3448

Ref: LON/00AW/LSC/2006/0019

LEASEHOLD VALUATION TRIBUNAL

LONDON RENT ASSESSMENT PANEL

DETERMINATION

OF TRANSFER UNDER PARA.3 OF SCHEDULE 12 TO COMMONHOLD AND LEASEHOLD REFORM ACT 2002

Property: **16 Notting Hill Gate, London W11 3JE**

Claimant: Mr M S Khan (deceased) and Mrs T R Khan as Executor [*Landlord*]

Defendant: Ms K A Barker [*Tenant*]

Hearing: 4 October 2007

Inspection: 3 October 2007

Representatives of Claimant:

Mr S Sullivan of Go-Legal Limited

[*No attendances at Hearing*]

Representatives of Defendent:

Mr P Adams and Miss O Lessington of Shadbolt & Co. Solicitors with Mr C M Avery FRICS, expert witness, and Ms Barker in Person

Tribunal: Professor J T Farrand QC LLD FCIArb Solicitor
Mr T W Sennett MA FCIEH
Mr L G Packer

Introductory

1. By a Claim in the Central London County Court, issued on 24 February 2005, the Claimant sought payment by the Defendant of the sum of £4,345 plus costs. The Particulars of Claim stated that the Defendant had, in breach of her lease, "failed to pay the reserved rents and the maintenance charge in the total sum of £4,345.00, being the balance outstanding for the years 1 May – 30 April 2003 and 2004".

2. The following Summary was attached to the Claim:

	£
1 May 2002 - 30 April 2003	521.67
1 May 2003 - 30 April 2004	9198.33
	9720.00
Less agreed adjustment	1375.00
	8345.00
Received from you October 2004	4000.00
Balance outstanding	**4345.00**

3. The Defendant filed a Defence on 22 March 2005 and, with permission, served a Counterclaim on 22 July 2005.

4. Her stated Defence was, in effect, threefold: she alleged that: (i) the Claimant had failed to comply with provisions of her lease as to the amount of expenses incurred being certified; (ii) the Claim included management fees which had not been incurred in accordance with the lease; and (iii) costs of repairs claimed had not been reasonably incurred and works were not of a reasonable standard (ie as required by s.19(1)(a) and (b) of the Landlord and Tenant Act 1985). She also sought an order under s.20C of the 1985 Act (limiting inclusion of the Claimant's costs as service charges) and applied for the matter to be transferred to a Leasehold Valuation Tribunal.

5. Her Counterclaim essentially asserted that the works had been defective and overvalued so that her part payment of £4,000 had involved an overpayment of £1,915.83. She attached in support a Preliminary Report of Decoration Works at the Property by Mr Milan Babic MA Dip Arch RIBA, a copy of which, unsigned and undated, has been seen by the Tribunal. Also exhibited was a draft Report on External & Internal Painting Works at the Property by Mr C M Avery FRICS. The Tribunal has seen a final version of this Report signed and dated 13/15 April 2005. The Defendant claimed the overpaid sum of £1,915.83 together with £400 for door repairs (a separate matter), a total of £2,315.83, plus costs.

6. The Claimant filed a Defence to the Counterclaim on or about 9 November 2005. So far as presently relevant, this simply stated: "The Valuation of the works is disputed and the Surveyors have been instructed for the estimates and works which has been done. Reports still awaited." The Tribunal has seen an unsigned draft preliminary Report, dated 30 September 2005, on the Standard of Finishes to the Common Parts at the Property, apparently prepared by a Mr K Zablocki of Soarbond Ltd for the purposes of this Defence.

7. On 24 January 2006, Deputy District Judge Soloman made the following Order:

> A. On parties accepting in relation to the claim of £8345.00, the Defendant accepts the sum of £50 ground rent and £521.67 are due and owing to the claimant but disputes the total sum of £7773.33 in relation to repairs and management fees.
>
> B. In relation to the Part 20 counterclaim, claimant accepts that the sum of £400.00 is due and owing to the defendant in relation to repairs to the door.
>
> 1. The outstanding issues of the reasonableness of the service charge for repairs to October 2004 and the management charge to 2004 to be transferred to the Leasehold Valuation Tribunal for determination after 28 days.
>
> 2. There be a without prejudice meeting within 21 days of the surveyors for the parties at which they shall produce a report setting out items on whcih [sic] they agree and do not agree and a valuation in respect of them.

