therefore requested that people speak clearly and slowly. He explained that he might need the assistance of Mr Pope to repeat matters to him. In the event, although there was occasional need to repeat what was said, it

was possible to conduct the hearing without any further special measures and Mr Goldenberg was able to participate fully.

The application for a manager

5. Section 24 of the Landlord and Tenant Act 1987 gives the Tribunal the power to appoint a manager of premises. However before the Tribunal can make such an order the tenant must serve on the landlord a notice pursuant to section 22 of the Act. The Tribunal may dispense with service of a section 22 notice "where it is satisfied that it would not be reasonably practicable to serve such a notice..."

6. In this case the tenant had not served a section 22 notice. In the Tribunal's judgment it was reasonably practicable to serve such on the landlord. The tenant knew full well who his landlord was and the landlord's address. In the absence of a section 22 notice the Tribunal has no jurisdiction to appoint a manager, unless it dispenses with service of such a notice.

7. On the morning of 7th August 2007 the tenant (having had this difficulty pointed out to him) asked for an adjournment. He had overnight collected the signatures of 14 neighbours who, he said, supported his application for an appointment of a manager. The application for an adjournment was opposed by the landlord.

8. In the Tribunal's judgment the section 22 point was not one which the tenant could overcome, even if he were given an adjournment. There was no alternative but for the tenant to commence a fresh application if he wished to pursue the question of the appointment of a manager. Accordingly there was no purpose in granting an adjournment for this purpose and we refused the application.

9. The tenant on the morning of 7th August also sought adjournment of the service charge proceedings and we deal with this part of his application below.

10. By reason of his failure to serve a section 22 notice, the tenant's application for the appointment of manager is dismissed.

The law on service charges

11. Section 19(1) of the Landlord and Tenant Act 1985 provides:

> "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."

12. Section 27A gives the Tribunal jurisdiction to determine by whom, to whom, when, in what matter and how much is to be paid.

13. Section 20B of the 1985 Act provides:

> "(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.
> (2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge."

Description of the site

14. Chelsea Harbour is a large, extremely prestigious, mixed development bordering the Thames. It comprises several blocks of residential flats, two rows of residential town houses, an hotel and three commercial buildings used variously for shops and offices and a design centre. In addition there is a marina. There are five separate car parks.

15. Mr Goldenberg is the tenant of Flat 17 in Chelsea Crescent, one of the residential blocks. He also has an allocated parking space in the car park adjoining his block.

16. Neither party invited the Tribunal to inspect the property, so the Tribunal did not. The tenant did, however, produce some photographs of the outside of his block and of the gardens.

17. These showed that the gardens outside the commercial premises were kept to a very high standard. By contrast the gardens outside the residential premises, although perfectly adequate, were not kept to quite such a high standard. He also shows that there was some staining on the walls of Chelsea Crescent, possibly from balcony railings. Again this was fairly minor but suggested that there were some failings in the scheduling of works.

The service charge dispute

18. The service charges payable by the tenant under the lease comprise three elements: (a) the Building Contribution, (b) the Car Park Contribution and (c) the Village Contribution. These comprise expenses allocated respectively (a) to Chelsea Crescent, (b) the Crescent and Belvedere Car Park and (c) the common parts of the estate.

19. The total service charge claimed in respect of the tenant's flat and car parking space is as follows:

1999	£5,848.06
2000	5,513.81
2001	5,500.00
2002	5,474.23
2003	6,304.91
2004	6,282.89
2005	6,589.47
2006	6,800.22

20. The tenant agreed that his complaints were summarised in the Respondent's Submissions (R2/18/945). These were:

    a. the landlord's failure to provide audited service charge accounts for the Village Charge in any of the service charge years;

    b. that the landlord had failed to make demands within eighteen months of the sums being incurred, so that under section 20B of the 1985 Act none of the service charges were payable;

    c. that the landlord was not entitled to demand monies for a service charge reserve;

    d. that the service charges were unreasonable and/or excessive in amount;

    e. that the apportionment of the service charges between the residential and the commercial parts of the estate was wrong;

    f. that the landlord had entered long-term agreements without complying with the consultation requirements of section 20 of the 1985 Act.

