SOUTHERN LEASEHOLD VALUATION TRIBUNAL

In the matter of section 27A of the Landlord & Tenant Act 1985 (as amended)

and

in the matter of Carillion House, 18 Eversfield Road, Eastbourne.

Case number: CHI/21UC/LSC/2008/0072

BETWEEN:

Stephen McMillan and other lessees	Applicants
and	
Longmint Limited	Respondent

Statement of the Tribunal's decision and reasons

Hearing: 28th October 2008

Further representations received: 22nd November 2008

Appearances: Mr Jeremy Donegan of Messrs Osler Donegan Taylor for the Applicants

Miss Emma Thompson of Messrs Juliet Bellis & Co for the Respondent

Dated: 8th December 2008

Date of Issue: December 2008

Tribunal:

Mr R P Long LLB (Chairman)

Mr N Cleverton FRICS

Miss J Dalal

Decision

1. The Tribunal has determined:

   a. that the words of paragraph 4(6) of the Fourth Schedule to the leases under which the flats at the property are held are sufficient to entitle the landlord to recover the cost of all the fire prevention work undertaken there as part of the service charge, including that carried out inside individual flats

   b. that the amount charged for such work is unreasonable to the extent that surface wiring has been undertaken, rather than recessed wiring as the specification required, and that a reduction of £3650 in the total cost is appropriate to provide for that fact

   c. that the surveyor's fee was unreasonable and that the appropriate sum for the balance of surveyor's fee, VAT and disbursement is £1213-92 as set out at paragraph 42

   d. that a reasonable management fee for the year would have been £280-00 per flat plus VAT to reflect the work done in that year

   e. that the landlords costs of this matter recoverable as service charges (if the lease so permits) shall be limited to the sum of £1250 plus VAT

   f. that the landlord shall refund one half of the application and hearing fees paid by the lessees, namely a total of £250.

   The Tribunal has set out the effect of its findings on the calculation of expenses for the year 2006 at paragraph 49 below.

   For the avoidance of doubt, in the event of any conflict between the summary in this paragraph and the matter contained below in the body of this note, the latter shall be treated as the definitive statement of the Tribunal's decision.

Application

2. The Applicants applied to the Tribunal to determine whether service charges were payable in respect of their respective flats at the property in the year to 31st December 2006. The application was made pursuant to section 27A of the Act on 4th August 2008, and directions were issued on 6th August 2008. They required that any response from the applicant to the respondent's case with any accompanying documents should be lodged by 3rd. October 2008.

The Law

3. The statutory provisions primarily relevant to applications of this nature are to be found in section 18, 19 and 27A of the Act. The Tribunal has of course had regard in making its decision to the whole of the relevant sections as they are set out in the Act, but here sets out what it intends shall be a sufficient extract (or a summary, as the case may be) from each to assist the parties in reading this decision.

4. Section 18 provides that the expression "service charge" for these purposes means:

   "an amount payable by a tenant of a dwelling as part of or in addition to the rent-

a. which is payable directly or indirectly for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and

b. the whole or part of which varies or may vary according to relevant costs"

"Relevant costs" are the costs or estimated costs incurred or to be incurred by the landlord in connection with the matters for which the service charge is payable, and the expression "costs" includes overheads.

5. Section 19 provides that:

"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".

6. Subsections (1) of section 27A of the Act provide that:

"(1) 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 –

a. the person to whom it is payable
b. the person by whom it is payable,
c. the amount which is payable,
d. the date at or by which it is payable, and
e. the manner in which it is payable.

Subsection (1) applies whether or not any payment has been made."

There are certain exceptions that limit the Tribunal's jurisdiction under section 27A but none of those exceptions has been in issue in any way in this case.