8. Such a transfer by a Court to a Leasehold Valuation Tribunal may only be made of proceedings relating to "a question falling within the jurisdiction of a leasehold valuation tribunal", with remaining proceedings being adjourned or disposed of by the Court (see para.3(1) of Schedule 12 to the 2002 Act). Then, when a transferred question has been determined by the Tribunal, the Court may give effect to the determination in an order of the Court (para.3(2)).

9. Despite the direction in para.2 and various meetings, no joint report of surveyors has been produced.

10. Similarly, attempts to resolve the disputed issues by mediation, initiated by the Panel, have not succeeded.

11. However, the Claimant submitted a Statement of Case dated 21 March 2006 and the Defendant submitted a Statement of Reply dated 31 August 2007. Otherwise, unfortunately, little progress was made with the reference to the Tribunal.

12. An oral Pre-Trial Review was held on 17 May 2006, attended by the Claimant in person, following which the Tribunal directed (para.2):

> "The [*Claimant*] shall by **31 May 2006** provide to the [*Defendant's*] Solicitors copies of all relevant documents concerning the cost of the decorative works which are the subject matter of this application and payment of those costs, including invoices, receipts, any notices served pursuant to section 20 of the Landlord and Tenant Act 1985, service charge demands and accounts."

Then Directions were made as to the Defendant's Statement of Reply and as to the parties' experts meeting and preparing a joint report. These directions appeared to assume that the Claimant would have complied with the quoted direction and provided the indicated documents. There was also an emphasised warning that failure to comply with directions might prejudice a party's case and debar reliance on evidence at the Hearing, which had been fixed for 31 July 2006.

13. The quoted Direction was not complied with by the Claimant and, on 29 June 2006, a Procedural Chair revised the date for compliance to 10 July 2006. The date fixed for the Hearing was also revised to 8 September 2006.

14. The Claimant did not comply with the Direction as revised and, on 26 July 2006, the Procedural Chair decided that the case should be adjourned for three months "due to Mr Khan being hospitalised".

15. Then, by letter dated 29 September 2006, the Tribunal was informed that Go-Legal Limited had been instructed to act for the Claimant. That company is not a firm of solicitors but described on its website as:

> "We are a team of legal and business consultants who have come together as a result of a joint awareness of the failure of the traditional legal institutions to deal effectively at an affordable price with legal disputes."

The letter referred to the "extremely poor state of health" of the Claimant and enquired about "the current status of the case and any directions which have been issued".

16.Sadly, by letter dated 16 October 2006, Go-Legal Limited informed the Tribunal that the Claimant had died on 20 September 2006. Accordingly, by letter dated 20 October 2006, the parties were informed that the Tribunal had decided to adjourn the case for a further six weeks. Subsequently, by letter dated 19 January 2007, the case was further adjourned until 16 April or "until the Grant of Probate is received".

17.The Tribunal was informed by letter dated 24 July 2007 from Go-Legal Limited that Probate had been granted to Mrs T R Khan as Executor of the deceased Claimant. A copy of the Grant was enclosed dated 26 June 2007. In their letter, Go-Legal Limited stated: "In view of this the matter can now proceed". The letter concluded: "Should the matter proceed to a full Hearing in the autumn, we would wish to avoid 20 September to 3 October inclusive."

18.Accordingly, on 10 August 2007, Further Directions were issued. First, it was directed that "Mrs Khan be substituted as applicant in this matter". Then the date for compliance with the quoted Direction requiring the provision of documents was amended to 20 August 2007 but the Hearing date was fixed as 3 October 2007. The warning about non-compliance was again emphasised.

19.The quoted Direction was not complied with and, by letter dated 5 September 2007, Go-Legal Limited requested further amendment of the Directions and postponement of the Hearing. This request was reviewed and refused by a procedural chairman by letter dated 10 September 2007. This refusal was objected to in a letter from Go-Legal Limited received on 20 September 2007 partly because Mrs Khan did not fully understand the case and also "because of a lack of sufficient notification we are not prepared for a Hearing on the designated date". This was rejected for the following reasons in a letter dated 21 September 2007:

> "As previously pointed out it is now well over two years since the case was transferred from the Court and the protracted delay may well make it difficult for the tribunal to reach a decision on any disputed facts. The Respondent is entitled to have the matter resolved without further delay. Although sympathetic to the situation in which the Applicant finds herself it is now some 3 months since probate was granted and there has been ample time to prepare the case. For each of these reasons the postponement application is refused."