21. At the outset of the hearing the tenant abandoned his complaint under (c) in respect of the service charge reserve. He expanded on the other heads and we deal with these as we consider each head.

(a) Failure to provide audited accounts

22. The landlord admitted that it had failed to provide audited accounts of the Village Charges within a reasonable time. The audited accounts for service charge years ending 28th September 2000 to 2005 were only served on 30th April 2007 pursuant to an order of the Tribunal.

23. This complaint is accordingly made out. In itself, it does not give rise to a claim by the tenant for the reduction of his service charge. It does, however, show poor management and we consider this point below.

(b) Section 20B

24. After the landlord started to take us through the section 20B documentation (S/5/94,96) (R1/7/171) (S/48), the tenant accepted that he had been served with demands for service charges on account and given section 20B notices. His real complaint was that the amounts claimed had not been finalised until he received the audited accounts.

25. This is not, however, the purpose of section 20B. Section 20B is intended to prevent a tenant being taken by surprise by a demand out of the blue, years after the landlord has incurred an expense. In our judgment a landlord can satisfy section 20B by serving a notice "that those costs had been incurred and that [the tenant] would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge." This the landlord did in this case. Accordingly the demands are not barred by section 20B.

(e) Allocation

26. It is convenient to deal with the complaint as to allocation before the complaint as to excessive and/or unreasonable charges.

27. Under the lease the tenant was obliged to pay by way of the Building Contribution 1.40 per cent of the total cost of the expenses (in summary) referable solely to Chelsea Crescent. The tenant did not seek to challenge this apportionment.

28. Sub-paragraph 2(f) of the Fourth Schedule to the lease provides for payment of "the Car Park Contribution comprising a fair proportion of the Car Park Charge (such proportion to be determined by the Landlord whose decision shall be final and binding)." Sub-paragraph 2(g) provides for payment of "the Village Contribution comprising a fair proportion of the Village Charge (such proportion to be determined by the Landlord whose decision shall be final and binding)."

29. Clause 5(9)(i) of the lease provides:

"In the event of the Property being altered added to reduced or extended or redeveloped... the Service Contribution shall be adjusted in such manner as shall be just and equitable..."

30. The amount charged the tenant in respect of the car park was 0.5649 per cent of the total referable to the Crescent and Belvedere Car Park. The list of car park apportionments (R2/12/698) shows that the total contributions of all the parking spaces listed there amounted to 99.4224 per cent of the total cost.

31. The tenant made two points on this allocation. Firstly, he said that there were ten parking spaces which were not accounted for. Secondly he said that some of what had formerly been dead space had been converted into bricked up lock-up storage areas.

32. The landlord accepted that there were eight spaces which were not accounted for, but said that these were in fact too narrow to be conveniently used or had other deficiencies. So far as the storage areas were concerned, these were useless for any other purpose and the landlord paid for their construction and maintenance. They were constructed at various times between 2002 and March 2007. The amounts were *de minimis*. Accordingly it was reasonable to ignore these. In any event the landlord's decision was final and binding.

33. The amount charged the tenant in respect of the Village Contribution was calculated in a complicated manner. Firstly the landlord took the total costs allocated to the Village. Secondly this amount was allocated to each of the different parts of the estate by the historic square footage. The commercial areas comprised 32.69 per cent of the total. The residential parts comprised 32.57 per cent, to which Chelsea Crescent contributed 7.58 per cent. The car parks comprised 30.70 per cent, to which the Crescent and Belvedere car park contributed 4.34 per cent. The yacht club and marina contributed 0.15 and 3.89 per cent respectively.

34. Thirdly, Mr Goldenberg was charged 1.40 per cent of the amount allocated to Chelsea Crescent and 0.5649 per cent of the amount allocated to the Crescent and Belvedere Car Park.

35. It will be readily appreciated that this is a complicated system of allocation. If there is £1,000 of Village expenditure, then Mr Goldenberg's contribution will be £1,000 x 7.58 per cent x 1.40 per cent plus £1,000 x 4.34 per cent x 0.5649 per cent. This equates to £1.06 by Building Contribution plus 24 pence by Car Park Contribution, a total of £1.30.