7. To such extent (if at all) as the point is not implicit in the wording of the Act, the Court of Appeal laid down in *Finchbourne v Rodrigues [1976] 3 AER 581* CA that it could not have been intended for the landlord to have an unfettered discretion to adopt the highest possible standards of maintenance for the property in question and to charge the tenant accordingly. Therefore to give business efficacy to the lease there should be implied a term that the costs recoverable as service charges should be fair and reasonable.

Inspection

8. The Tribunal inspected the property on 27th October 2008 in the presence of Mr Donegan and of Mr Martyn Surman of Messrs Parsons Son & Basley. They saw a semi-detached house that appeared to have been constructed in the latter half of the nineteenth century. The property is on four floors at the front, and five at the rear where the lower ground floor flat is located. floors. It appears originally to have been built as a family house but has since been converted into seven flats. The Tribunal was shown the interior of flats 2 (the basement flat) and of flat 4 (the rear ground

floor flat) as well as the rear of the property and the common parts inside the building, which essentially consisted of the entrance hall and staircase.

9. Fire prevention works ("the Works") have been carried out at the property, and formed the subject matter of the primary issues before the Tribunal. The attention of the Tribunal was drawn in particular to the quite extensive use of surface conduit to surround the electrical wiring connected with the installation of the fire alarm system. The conduit was apparent both in the entrance hall and on the staircase, and inside the flats that it saw. It was told that the remaining flats were similarly fitted with surface conduit that connected in every case to the relevant alarms and detectors. The Tribunal also saw the rear of the building, where the external fire escape was to have been fitted, and was shown the location of the works carried out by the owners of flat 4 to the inside of that flat at their expense to render the erection of a fire escape at the rear of the building unnecessary. It was informed that this action had saved considerable expense.

The Lease

10. The Tribunal was provided with a copy of a lease ("the Lease") of flat 4. It is dated 21st December 1989 and was made between Beresford International (UK) Limited (1) and Paul Anthony Holder (2). In the light of Miss Thompson's concession made at the hearing that paragraph 1 of the Fourth Schedule does not of itself allow the landlord to recover the cost of the Works, the relevant provisions were clause 4(2), which requires the lessee of each flat to contribute the specified proportion attributable to his or her flat to the costs expenses outgoings and matters mentioned in the Fourth Schedule, and paragraph 6 of the Fourth Schedule, which allows the landlord to recover:

"all other proper expenses (if any) incurred by the Lessor in and about the maintenance and proper and convenient management and running of the property."

The expression "the property" is defined in paragraph 1 of the recitals to the Lease as including the building at 18 Eversfield Road in which the flats the subject of this application are situate, and the gardens and grounds thereof.

Paragraph 7 of Schedule 4 of the Lease provides that the lessee is to pay (his share of) "the fees and disbursements paid to any managing agent accountants and auditors appointed by the lessor in respect of the property provided that as long as the lessor does not employ managing agents he shall be entitled to add the sum of ten per cent to any of the items in this Schedule for administration". The expression "the items in this Schedule" refers to other items of expenditure for which the lessee is liable to reimburse the lessor.

The Tribunal understood that the leases of all of the flats were all to the same effect so far as was material to any of the matters before it.

Hearing

11. The parties agreed that there were five matters for the Tribunal's decision as follows:

    a. Whether the terms of paragraph 6 of Schedule 4 were sufficient to permit the landlord to recover the cost of the Works.

b. If those terms were sufficient to allow the landlord to recover the cost of the Works, whether they were also sufficient to allow the landlord to recover the cost of the work carried out internally in each flat as part of the Works.

c. To such extent as the landlord was entitled to recover the cost of the Works, whether the cost of them was reasonable.

d. Whether cost of the surveyor's costs in connection with the Works was reasonable, and

e. Whether the management costs in 2006 were reasonable.

12. The Tribunal dealt successively with the issues described above, save that those in sub paragraphs (a) and (b) of the preceding paragraph were taken together for convenience, and this note deals successively with the arguments advanced in respect of each of the issues, and with the Tribunal's findings in respect of them.

