Southern Rent Assessment Panel and Leasehold Valuation Tribunal

Case No. CHI/21UD/LSC/2008/0031

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL
SECTION 27A and SECTION 20C of the LANDLORD AND TENANT ACT 1985

Case Nos:	CHI/21UD/LSC/2008/0013 CHI/21UD/LSC/2008/0014 CHI/21UD/LSC/2008/0027 CHI/21UD/LSC/2008/0028 CHI/21UD/LSC/2008/0029 CHI/21UD/LSC/2008/0030 CHI/21UD/LSC/2008/0031
Property:	Marina Park, Seaside Road, St Leonard's on Sea, East Sussex TN38 0AQ
Applicants:	Finch (UK) PLC (landlord)
Respondents:	William Greenhouse (Flat 4) Polly O' Keefe (Flat 5) Charles Burke (Flat 6) Margaret Russo (Flat 7) Eileen Roche (Flat 7) Yvonne Fisher (Flat 9) Grahame Wilkins (Flat 11) Charles Coxsedge (Flat 13) Keith Twist (Flat 14)
Appearances:	For the Applicant: Mr S R Finch, Director of Finch UK PLC For the Respondents: Mr Greenhouse and Mr Twist in person Other lessees present as observers
Date of Application:	25 March 2008
Pre-Trial Review:	25 April 2008
Hearings:	10/11 November 2008 4 December 2008 (re-convene)
Decision:	4 February 2009

Ref: CHI/21UD/LSC/2008/0031

Property: Marina Park, Seaside Road, St Leonard's On Sea, East Sussex TN38 0AQ

Application

1. These were 6 Applications brought by the landlord Finch UK PLC in Hastings County Court on 14 January 2008 against the tenants listed above as respondents, for arrears of service charges, ground rent, interest and costs for the years 2002-2007. Some of the tenants put in defences, and on 29 February 2008 the cases were transferred by order of District Judge Pollard to the LVT.

2. An oral Pre-Trial Review was held in Hastings on 25 April 2008 and Directions were issued on 2 May 2008 that all the applications would be heard together, including a cross application by Mr Greenhouse under Section 27A of the Landlord and Tenant Act 1985. The Directions recited that certain minor matters were agreed or admitted. Insurance was identified as one matter in dispute and documents were directed to be produced.

Jurisdiction

Section 27A of the 1985 Act

3. The Tribunal has power under Section 27A of the Landlord and Tenant Act 1985 to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The Tribunal can decide by whom, to whom, how much and when service charge is payable. A service charge is only payable insofar as it is reasonably incurred, or the works to which it related are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the charges.

Lease

4. The Tribunal had a copy of the leases of the flats all of which were in the same form. As an example the lease of Flat 5 is dated 30 April 2002 between Finch UK PLC and Mr F G Brookes and Ms P A O'Keefe and is for a term of 125 years from 1 July 2001 at an initial ground rent of £50 per year and rising thereafter.

5. The provisions relating to the calculation and payment of the service charge are to be found at Clause 5) and the Fifth Schedule of the lease. The tenant's "contribution to expenses" is one seventeenth of the expenses shown in the Fifth Schedule, which includes managing agents fees for preparing accounts and administering the building, providing a reserve fund, and the landlord's costs of carrying out its obligations to insure the estate and to maintain the main structure, roof, and common parts of the building, including the swimming pool and leisure complex.

6. Estimated service charge contributions are payable in two equal installments on 1 July and 1 January each year, with any balance to be paid after the provision of accounts after 30 June each year showing the actual expenditure.

7. The lease recitals draw a distinction between the estate, defined as the freehold property "on which it is intended to create seventeen flats and five shop units" plus a leisure complex in

the lower ground floor, and "the Building" "containing the flats of which the demised premises form part". There was no further detailed or structural definition of these terms.

Inspection

8. The Tribunal inspected the property before the hearing on 8 September. It comprised a substantial period property, with 5 storeys plus basement, located on the south side of Seaside Road, St Leonard's on Sea, fronting on to a main road and backing on to the sea front. Probably originally constructed as a hotel in the 1900's, the property was redeveloped by Finch UK in 2002. On the ground floor, facing the road, there were 3 retail units (of which one, a small supermarket, took up 3/5 of the space). The shop fronts consisted of large plate glass windows separated by narrow wooden frames with a decorative cornice on the rendering between the shops and the flats.