36. The tenant's complaint on this allocation of the Village expense is that the square footage of the commercial premises has been expanded but that there been no corresponding reallocation of the costs as between the commercial and the residential parts.

37. The landlord accepted that there had been some changes in the area of the commercial properties. In March 2002 the north extension to the Design Centre added 7,228 sq ft; in April 2001 the ground floor of the Chambers added 904 sq ft and in April 2003 the Harbour Yard restaurant added 1,600 sq ft. By contrast in August 2000 the Harbour House lost 1,000 sq ft. The commercial premises comprised the Chambers 93,185 sq ft, the Design Centre 95,095 sq ft, the Harbour Yard 74,219 sq ft, the Yacht Club 2,200 sq ft, the Harbour House 9,459 sq ft and the kiosk 81 sq ft.

38. The landlord said, however, that if there was going to be a reallocation then it would be necessary to have a proper survey. This issue had been discussed with the residential tenants' association who decided that the amounts involved would not justify the expense of a survey.

39. The landlord produced a worked example based on an increase of 10 per cent in the commercial premises (disregarding the hotel). The commercial premises without the hotel comprised 20.78 per cent of the whole. A 10 per cent increase would result in the commercial premises taking 22.38 per cent of the whole. The proportion paid by Chelsea Crescent would decrease from 7.58 per cent to 7.43 per cent. That would equate to a reduction in Mr Goldenberg's service charge of £22.72 in 2004 and £26.57 in 2005. These figures would, however, stand to be reduced by the cost of the survey. Since the change in floor area was substantially less than 10 per cent, the amounts would be consequentially smaller.

40. The landlord submitted again that it was allocating the amounts fairly and that in any event its decision was final and binding.

41. Mr Peters submitted that the Tribunal could not go behind the landlord's determination. He relied on the decision of Mr Justice Knox in *Nikko Hotels (UK) Ltd v MEPC plc* [1991] 2 EGLR 103. This was a case where a rent review clause provided for the appointment of a chartered accountant and said that "the decision of such chartered accountant, acting as expert and not as arbitrator, shall be final and binding on the parties hereto." The judge held that the Court could only interfere with the expert's determination if the expert had assessed the wrong subject-matter as a result of a mistake. If he carried out the very task which was entrusted to him (even if he reached an erroneous conclusion as a result of that assumed mistake), the Court could not interfere.

42. In our judgment the case is of little assistance in a case where it is a landlord who has to make a decision. An expert is appointed as an impartial third party, whereas a landlord is obviously not impartial. For the same reason we reject Mr Peters' submission that it is only if the landlord acts in bad faith that we can interfere.

43. Nonetheless clearly the lease does provide for the landlord to make the determination. In our judgment so long as the landlord acts reasonably and has regard to clause 5(9)(i), there is no ground on which the Tribunal can interfere.

44. In this case the landlord in our judgment has acted reasonably. The amounts involved are *de minimis*. We accept the landlord's evidence (which was not really challenged by the tenant) that the residents' association did not want the costs associated with a change.

45. Accordingly we dismiss the tenant's challenge to the allocation of the car park expenses and the Village expenses.

(d) Excessive and/or unreasonable sums

46. Pursuant to the directions of the Tribunal, the landlord gave the tenant access to the underlying invoices and vouchers to justify the accounts. After his inspection the tenant produced a schedule, Appendix One, which identified 53 items which the tenant said were wrongly charged as Village expenditure. These invoices came from 2004 and 2005. The landlord turned the Appendix into a Scott schedule with its comments on the items in it.

47. The tenant explained that there were vast numbers of invoices, probably running into the tens of thousands. He said that without employing a forensic accountant it was impossible for an individual such as himself to analyse all the invoices and identify all the errors which have been made. The 53 invoices were just the tip of the iceberg and showed that the Village accounts are wholly unreliable.

48. His primary case was that the landlord was dishonest, that the accounts were utterly unreliable and that all sums claimed by way of Village Contribution should be disallowed. His secondary case was that the Tribunal should infer from these invoices that the Village Contribution in all the service charge years was likely to be wrongly calculated.

49. We deal with this secondary case first. We say at once that we appreciate the difficulties under which a single individual tenant, such as Mr Goldenberg, labours, when confronted with extremely large numbers of invoices as in this case. Often it will be sensible for the residents'

association or a body of tenants to join forces, so that a forensic accountant might be employed. But this cannot of course take away the right of an individual tenant to apply to the Tribunal for a determination of his own liabilities.