However, the Hearing date was adjusted to 4 October 2007 with only an inspection on 3 October 2007.

20. Another request for a postponement was made by letter dated 26 September 2004, with the added ground that the person with conduct of the case would only return to work from leave on 4 October 2007. This too was refused for the reasons already given.

21. On 2 October 2006 a letter of protest was received from Go-Legal Limited which commented, inter alia, that:

> "Your office seems to be intent on considering only the position of the Respondent and her wishes to bring this matter to a speedy end. You appear totally oblivious to the feelings of Mrs Khan let alone the fact that it is her who is owed the money from this case. By refusing Mrs Khan sufficient time to prepare and be represented by the person who has had conduct throughout, you are prejudicing her right to reclaim money due to her and unfairly assisting the Respondent in avoiding her liability."

Reference was also made to an application for judicial review and to pressures from government targets. However, the letter had not been copied to the Defendant's solicitor. Accordingly, after the Chairman had been consulted, the Case Officer wrote to Go-Legal Limited, by letter dated 2 October 2006 and copied to the Defendant's solicitors, as follows:

> "The LVT cannot at this late stage consider another request for postponement given
> (a) grounds do not have appeared to have altered
> (b) convenience of other party must be considered.
>
> The application for postponement will be copied to the Tribunal members tomorrow and can be renewed at the start of the hearing (09:30am)
>
> Both parties should be prepared for a full hearing should the postponement be refused."

Relevant Lease Provisions

22. The Defendant is the current Tenant/Lessee of flat No.3 at the Property, which is a third floor flat in a Victorian terraced building now comprising retail shops in the basement and ground floor with self-contained flats on each of the three floors above. Access to the three flats is by a

separate front door to the street leading into a hallway and staircases with landings.

23. She holds the flat under a Lease granted in 1986 for a term of 99 years from 25 December 1985 in consideration of a premium and ground rent (currently still £50 pa), which lease was assigned to her in 2001. The Claimant had purchased the freehold of the Property in 1999.

24. The Lease contains Lessee's Covenants upon which the Claimant specifically relied in his Statement of Case (para.4) and which were not challenged as inaccurate as follows:

> In the said Lease the Lessee covenants:
>
> a) by Clause 1 of Part 1 of the Fifth Schedule;
>
> *"To pay the reserved rents at the time and in the manner aforesaid"* [i.e. by equal half yearly payments on the Twenty Fifth day of March and the Twenty Ninth day of September in every year].
>
> and
>
> b) by Clause 2 of Part 1 of the Fifth Schedule;
>
> *"To pay to the Lessor a maintenance charge being that percentage specified in Paragraph 9 (subject to Clause 7 of the Seventh Schedule hereto) of the Particulars* [i.e. one third] *of the expenses which the Lessor shall in relation to the property reasonably and properly incur in each maintenance year and which are authorised by the Eighth Schedule hereto (including the provision for future expenditure therein mentioned) the amount of such payment to be certified by the Lessors Managing Agent acting as an Expert and not as an arbitrator as soon as conveniently possible after the expiry of each maintenance year..."*

25. The Eighth Schedule of the Lease primarily includes "the costs incurred by the Lessor in complying with its obligations in paragraphs (1) to (6) inclusive of Part I of the Sixth Schedule". That Schedule lists Lessor's Covenants, starting with (para.1):

> "...to keep in good repair and decoration (and to renew and improve as and when the Lessor may from time to time in its absolute discretion reasonably consider necessary):
>
> (a) the roofs and foundations of the property;
>
> (b) all the external walls of the property;

(c) the chimney stacks gutters rainwater and soil pipes of the property;

(d) the common parts;

(e) the boundary walls and fences of and in the curtilage of the property BUT EXCLUDING any part of the property included in the demised premises by virtue of the Second Schedule"

26. The next covenant (para.2) is connected and relevant:

"As often as may be necessary to decorate the exterior of the property except such parts thereof as are required to be decorated by the Lessees of any of the other parts of the property."