Whether the landlord can recover the cost of the Works

13. For the Applicants Mr Donegan referred to the terms of clause 4(2) and of the Fourth Schedule to the Lease. He submitted that the works were new item so far as the terms of the Fourth Schedule were concerned, and that they were not caught by paragraph 1 of that Schedule, which deals with repair and redecoration, to enable the landlord to recover their cost. Miss Thompson conceded that this was the case.

14. The question was therefore whether paragraph 6 of that Schedule, which was a sweeping-up clause, was sufficient to cover such expenditure. The Works could not be maintenance since there was no fire prevention provision in place before they were carried out. They had been carried out as a result of the service by the local authority of a section 352 notice served under the Housing Act 1985. That notice was served both on the landlords and upon the individual lessees.

15. Mr Donegan submitted that the Works were neither "management" nor "running" for the purposes of paragraph 6 of the Fourth Schedule of the Lease. An example of a matter caught by that description might be something like a subscription to an emergency call-out service. In 1989 when this lease was prepared there was already an awareness of fire prevention works. The Lease contained no obligation upon the lessees to contribute to notices served by the Local Authority or to statutory notices. The costs envisaged by the service charge provisions in the Lease all related to the common parts and the structure. None related to work to the interior of the flats. However, a large part of the Works had been carried out to the interior of the individual flats.

16. Mr Donegan further drew the attention of the Tribunal first to an extract from Woodfall on Landlord & Tenant consisting of paragraphs 7.162 to 7.174 on the subject of service charges at common law. In particular he pointed to paragraph 7.174 dealing with "sweeping-up" clauses, which contains the proposition that in the absence of clear words showing that a particular class of expenditure was contemplated such provisions are likely to be given a restrictive construction. He submitted that the examples given there are not helpful in the instant case. He further drew attention to the words of Mummery LJ in *Gilje v Charlgrove Securities Ltd [2002] 1 EGLR 41 (CA)* where (at paragraph 31 in the copy provided to the Tribunal)

he quoted with apparent approval a statement at paragraph 55 on page 71 of Vol. 23 of the Fifth Edition of the Encyclopaedia of Forms and Precedents which states:

"The draftsman should bear in mind that the courts tend to construe service charge provision restrictively and are unlikely to allow recovery for items that are not clearly included."

In that same case Laws LJ said at paragraph 27:

"The landlord seeks to recover money from the tenant. On ordinary principles there must be clear terms in the contractual provisions said to entitle him to do so. The lease moreover was drafted, or proffered, by the landlord. It falls to be construcd contra proferentem"

17. In addition, Mr Donegan referred the Tribunal to a very recent decision of the Lands Tribunal in *Norwich City Council v Marshall (LRX/114/2007)*. That decision had been published on the Friday preceding the hearing. At paragraph 14 the President drew attention to the fact that service charge provisions tend to be construed restrictively and referred to the quotations from *Gilje v Charlgrove Securities Ltd* set out above. Mr Donegan referred too to a case at *1 and 1a Castletown Terrace Hastings (CHI/21UC/LSC/2008/0072)* where a Tribunal consisting of members of this Panel had considered a lease with no sweeping up clause, and to *Rapid Results College Ltd v Angell and others 1986 1EGLR 53 (CA)* where Dillon LJ had indicated that it did not follow automatically that the 'services rent' must necessarily cover everything that the landlords were obliged to do under the terms of the lease.

18. Mr Donegan added that if the Tribunal was minded to determine that the cost of the Works was recoverable from the lessees under the terms of the Lease then similar problems arose in respect of the Works carried out inside to the various individual flats. In that case there was too a problem as to how such costs might be apportioned.