50. The Tribunal accepts that it may in some cases be appropriate to extrapolate from a sample of invoices to draw conclusions as to the reliability of a set of accounts. For example, if there were 10,000 invoices, then it might be appropriate for a tenant to take a sample of 1,000 and see to what extent there were misallocations or other errors in that sample. The Tribunal might then be willing to assume (in the absence of evidence to the contrary) that the errors were likely to be duplicated in the other 9,000 invoices.

51. However, care needs to be taken before this type of extrapolation is carried out. Where a sample is taken, the sample must be random. Further it is not possible to extrapolate unless it is known what proportion the sample bears to the total number of invoices. Lastly the sample must be sufficiently big to mean that the results are statistically significant.

52. Equally it may be possible to extrapolate from one year to another. If the tenant were able to show that in both 2003 and 2005 there was an overcharge of 20 per cent, then it might be appropriate to infer that there was such an overcharge in 2004.

53. In this case, Mr Goldenberg was unable to satisfy the Tribunal that his sample was random, nor was he able to say what the total number of invoices which he had examined was. He said that the 53 items he questioned were the invoices which immediately sprang to his eye. There was accordingly no basis on which the Tribunal could sensibly extrapolate from the tenant's 53 invoices. Equally the Tribunal has no idea whether the sample would be statistically significant. It strongly suspects, however, that it was not.

54. Equally in order to extrapolate from one year to another, it is necessary to show some consistent pattern.

55. Now the Tribunal went through the 53 items in the Scott schedule in reasonable detail. The landlord conceded that 26 items were misallocated, but others were not conceded. The second item in the schedule, for example, was an invoice for £105.75 in respect of festive lights. The tenant submitted that these Christmas lights were for the benefit of the commercial tenants, whereas the landlord submitted that the residents enjoyed them too and the residents' association approved the expenditure. The tenant's contribution was 11 pence and in the Tribunal's judgment properly charged as part of the Village Contribution.

56. The Scott schedule did not show the actual amount which the tenant was having to pay and it was obviously inappropriate for the Tribunal to spend time calculating the tenant's contribution to each individual item prior to adjudicating on each item. Accordingly the Tribunal asked the parties overnight to calculate the individual amounts, so that it could then adjudicate on the items in dispute.

57. Overnight Mr Peters calculated the amounts which the landlord conceded were wrongly charged to the tenant's Village Contribution were £1.63 in 2004 and £33.83 in 2005.

58. Mr Goldenberg did not carry a similar calculation. Instead he asked for an adjournment of the service charge application. As with the application to adjourn the application for the appointment of a manager, the landlord opposed the adjournment on the ground that the application had been going on for several months and that the tenant had had ample opportunity to prepare his case.

59. The Tribunal accepted the landlord's submissions on the adjournment application. The calculations which the Tribunal had asked the parties to carry out were not difficult, just time-consuming. There was no good reason why the tenant had not done the work which the landlord's counsel had been able to do without difficulty.

60. Mr Goldenberg is a surveyor and indeed manages nearly 1,000 residential properties himself. He was well capable of calculating the amounts he sought reductions on in the Scott schedule.

61. In the absence of any figures from the tenant, the Tribunal accepted the landlord's calculation that there had been an overcharge of £1.63 in the service charge year ending 28th September 2004 and £33.83 in the following service charge year.

62. Since there is no pattern to the errors in these two years, there is in the Tribunal's judgment no proper basis on which these figures can be extrapolated into other years. Accordingly the Tribunal refuses to extrapolate so as to make any disallowances in the other years in question.

63. We turn now to the tenant's primary case, that the landlord and indeed a named individual were dishonest. There was no evidence that the errors in the Scott Schedule were made intentionally. On the contrary, where the accounts for an estate have to be drawn up so as to distinguish between expenses incurred on numerous individual buildings, common parts, car parks etc, there is ample scope for particular invoices to be misallocated by accident.