27. There is in addition a covenant to insure the Property (para.3) and also (para.7):

"Upon demand to provide to the Lessee a true copy of the insurance policy or policies and the last receipt for premium(s) thereunder and to cause to be noted thereon the interests of the Lessee and his Mortgagees (if any)."

28. It should also be noted that the maintenance/service charge authorized by the Eighth Schedule includes (para.9):

"the cost of employing a Managing Agent or Surveyor to manage the property and to collect the rents and maintenance charges in respect of the flats therein and to carry out such other duties as may from time to time be assigend [*sic*] to him by the Lessor or are otherwise imposed on him by the provisions of this Lease;"

Service Charge Demands

29. Copies of the Claimant's Demands, addressed to flat 3 at the Property, on which his Claim against the Defendant was based were provided to the Tribunal. They were simple in form and neither dated nor signed but the amounts for the later year were handwritten and substantially greater (apart from Insurance):

SERVICE AND INSURANCE DEMAND
1 May 2002 to 30 April 2003

	£
1 Repairs	850.00
2 Insurance	480.00
3 Management fees (10% of item 1)	85.00

	1415.00
Your share (1/3 of total)	471.67
Ground rent	50.00
	521.67
Part payment received	--------
Outstanding.	521.67

SERVICE AND INSURANCE DEMAND
1 May 2003 to 30 April 2004

1	Repairs	24750.00
2	Insurance	220.00
3	Management fees (10% of item 1)	2475.00
	Your share (1/3 of total)	9148.33
	Ground rent	50.00
	Part payment received	
	Outstanding.	9198.33

30. As already indicated, no invoices, receipts or accounts evidencing any actual expenditure of the amounts stated in these Demands have been provided by the Claimant, notwithstanding the Directions to do so. However, in his Statement of Claim the Claimant explained (para.s 7 and 8):

> "During 2003 all tenants were advised the property would require redecoration during the forthcoming year and details of the work to be done together with estimates received for such work were provided to them. Further, a Section 20 Notice was served on all three tenants but no comment was received from any of them regarding the redecoration estimates, so the work was awarded to ASC [*sic*], the contractor with the lowest bid. Demands were sent out to tenants for the period commencing May 2003 reflecting the redecoration costs and the work duly commenced.
>
> After ASC [*sic*] had estimated the refurbishment of the flats, but prior to commencement of the work, the Landlord instructed a separate firm of builders [Oak Place Construction] to carry out building work on the shop premises which entailed fitting a mezzanine to the ground floor. This work necessitated replacement up to first floor level of the rear access staircase to the flats, which was in need of substantial repair in any event. When ASC [*sic*] subsequently started work they found that the replacement staircase

section, which had been included in their estimate, had already been replaced. This was ultimately brought to the Landlord's attention by the tenant of Flat No.2 and credits were made in lieu of this overcharge to each flat."

31. Again as already indicated, the Tribunal has not been supplied with a copy of the s.20 Notice or tender specifications. However, the Preliminary Report prepared by Mr Babic for the purposes of the Defendant's Counter-Claim (see para.5 above) referred to an attached estimate for various works at the Property from ASR CONSTRUCTION showing a total amount of £24,750. Although undated and ASR instead of ASC, this was obviously the estimate on which the Claimant had based his Demand for the year 2003-2004.

32. ASR's estimate related to three items of works: first, Common Parts: Hallway and Stairway for £11,750; second, Front Door & Frame for £4,365; and, third, Exterior for £6,385 plus £2,250 for scaffolding. No amounts were included for VAT.

33. Although the first two items related to parts of the Property used only for access to the three flats, the third item related to the Property as a whole. None of the items included works constituting "refurbishment of the flats" (cp Claimant's Statement above). Further, the first item included works which were neither repairs nor redecoration:

- To remove the existing stair case from the ground floor to the first floor half landing
- To supply and fix a new staircase after extending the half landing as shown upon inspection.