19. In reply Miss Thompson submitted that the right point at which to start consideration of the matter was at paragraph 6 of the Fourth Schedule to the Lease. The landlord submitted that the carrying out of the Works formed a part of the proper running of the property. Whilst there may be some restriction upon the interpretation of sweeping up clauses, they were nonetheless a perfectly legitimate device and could work properly. She drew attention to correspondence between the landlord and Mr Naish and Miss Seymour, the owners of flat 4, at pages C17, C20 and C 40 under Tab A in the Applicant's bundle that showed that they were aware of the proposed fire prevention work and anxious to have it carried out. Mr Wilkes of flat 6 had written to the landlords on 16 February 2004 (page 40 under Tab B in the same bundle) setting out his view of that part of the Works directly affecting his property and saying that those items were those for which he would he would be prepared to pay. Mr McMillan had written to thc Council on 3rd January 2007 expressing frustration over the Works and saying that he had had difficulty in establishing the costs attributable to his flat (page 152 under Tab B).

20. The landlords had served section 20 notices in respect of the Works and had obtained a partial dispensation from the LVT. Tenants had signed "bypass notices" that appeared at pages B17-23 of the Respondents' bundle. Taken with the letters to which she had previously referred this showed that the tenants had agreed to the arrangements for carrying out the works. It was a more convenient way of dealing with the matter as the section 352 notice had been served on everyone and all were

responsible for seeing that the notice was complied with. The landlord had had prior consultation, and this was proper and convenient management that in the circumstances justified the landlord's actions.

21. As well as being authorised by paragraph 6 of the Fourth Schedule of the Lease, the actions the Landlord took were supported by what amounted to a collateral contract created by the "by-pass notices", and if that were so the matter would be beyond the jurisdiction of the LVT. As to the internal works the expression "the property" as defined in paragraph 1 of the preamble to the Lease includes within its terms both the external and internal parts of the building.

22. Miss Thompson pointed out that there had been no sweeping up clause in the decision by the LVT at *1 and 1a Castletown Terrace* referred to by Mr Donegan, and submitted that the words used in the judgement of Mummery LJ in *Gilje v Charlgrove Securities Ltd* supported her case as her clients actions had amounted to proper management of the property. A note at page C59 by a member of her clients' staff saying that solicitors had advised that the cost must be recovered by 'court settlement' unless lessees could come to an agreement outside of court because the Lease contains no provision for such council notices related to advice given by solicitors other than her firm and did not reflect its view.

23. The Tribunal found as facts that the section 352 notice in this case had been served by Eastbourne Borough Council individually upon all of the lessees, as well as upon the landlord. It required fire prevention work to be carried out at the property, and the Tribunal understands that the work that now has been done satisfies the requirements of the notice. Each of the tenants, as well as the landlord, was respectively statutorily responsible for complying with its terms. The lessees were aware not only of the need to carry out the work in the period required by the local authority, but also of the nature and quality of the work to be carried out. Whilst specific evidence upon the point was not referred to in argument before this Tribunal, it is aware from the decision of the Tribunal that dealt with the application for dispensation with the requirements of section 20 of the Act at paragraph 33 of that on pages 15/16 decision, a copy of which is in the Respondent's bundle, that they had been given a broad outline of the work required, and that Schedule 2 to the section 352 notice specified the works required to enable compliance with it.

24. In reaching its conclusion about this matter the Tribunal was required to determine whether the words of paragraph 6 of the Fourth Schedule to the Lease are sufficient to permit the landlord to recover the cost of the works, or any part of that cost, from the lessees of flats at 18 Eversfield Road. The words used there allow the landlord to recover "all other proper expenses (if any) incurred by the Lessor in and about the maintenance and proper and convenient management and running of the property."

25. The parties agreed that there is no other provision of the lease that might be construed as permitting the recovery of the costs in question. Mr Donegan made the point too that there is here no provision allowing the recovery of the cost of complying with statutory notices, such as is quite commonly found in leases of this nature. He accepted that the lessees were aware not only of the need to carry out the work in the period required by the local authority, but also of the nature of the work to be carried out. In reaching its conclusion the Tribunal took account of the guidance in the Court and Lands Tribunal cases referred to it in argument mentioned above.