64. There was no evidence that the named individual, whom the tenant accused of dishonesty, had any direct dealings with the challenged invoices. On the contrary it was likely that a more junior member of staff made the mistakes. We have already held that the allocation of Village expenditure between the commercial and the residential parts was reasonable, so there can be no question of dishonesty there.

65. The allegations of dishonesty wholly fail in our judgment. There was no basis even for suspicion of dishonesty. The tenant should never have made these extremely serious allegations

66. The tenant raised an issue as to duplication of the staff costs. This was not a matter raised in the Scott Schedule, but the Tribunal heard evidence on it nonetheless. The landlord has its own staff at Chelsea Harbour. It also employs managing agents, latterly Gross Fine, to manage the residential parts of the estate. The tenant suggested that this resulted in duplication of work, but the landlord and the agents explained quite satisfactorily the division of labour.

67. The tenant also suggested that the salaries of staff members had not been properly allocated as between Village expenditure and expenditure on the commercial and marina sides. The landlord explained that allocation of salaries between the various heads was based on time spent. They had previously just estimated the allocation, but in order to check this they had in one year made staff fill out time sheets, showing how much time was spent on the common parts and on the other parts of the estate. This exercise had confirmed the estimates which they had earlier used. Because making time sheets is onerous, they had not continued the exercise in subsequent years.

68. In our judgment this fully justifies the allocation of staff costs carried out by the landlord.

69. The tenant also complained about the overall costs of management. The managing agents charged £50,000 plus VAT per annum. This equated to just over £300 per annum payable by Mr Goldenberg. This is higher than the level of management fees generally recoverable by managing agents in Central London, but is justifiable on an extremely high class estate for extremely high service. In addition there were the landlord's own management costs (eg for internal accounting staff).

70. We have identified a number of failings of management (not distinguishing here between those for which the agents were responsible and direct failings of the landlord). These include: the failure to finalise the Village accounts until the Tribunal order that this be done; the errors in allocating payments in 2004 and 2005; and the minor deficiencies shown

by the photographs. These failings are not grave, but they are matters of which the tenant can in our judgment justifiably complain. If he is paying for a premium service, he can reasonably expect a premium service and this he has not had.

71. In our judgment it is appropriate to reduce the management charges by £60 per annum. This still leaves the management charges near the very top end of the usual band for London managing agents.

(f) Long term contracts

72. The landlord has entered a number of long term contracts. Only one of these, the gardening contract, incurred a cost to the tenant of over £100 per annum, which is the trigger for the consultation requirements in the Service Charges (Consultation Requirements) (England) Regulations 2003.

73. In relation to the gardening contract there was a proper consultation in accordance with the regulations. In our judgment nothing stands to be disallowed on the grounds of a failure to consult on the long-term contracts.

Summary

74. In summary, therefore, we disallow £60 in each service charge year and in addition £1.63 in 2004 and £33.83 in 2005.

Costs

75. As to the fees payable to the Tribunal by the tenant applicant, the Tribunal has a discretion as to who should pay these. The tenant's success before the Tribunal has been negligible. In these circumstances the Tribunal refuses to order that the landlord pay the fees and makes no order for these costs.

76. The landlord indicated that its own legal costs would in due course be put on the service charge accounts to be paid by the body of tenants in accordance with the various leases. The landlord sought no order from this Tribunal against this particular tenant.

77. The tenant asked the Tribunal to make an order under section 20C of the Landlord and Tenant Act 1985 to prevent the landlord recovering its legal costs from the body of tenants. The Tribunal has a discretion whether to make an order under section 20C. In the light of the extremely limited success of the tenant, however, it sees no good reason to interfere with the landlord's rights under its leases. Accordingly the Tribunal refuses to make an order under section 20C.

78. The Tribunal was not asked to consider the quantum of the legal fees which the landlord might be claiming. It will therefore be a matter for another day whether the landlord was justified in employing both a partner and a trainee solicitor from a City firm to attend the whole of the hearing before the Tribunal.

DETERMINATION

The Tribunal disallows £60 in each of the service charge years in dispute and in addition disallows £1.63 in the service charge year 29th September 2003 to 28th September 2004 and £33.83 in the service charge year 29th September 2004 to 28th September 2005. The Tribunal makes no order in respect of costs.

Adrian Jack, Chairman 12th September 2007