9. Above and to the rear of the shops were 17 flats arranged over 3 floors. All the units had 2 bedrooms but the floor areas varied in size. Flats 4-17 were accessed from a large entrance hall at the rear leading to staircases to all floors. Flats 1-3 on the ground floor facing south had their own separate entrances. There was also a lift serving all floors and the basement leisure centre. The Tribunal saw some evidence of water penetration to the ceiling on the 4th floor landing, some damp to the north wall opposite Flat 12 and some cracking to wall and ceiling plaster on the 2nd floor, but generally the common parts were in reasonable condition.

10. On the lower ground floor was a leisure centre for the use of the residents (but not the shop units) comprising sauna, swimming pool, gym and changing rooms. Also on this floor was a utility and storage area and meters. The property was surrounded at lower ground level by a Victorian moat, or void area, under the pavement. It is not known whether this area was part of the registered freehold title; however, lights, further meters and a filtration unit had been installed there and it also led to some emergency exits.

11. At the request of the lessees the Tribunal members inspected Flat 8 internally. They were shown some damp and evidence of water penetration from the outer wall around the balcony.

Hearing

12. The hearings took place in Hastings over 2 days on 10/11 November 2008. Mr S R Finch, Director or Finch UK PLC, attended for the applicant landlord. The case for the respondent lessees was presented by Mr Greenhouse (Flat 4) and Mr Burke. The Tribunal re-convened on 4 December 2008 for its deliberations.

13. At the hearing the tribunal followed the list of disputed items in the respondents' Statement. The lessees had put in Defences to the County Court claims for service charge arrears. In the lessees' Statement of case, contained in the Respondents' bundle of papers, certain items were identified as in dispute and at the hearing the lessees' representatives confirmed that these were the only items in dispute from the service charge accounts. In this Decision, for ease of reference, the Tribunal's decision on each disputed item of service charge expenditure follows the consideration of each item in dispute.

14. By way of general background, the Tribunal heard that Finch PLC redeveloped the property which was completed in 2002. New leases were granted with Finch PLC as the grantor. For a while Mr Finch occupied the penthouse flat on the top floor, which was subsequently divided into 2 units, flats 16 and 17. Finch PLC employed managing agents Oakfields who managed

the property until March 2005. After that the property was managed by a Mr David Duke. A dispute arose as to whether Mr Duke was an independent managing agent or part of Finch PLC (dealt with below in this decision). The accountants were Ashdown Hurrey, who produced annual accounts to 31 December each year (not 30 June as in the lease).

15. In 2005 there was a sewerage flood in the basement area, affecting the gym, pool and basement flat. Repairs and redecoration were required. The insurers were involved and eventually Southern Water accepted liability. The works were carried out by Finch PLC at no cost to the lessees. This was not part of the dispute before the Tribunal.

16. During 2006 and 2007, the lessees became concerned about service charges and accounting, especially relating to insurance, management and the reserve fund. Some withheld payment. Solicitors were instructed but matters were not resolved. In May 2008, Finch PLC appointed Mr Okines of Arko as managing agents, in the expectation that the lessees would purchase the freehold, but this did not come about. Instead the lessees set up an RTM Company and acquired the Right to Manage (RTM) in September 2008. The RTM Company instructed Mr Okines and he attended the hearing as the current managing agent.

17. It emerged at the hearing that Finch PLC went into liquidation in July 2008 and a receiver has been appointed. This may explain the timing of the County Court claims, in an attempt to collect all possible income due to the company. The Tribunal was told that the lessees were denied entry to a creditors meeting, despite the fact that as landlord Finch PLC was legally obliged to hold service charges and reserve fund for the property on trust for the lessees in a separate account, and this was not done.

18. During 2007 and 2008 the lessees entered into negotiations to purchase the freehold and valuations were prepared. Unfortunately the negotiations reached a stalemate and an application to the LVT for collective enfranchisement is due to be heard.