26. Whilst the Lease does not anywhere specifically envisage the need to carry out fire prevention works, or indeed any other works of a sort that may be required by statutory notice, nonetheless the service of the section 352 notice required that all the parties take steps to comply with the notice. It imposed upon them an obligation to carry out works at their individual expense. They would have been subject to sanctions had that work not been done to the satisfaction of the local authority. The nature of the work required, that of the installations of detectors and alarms throughout the building, coupled with the appropriate wiring and control mechanism, necessitated a co-operative approach.

27. It would not be possible to carry out such work on a piece-meal basis because it required works in all parts of the building, so that a collective approach, given the Tribunal's finding that the lessees were aware of the nature and quality of the work required, was essential to compliance with the notice. The fact that the lessees would effectively enjoy something of a windfall if the Tribunal found that the Lease did not require them to pay for the works was not, however, a matter material to the Tribunal's decision.

28. The Tribunal concluded in consequence that the provisions of paragraph 6 of the Fourth Schedule of the Lease were apt to encompass just such work. Its execution was entirely necessary to the proper and convenient management and running of the property, and the expense of carrying it out is of itself (subject to the other matters that were before the Tribunal) a properly incurred expense, for the parties collectively had a legal obligation to incur it. Paragraph 4(6) relates to such expenses incurred in respect of "the property" as defined in the first recital to the Lease. That definition refers to "the building". It is apparent that it would be impossible to carry out work of the sort required by the local authority without an installation in all parts of the building, including the individual flats, so that the expense of installing the Works in the individual flats is in the Tribunal's judgement also a recoverable expense.

29. Apart from Mr Donegan's observation that there may be a problem of apportionment if the Tribunal found that the cost of works to individual flats was recoverable, the parties did not address the point further either at the hearing or in their respective statements of case. The Tribunal is therefore able to do no more than to point out that, on the face of the matter, the leases provide for the proportions in which service charges are to be contributed.

30. The Tribunal adds that if it is wrong on that point, it would not have felt able to conclude that there was a collateral contract of the sort for which Miss Thompson argued. No evidence has been adduced before it to enable it to determine that an enforceable contract had been created. It has seen merely what purports to be a sort of signed consent form. The question whether or not such a contract, even if it existed, was sufficient to override the requirements of section 20 of the Act was not canvassed by Miss Thompson. In the light of those findings it is unnecessary for the Tribunal to consider whether or not monies payable under such a contract, if it had existed, would fall either within or outside of the Tribunal's jurisdiction.

<u>The cost of the works</u>

31. Mr Donegan argued that the cost of the electrical works was unreasonable. He said that the specification for the work, upon which the contractor's estimate had been based, provided that the electrical wiring should be recessed, and that the contractor was to provide for making good the plastered walls. This point appeared in page 3/3

of the copy of the specification. It was to be found at page D44 of the Applicant's bundle.

32. The cost of the electrical works shown in the copy of the tender analysis at page D51 of the Applicant's bundle was £20,404-00. However, as appeared in the summary of tender at page D59 of the same bundle which broke down that figure, the cost of the fire prevention works was shown as £12148-00.

33. Mr Donegan sought to put in evidence a report by Mr Martin Surman FRICS FBEng FIAS, MIRPM dated 24th October 2008 dealing with works actually undertaken, comments upon the applicant's statement of case, and the standard of work carried out. The statement was submitted as that of an expert witness. Miss Thompson pointed out that she had seen the report only that morning, as had the members of the Tribunal, and she was not in a position to take instructions upon it She submitted that the Tribunal should not admit it and pointed out that it should have been lodged, according to the directions by 3rd October.