These works were evidently improvements made to benefit the Claimant's retail premises in the basement and ground floor. Although, the Claimant has a discretion to improve the Property, there is no obligation to do so bringing the cost within the maintenance/service charge (see para.24 above). According to the Claimant's Statement (see above), he did eventually appreciate that the costs of these works should not have been charged to the tenants of the flats and included by way of credit what was called an "agreed adjustment" of £1,375 from the amount of his Claim against the Defendant. However, the Tribunal has not been made aware of any evidence or admission as to an agreement in this respect.

Inspection

34. The Tribunal visited the property on the afternoon of the 3rd October 2007 at the time specified in Directions. Mr Avery and Ms Barker were present. The Claimant was neither present nor represented at the Inspection. The Property is a terraced Victorian building, converted into three self contained flats on first to third floors with commercial users to ground and basement floors, to the north side of Notting Hill Gate. The Tribunal saw that although the front elevation had been decorated in recent years there was evidence of cracked render to the top floor parapet with flaking paintwork, flaking paintwork to wooden windows, rotted window sills and windows that had been painted shut. The front door was of hardwood with brass furniture in sound condition with worn varnish finish to the threshold and weatherboard. Internally, to the common-ways serving the three flats only, walls were emulsion painted on plaster that presented with areas of cracked and unkeyed plaster although the paintwork was in fair order. The Tribunal also noted rotted timber and dampness to the first floor half landing. Mr Avery indicated to the Tribunal eight places on the common stairway where plaster samples had been taken.

Hearing

35. The Tribunal had anticipated that, at the outset of the Hearing, some person from Go-Legal Limited would appear in order to renew the application for a postponement. No such person did appear and the Clerk was informed, in response to an enquiry by telephone, that it was not considered worthwhile for anyone to attend and represent Mrs Khan.

36. In these circumstances, the position is governed by the following provisions of Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003:

> *Hearings*
>
> **14.** - (1) Subject to regulations 8(3), 9(2) and 10(2), a hearing shall be on the date and at the time and place appointed by the tribunal...
>
> (8) If a party does not appear at a hearing, the tribunal may proceed with the hearing if it is satisfied that notice has been given to that party in accordance with these Regulations.
>
> *Postponement and adjournment*
>
> **15.** - (1) Subject to paragraph (2) the tribunal may postpone or adjourn a hearing or pre-trial review either on its own initiative or at the request of a party.

(2) Where a postponement or adjournment has been requested the tribunal shall not postpone or adjourn the hearing except where it considers it is reasonable to do so having regard to -

(a) the grounds for the request;
(b) the time at which the request is made; and
(c) the convenience of the other parties.

(3) The tribunal shall give reasonable notice of any postponed or adjourned hearing to the parties.

37 The Tribunal was satisfied that notice of the Hearing, as also of the Ispection, had been duly given to Mrs Khan and to the company representing her.

38 Although understanding the difficulties occasioned for Mrs Khan in connection with these proceedings by the untimely, although no longer so recent, death of the Claimant, the Tribunal considered that Go-Legal Limited should not have experienced similar difficulties since they had been instructed before he died and would have had sufficient comprehension of the comparatively narrow issues to advise Mrs Khan adequately as well as enough time to prepare for the Hearing. In particular, no good reason has been suggested for failing to give appropriate instructions to Mr Zablocki or another expert witness to cooperate in the production of a joint report and/or to present evidence to the Tribunal at this Hearing.

39 In addition, the Claim against the Defendant was brought to Court 2½ years ago. She has submitted not only a Defence but also a Counterclaim on grounds supported by expert witnesses which should not be dismissed out of hand. The proceedings have undoubtedly caused her significant expense and stress which can only have been exacerbated by the fact that the Claimant saw fit to inform her mortgagee of his claims against her resulting in the mortgagee threatening to instruct solicitors to protect its security at her cost. The Tribunal is of the opinion that she is reasonably justified in objecting to continued postponements delaying the disposal of the proceedings.

40 It further appeared to the Tribunal, from a perusal of the available papers, likely that neither side had yet fully appreciated the true status of the Demand leading to the Claim in the light of the Lease provisions and that consequently an early clarification of the position would be desirable and might assist in the settlement of outstanding proceedings. Accordingly, the Tribunal decided to proceed with the Hearing despite the absence of Mrs Khan or any representative for her.