34. After discussion the Tribunal ruled that the statement may be admitted only to the extent that it dealt with the suggested reduction in cost of the works arising from the fact (which it had seen during the inspection) that the all of the electrical wiring in connection with the fire work was surface-mounted, and not recessed. That was a matter upon which, depending upon its conclusions upon the question of recoverability, it may need to have representations. Miss Thompson was to have 21 days from the date of the hearing in which to send written representations upon that aspect of the matter, and if Mr Donegan wished to send any written response he might do so within a further seven days. If there were matters then in issue between the parties that required the hearing to be resumed the Tribunal would give directions at that stage, but the parties indicated that they thought this unlikely and that they were content to continue with the hearing on that basis.

35. Mr Surman's evidence in respect of the difference in cost between surface mounted wiring and recessed wiring was that he considered that recessed wiring might have been expected to account for 30% of the cost of the fire prevention work.

36. Miss Thompson in her written response argued that her clients' surveyor had certified the work as it stands at the tender price of £12148-00. He had had the benefit of seeing just what had been done and of satisfying himself that the work done justified the payment of the contractor's invoice. The Tribunal should therefore rely upon the evidence of that certification to enable it to find that the cost was reasonable. Mr Donegan did not seek to respond.

37. The Tribunal concluded that the works that had been done, so far as it had been able to see them at the inspection, had indeed been done to a reasonable standard. However, it was apparent from its inspection that the wiring was surface mounted rather than being recessed as the specification required. The evidence before it was that it would cost approximately 30% less to carry out such wiring it if the wiring was surface mounted than would be the case if the wiring were recessed. That figure is applied to the cost of £12148 mentioned above. It was not suggested that there had been any reduction in the amount actually paid to the contractor to reflect this fact. Accordingly it concluded that the amount charged for the fire protection works was not reasonable because it did not reflect the amount of the estimate. The work that had been done was significantly less, in that the wiring was not recessed, than had been provided for in the specification against which the tender had been given.

38. The Tribunal is satisfied that the amount of the reduction it has made is a reasonable reflection in any event of the difference in cost that would have arisen between the likely cost of recessed wiring and the cost of surface wiring for this particular job. The amount of the reduction is £3650, thus leaving a sum of £8498-00, say £8500, for the protection works as they stand. The Tribunal determines that that is the sum is payable for that aspect of the works by the lessees to the landlord. The tender sum was net of Value Added Tax, so that the sums mentioned above are also net of the tax.

39. Page 216 in the Applicant's bundle purports to show the final account for the various electrical works carried out at the property, including those for the fire alarm installation. The Tribunal adopted the figure for electrical works at item 3.20 there, which involves adding the figures that appear between (and including) the sums of £940 and £1192 (which include the original sum of £12148 for fire prevention works). As stated there they total £19,904-00. From that sum it deducted the figure of £3650 that it had determined as the reduction in cost for the substitution of surface wiring for recessed wiring, leaving a sum of £16254.

40. Thus the account on page 195t of the Applicant's bundle that shows the amount payable by the lessees for works carried out to date should read:

	£
Items 3.19-3.21 Page 3/3 electrical works:	16254-00
Less 10% retention	1625-40
	14628-60
Add VAT@17.5%	2560-00
Total:	17188-60

41. That figure of £17188-60 requires to be substituted for the figure of £21,150 that appears in the account of expenditure for the period to 31 December 2006 at page 195 in the Applicant's bundle.

The Surveyor's Fee

42. The Landlord's surveyors had charged the balance of their fees amounting to £1519-00 for acting as contract administrator and planning supervisor. The fees for this work were stated to be calculated on the contract sum of £39,742 at a rate of 15% plus VAT and disbursements. Their invoice appears at page 195k of the Applicant's bundle. The invoice appears to make provision for earlier fees and interim payments, not all of which seem from the narrative to have been for the work described above, and the fee discussed in it is in any event stated to be an interim fee. Mr Donegan argued that the fee should be charged on the sum allowed by the Tribunal, whilst Miss Thompson said that it was proper for the surveyors to charge their fees against the contract value. There was no issue between the parties over the rate of 15% charged, nor the fact that a fee was payable under the terms of the lease, and nor did Mr Donegan challenge the disbursement of £72-00.

43. The Tribunal accepted Mr Donegan's argument. The work had not been done in accordance with the tender and it had found that the contract value was as a result reduced by a sum of £3650. It would not be reasonable for the service charge to reflect a fee charged against what had become a notional, as opposed to the real, value. Accordingly it determined that the account for surveyors' fees should be adjusted to take account of the reduction in contract value by a sum equal to 15% of

£3650, being £547-50. The Tribunal was in a position to adjust the last part of the account, from the balance of £1519 claimed in it onwards, by the use of the figure it had determined as follows:

Additional fees and expenses claimed:	1519-35
Less deduction for reduction in contract value of £3650 @ 15%	547-50
	971-85
Plus VAT @17.5%	170-07
Plus disbursement	72-00
Total:	1213-92

Accordingly it determines that the figure for surveyor's fees that appears in the account of expenditure for the period to 31 December 2006 at page 195 in the Applicant's bundle should be £1213-92 in place of the sum of £1757-24 that presently appears there. A sum of £88-13 falls to be added to this sum in the summary at paragraph 48, the invoice for which from Messrs BCB appears at page 195j. No issue has been taken in respect of it. Accordingly the total that appears there for surveyor's fees and disbursements in the summary at paragraph 49 below is £1302-05.

Management Fees

44. Mr Donegan said that at pages 195 f, g and h of the Applicants' bundle there were accounts respectively for £200 (£170-21 plus VAT) for management fees for the half year to 30 June 2006, of £300 (£255-32 plus VAT) for such fees to 31 December, and then for £ 2650-48 (£2255-73 plus VAT) for balance of management fees for the year to 31 December 2006. The fees for the year thus totalled £2681-26 for the year net of VAT. The last of the invoices, he said was calculated at the rate of 10% of total actual expenditure. He submitted that a reasonable management fee in the Eastbourne area would be around £100-£150 per unit. The RICS Code of Practice for Residential Management indicated at paragraph 2.4 that fees should usually be charged on a basis according to the number of accommodation units. Since the manager here was a managing agent and not the lessor, the entitlement to charge a 10% administration fee as described in paragraph 7 of Schedule 4 to the lease did not arise. The only additional work in the year had been the preparation and service of the section 20 notices.

45. Miss Thompson replied that it was perfectly permissible to charge on a percentage basis. The charges equated to £378-64 per unit, and this was in line with the industry standard. The agents had been responsible for the section 20 notices, for the preparation of tender for works, for consultation with lessees, and for instructing contractors and surveyors and had applied for dispensation because of the time limits. They had done a considerable amount of work, and done it to a reasonable standard. If the Tribunal were minded to base the fee on a unit cost there would have to be an uplift of £250 to reflect this work to bring the fee to around £375 per unit as a reasonable fee for all that had been done.

46. The Tribunal accepted that the managing agents had dealt with the section 20 notices. They had instructed the surveyors, and, eventually, the contractors, and had been involved in additional correspondence in particular over the revised arrangements at flat 4 that eventually obviated the need for a fire escape as well as in correspondence with the lessees and with the Council. It was not suggested that the work had not been

done to a reasonable standard. On the other hand, the surveyors had dealt with the work of preparing the specification and of dealing with the tenders.

47. It also accepted Mr Donegan's argument (which Miss Thompson did not seek to oppose) that the managers here were managing agents rather than the lessor itself, so that the ten percent uplift referred to in paragraph 7 of the Fourth Schedule to the Lease did not automatically arise. The Tribunal that dealt with the application for dispensation under section 20ZA of the Act had made an order under section 20C that the lessor should not be entitled to recover its costs of that application as part of the service charge so that any costs attributable to the managing agents of that application could not be recovered here. The decision was before the Tribunal at pages 44 et seq. of the Respondent's bundle. It agreed that it is preferable where appropriate to charge on the basis of each unit of accommodation, and the figures offered by Mr Donegan made it easier in any event to proceed on that basis.