41 At the Hearing, which lasted 1½ hours, although the Tribunal received certain submissions from Mr Adams, the bulk of the time was spent in hearing and considering the evidence of Mr Avery FRICS as an expert witness. Since the primary issue transferred to the Tribunal was the reasonableness of the service charge for repairs to October 2004, it was essential for there to be such evidence from someone with the relevant qualifications and experience possessed by Mr Avery. Further, the Tribunal was satisfied that he fully recognised that his obligations in giving evidence were owed to the Tribunal and not to his client.

42 As already mentioned, Mr Avery had first prepared a Report in 2005 for the purposes of the Defendant's Counterclaim. In brief, he had then concluded that the costs as estimated by ASR Construction at £24,750 were excessive. His costings, in contrast, totalled £9,375 and he also expressed the opinion that this amount should be reduced by 50% "to reflect the poor quality of the completed job".

43 However, Mr Avery had prepared a second Report, dated 19 September 2007, as his evidence for the Hearing. He explained orally that he had re-inspected the property and reconsidered his findings leading to his previous conclusions. These were carefully detailed in his Report and convincingly elaborated in response to questions from the Tribunal. Further, the Tribunal had observed in the course of its inspection a generally poor state of decoration and repair at the Property which was entirely consistent with the substance of Mr Avery's evidence.

44 In summary, in Mr Avery's professional opinion, "the true market value" of the works itemised in ASR Construction's estimate were as follows:

Decorating internal common parts	£3,525
New front entrance door	£ 575
Scaffold	£1,150
Exterior painting	£3,630
	£8,800

45 Instead of his previous flat reduction of 50% "to reflect the defects in the standard of workmanship", Mr Avery now proposed a reduction of 20% for the internal decorations and of 35% for the exterior painting. Thus his summary became:

Decorating internal common parts	£2,820
New front entrance door	£ 575
Scaffold	£1,150

Exterior painting	£2,360
	£6,905

46 It should be noted that the major difference from the ASR estimate in relation to 'decorating internal common parts' (ie £11,750) is attributable to two factors. One is that Mr Avery correctly took no account of the significant cost of staircase removal and replacement (estimated by Mr Avery at £4,054 but conceded by the Claimant at £1,375 x 3 = £4,125). The other is that My Avery gave evidence supported by the production of a core sample, one of eight, four taken at sites nominated by Mr Zablocki and four nominated by Mr Avery, to the effect that, instead of stripping and replastering, a skim coat of plaster had been applied over the original plaster. In consequence of this, he disallowed £4,696 from the estimate.

47 As already indicated, no expert evidence had been submitted on behalf of the Complainant and no expert witness attended the Hearing. However, the Tribunal did look at the unsigned draft preliminary Report on the Standard of Finishes to the Common Parts at the Property prepared for the purposes of the Claimant's Defence to the Counterclaim by Mr Zablocki, who is apparently a Chartered Civil Engineer with nearly 30 years standing. This Report necessarily could carry little weight given its unfinalised state as well as the fact that Mr Zablocki did not attend the Hearing to answer questions. Nevertheless, the Tribunal noted that the Report did not unequivocally support the ASR estimate and accepted that the works appeared to be, in various respects, defective. In particular, it is stated (at para.2.2) that Mr Zablocki had had to accept statements from the Claimant and the Contractor as to stripping and replastering.

48 Finally, after making submissions about the provisions of the Lease as to certification of expenditure, managing agents and insurance policies, the value of the works, the current state of the Property, the costs incurred by the Defendant and the conduct of the claimant, Mr Adams requested that the Tribunal should decide that the Defendant was entitled to the following relief:

i. that the [*Claimant's*] claim is struck out;
ii. an order to the effect that the [*Claimant*] remedy the outstanding defects to the property, to return it to a fit and proper state by a date to be fixed by the Tribunal;
iii. an order to the effect that the [*Claimant*] is to refund the Respondent the sum of £1,578.33 in relation to the overpayment of the amount paid by the [*Defendant*] and the damage suffered to

the property;

iv. an order to the effect that the [*Claimant*] should pay the [*Defendant's*] fees and reasonable expenses, namely £6,184.36; and

v. an order that the costs incurred by the [*Claimant*] were not relevant costs under s.20C of the Landlord and Tenant Act 1985 and so should not be paid by the [*Defendant*].