48. Doing the best it could with all of that information, the Tribunal concluded that the managing agents were on this occasion entitled to an additional amount over and above the usual fees for management for the additional work they had done. The usual management fee per unit in Eastbourne would in its experience probably by now be closer to £150 per unit than £100 for a property of this type, and so towards the top of the range that Mr Donegan had suggested. The Tribunal took a figure of £140. It would be reasonable in its judgement to allow a further total of approximately £1000 for the additional work that the agents had undertaken in the period in question and whose cost was recoverable from the lessees. That amounted to a further £142-86 (but say £140) per flat. In this way the Tribunal determined that the reasonable management fee for the year was £280 per unit exclusive of VAT.

Summary

49. The figures that appear in the list of expenditure for the period from 1 January to 31 December 2006 thus fall to be adjusted as a result of the Tribunal's determinations in the following fashion:

Cleaning	691-09
Minor repairs	35-25
Fire proofing works	17188-60
Gardening	508-00
Surveyor's fee	1302-05
Planning and building control	340-63
Insurance	2092-26
Accountant's fee	150-00
Management fee (£280 x 7) plus VAT	2203-00
Total:	24510-88

The Section 20C Application

50. Mr Donegan's primary point was that if the Tribunal made the reductions for which he had argued then the lessees were entitled to an Order under section 20C of the Act that the landlord's costs of this matter should not be regarded as relevant costs to be taken into account for the purpose of determining the service charge payable by the lessees. He said it would be wrong to make the lessees pay those costs, and he also requested that the Tribunal should order that the landlord refund their application fee of £500.

51. Miss Thompson's response was that it was apparent from the hearing and from the correspondence that the Applicant's primary stance was that the cost of the fire prevention works was not recoverable. It would be quite unreasonable to expect the landlord to write off some £20,000 without more. If the Tribunal ruled that any of the landlord's charges were recoverable then the landlord should be able to recover its costs. A subsidiary issue between Miss Thompson and Mr Donegan about the time when copies of vouchers had been supplied did not materially assist the Tribunal in forming its decision upon the section 20C issue.

52. The Tribunal has a very wide discretion arising from the terms of section 20C of the Act. It is able to make such Order as it considers just and equitable in all of the circumstances. In the present case the primary issue, that of recoverability, arose from a genuine issue between the parties that turned upon the interpretation of the terms of a lease that was not, in that respect at least, very clearly drawn. It is not unreasonable that they have been obliged to come to the Tribunal to determine that aspect, and the Tribunal has eventually determined it in favour of the Respondent.

53. On the other hand, having arrived at that point, the Tribunal found that the Applicants were entitled to a reduction in the cost of the work that was done for the purposes of determining the amount of the service charge they must pay in that it found the cost of the Works, of the Surveyor's fee and of the management charge in each case to have been unreasonably high.

54. Balancing those findings as best it may, it has determined that the Respondent may not recover costs by way of service charges in a sum not exceeding £1250 together with any applicable VAT. In arriving at that decision it observes that the parties did not address it upon the question whether or not such costs are recoverable pursuant to the terms of the lease, and expresses no opinion upon the matter.

Refund of Fees

55. The jurisdiction to order a refund of fees arises under regulation 9 of the Leasehold Valuation Tribunals (Fees) (England) Order 2003 (SI 2003/2098). The Tribunal may in these circumstances order the repayment by one party to the proceedings of the whole or of some part of the fees paid by another. The Tribunal is satisfied for similar reasons to those expressed in relation to the section 20C application, that it is just and equitable to order the Respondent to refund one half of the fees paid by the applicant, that is to say a sum of £250.

Robert Long
Chairman

8th December 2008