Decision

49 Although undated, it appears clear from the Claimant's Statement of Case (see para.s 5 and 7) that the disputed Service and Insurance Demand for 2003 -2004 was issued to the Defendant on 1 May 2003. This was before the works in issue had been undertaken and before any of the estimated costs had actually been paid or incurred by the Claimant. It was, therefore, a demand for a payment on account or in advance. Landlords are entitled to demand payments of service charges in advance only if there is a provision in the relevant lease requiring such payments. Further, statute provides that, where a service charge is payable before the relevant costs are incurred, "no greater amount than is reasonable is so payable" and necessary adjustments must be made after the costs have been incurred: s.19(2) of the Landlord and Tenant Act 1985.

50 The Defendant's Lease does contain a provision for advance payments immediately following the extract from para.2 of Part I of the Fifth Schedule which was quoted in para.23 above and specifically relied upon by the Claimant. This further provision requires the Lessee to pay, by equal instalments on 25 March and 29 September in each maintenance year, the sum specified in para.8 of the Particulars (ie £200) *or* the amount of the preceding year's maintenance charge (here £471.67 excluding ground rent of £50) "*whichever shall be the greater*" (italics supplied for emphasis). It is then provided that payments by way of adjustment should be made "immediately upon the Lessors Managing Agents of [sic] Accountants certificate being given as aforesaid". The certificate is to be given "as soon as conveniently possible after the expiry of each maintenance year" (see extract in para.23 above). "The maintenance year" is defined in para.(ix) of the First Schedule to the Lease as a period commencing on 25 December in each year and ending on 24 December in the following year.

51 It is plain, therefore, that the Claimant's Demand for advance payments of the maintenance/service charge totalling £9,148.33 for 2003-

2004 was not made in compliance with the provisions of the Defendant's Lease. It follows in the judgment of the Tribunal that she has not become legally liable to pay that amount to the Claimant. She did, however, become liable under her Lease to pay to him £471.67 plus £50 ground rent.

52 The Tribunal would observe that it has jurisdiction to determine liability to pay service charges under s.27A of the Landlord and Tenant Act 1985. It would also observe that, had it been necessary to determine whether or not the amount of £9,148.33 was no greater than reasonable as an advance payment (ie as required by s.19(2)), the Tribunal would have taken account of and applied Mr Avery's evidence as to costings and reduced the amount to £2,933 (ie one-third of £8,800). For this purpose and at that stage no deductions should be made in anticipation of a poor standard of works. However, the Tribunal would probably have been persuaded that it was not reasonable for the Claimant to require payment in full in advance from tenants of the flats and so a further reduction could have been made of approximately 50% to produce a round amount of £1,500 as payable in advance.

53 As it is, the Tribunal has determined that the Defendant only became liable to pay to the Claimant £471.67 and she has accepted liability to pay the £50 ground rent as well as the amount of £521.67 demanded for the previous year (see para.7 above). This makes a total liability of £1,043.34. Against this, the Claimant has accepted that he owes the Defendant £400 (see para.7 above again). Further, the Defendant has paid £4,000 to the Claimant in respect of the Demand for 2003-2004 but without accepting liability to do so. This makes a total of £4,400.00 due to the Defendant. Consequently, it can readily be calculated by deducting £1,043.34 from £4,400.00, that the Defendant became entitled to recover the sum of £3,356.66 from the Claimant. However, this calculation does not take into account, by way of set-off or otherwise, any payments made or liabilities arising subsequently.

54 Essentially, the Tribunal has found that the Claimant's Demand for service charges in respect of the costs of the 2004 works was made prematurely. Nevertheless, it still remains open to the Claimant to produce an account of expenditure actually incurred on the works and have it properly certified in accordance with the provisions of the Lease. It should be noted that certification by a managing agent involves an independent person so as to afford a measure of protection to the tenants: *Finchbourne Ltd v Rodrigues* [1976] 3 All E.R. 581. Then the Defendant would become liable under the Lease to pay to the Claimant the difference from the amount

paid in advance. However, this liability would be subject to the costs having been incurred reasonably and to the works being of reasonable standard as required by s.19(1) of the Landlord and Tenant Act 1985. As to these aspects, the present Tribunal has accepted the expert evidence of Mr Avery and would, in effect, cap the Defendant's liability at £2,301.66 (ie one-third of £6,905: see para.45). The Tribunal would further require production of invoices, receipts and accounts as previously directed in order to establish what costs have actually been incurred and for what purpose before determining liability.

55 The Tribunal observes in this respect that the Defendant's Lease contains no provision entitling the Claimant as Lessor to charge, as he has done, management fees of 10%. The Lease does enable recovery of the actual costs of employing a managing agent or surveyor (see para.28 above), payment of which would have to evidenced and justified. Also the Lease does not preclude the Claimant from recovering his own costs incurred as Lessor in managing compliance with his obligations under the Lease, but these too would have to be evidenced and justified and cannot properly be charged as a notional percentage: *St Modwen Developments (Edmonton) Ltd v Tesco Stores Ltd* [2006] EWHC 3177.

56 Further, the Tribunal felt some concern that the Leases of the three flats might be regarded as failing to make satisfactory provisions in respect of service charges within s.35(2)(e) and (f) of the Landlord and Tenant Act 1987. The point of concern is that the tenants of those flats appear to be obliged to pay together 100% of maintenance charges including costs relating to the whole building without any contribution from the owners or occupiers of the retail shops on the ground or basement floors of the Property. This might be satisfactory in respect of expenditure on the common parts which only give access to the flats but not in respect of expenditure on maintenance of the exterior of the building. In particular, it would be unsatisfactory for the three flat tenants to carry the costs of insuring the whole building, when the premiums will presumably be significantly increased to cover the commercial risks of the retail shops. Even if no application for variation of any of the Leases has been made under s.35 of the 1987 Act, the Tribunal would need to be satisfied that the costs of insurance had been reasonably incurred so far as concerns the liabilities of the tenants.

57 However, the Tribunal has not seen any insurance policies relating to the Property nor any evidence of quotations or premiums paid but notes with some surprise that, in the Claimant's Demands, the cost of insurance for

2003-2004 was shown as only £220 whereas it had been shown as £480 for 2002-2003 and £655 for 2004-2005.

Orders

58 The Tribunal does not possess any statutory or other jurisdiction to order any of the first four sorts of relief sought by Mr Adams on behalf of the Defendant. Although the Tribunal has made a determination as to the extent of the Defendant's liability to pay service charges in respect of 2003-2004, following a transfer of the matter from the Central London County Court, it is for the Court to make any order giving effect to the determination and to dispose of any other aspects of the proceedings (see para.8 above). In particular, the Court rather than the Tribunal appears to be the appropriate place to seek an order as to costs generally.

59 The Tribunal does have a limited power to award costs conferred by para.10 of Schedule 12 of the Commonhold and Leasehold Reform Act 2002. However, this is conditional upon the Tribunal forming the opinion that the party concerned has "acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings". Serious consideration was given to the question of whether this condition had been met by the conduct of the Claimant and Go-Legal Limited but, on balance and in the light of the Claimant's regrettable death, the Tribunal concluded that it would not be wholly justifiable in all the circumstances for costs to be awarded in exercise of this power.

60 Lastly, the Tribunal does also have jurisdiction to make the order sought by Mr Adams under s.20C of the Landlord and Tenant Act 1985, in effect, to preclude or limit recovery of the Claimant's costs of these proceedings by means of the maintenance/service charge. The only statutory criterion for the making of such an order is what the Tribunal "considers just and equitable in the circumstances" (see s.20C(8)). These proceedings and, therefore, the costs incurred by both sides, are a direct consequence of the fact that the Claimant brought a Claim against the Defendant based upon a premature, unjustified and legally ineffective Demand for substantial service charges. The Tribunal considers that it would be completely unjust and inequitable for the Claimant's costs to be included in a future service charge demand. As to this, it is not clear to the Tribunal that there is any provision in the Defendant's Lease apt to allow this and it is, at least, possible that if there were, it would be determined that the costs had not been reasonably incurred. Nevertheless, for the avoidance of uncertainty, the Tribunal herby orders that none of the Claimant's costs incurred in connection with its

proceedings are to be regarded as relevant costs in computing service charges payable by the Defendant.

CHAIRMAN Julian Faraud **17 October 2007**