Service Charges

Apportionment and insurance costs

19. The lessees were concerned that they were required to pay 1/17 of the total insurance cost for the whole property, including the shop units, which they regarded as an unfair subsidy by the residential occupiers to the commercial units. They had not been provided with information about the insurance or copies of the policy despite requests over a long period. Documents were finally produced in May 2008 by Meneer Shuttleworth, solicitors for Finch PLC, in response to the LVT's directions. The shop units also benefitted from centralised fire alarms and electricity supply to the fire escape areas and areas housing utility meters.

20. The lessees submitted that a reasonable apportionment between commercial and residential units would be fair and common practice. A fair proportion for the commercial tenants would be between 10-15%. This was an estimate of what they regarded as equitable, loosely based on the floor area figures in their valuer's enfranchisement report. On questioning from the Tribunal, Mr Burke explained that the figure they had come to as 12% which was their best estimate of the ratio of the floor area of the shops to the flats, but he could not produce any actual calculations. The leisure centre, basement, car park and exterior bin store had not been included. Alternatively, Mr Burke said that there were 20 units in total, 3 shops and 17 flats, and that 3/20 was roughly 15%.

21. Mr Finch argued that as the retail units had the onerous burden of maintaining the shop fronts, it had not been intended, when the leases were drawn up, that the shops should contribute towards insurance costs. As far as he could recall there were 3 commercial leases whose terms did not require the tenants to contribute. He said this was to keep things simple, as the shop units were self contained, sandwiched between the basement and the residential flats, and did not share services or facilities. The lessees had not been charged for any other element of maintenance or repair to the shops.

22. At the request of the Tribunal, Mr Finch produced during the course of the hearing a copy of the lease of one of the shops, No.1, the terms of which did not accord with his recollection. The "premises" were defined as a lock up shop on the ground floor and basement including the plate glass. The "building" was defined only as "the building or buildings of which the Premises forms part". There was no corresponding definition of the "estate" contained in the residential leases, and no further definition of the extent of the property - for example there was no mention of the shop fronts or the cornice – and the tenant's repairing obligation was to maintain the interior only.

23. That lease further contained a provision for the landlord to insure and the tenant to pay an insurance rent, meaning the sums paid by the landlord "by way of premium for insuring the Building and/or the Premises". However, it further emerged that the lease of the supermarket (covering 3 units) omitted any reference to the insurance rent. Mr Finch could not explain how these discrepancies had come about. He had instructed solicitors and thought they had given effect to his intentions.

24. With regard to what might be a fair apportionment, Mr Finch thought the lessees' calculations were unscientific. From memory he thought the percentage footprint of the shop units as part of the whole "estate" was about 4% but he could not explain the basis upon which this figure was reached.

25. On the amount of the insurance premiums, the lessees submitted that whilst they thought service charge demands for the years in issue had included an amount for insurance, this turned out not to be the case. A typical demand on account issued in August 2002 for the year up to 31/12/2002 showed a budget figure for insurance, but not the actual expenditure. This was the year when the redeveloped property was opened.

26. The lessees received a letter from Mr S Finch dated 4 May 2007 stating that Oakfield had failed to charge for insurance costs from 2002 to 2005. Enclosed with the letter was a "summary of insurance costs for period 01 July 2002 to 30 June 2005". This showed the insurer, the "annual premium" and a daily breakdown. The letter also enclosed an "individual liability statement" for each lessee which was to be taken as a "proper demand". The lessees, alarmed at the contents of this letter, requested further information which was not forthcoming. They attempted without success to cross-refer the summary to the accounts.

27. On examining the annual accounts prepared by Ashdown Hurrey, it was evident that the insurance premiums had not been included for the years ending 31 December 2002, 2003 and 2004. Neither Mr Finch nor any of the lessees had noticed this omission. An interim account for the period 1 January to 31 March 2005 (when Oakfield ceased management) included 3 insurance figures: "Norwich Union £417.81", "insurance £2,185.07", and "prior years insurance" of £14,617.14. An account for the period 1 April 2005 to 30 June 2006 showed insurance of £12,715.12 and for the year end 30 June 2007 the figure was £8,615.11.

28. Apart from the confusion surrounding the amount of the premiums, the lessees argued that the landlord was not entitled to recover the insurance costs under Section 20B of the Landlord and Tenant Act 1985 because the demand dated 3 May 2007 was not made within 18 months of the landlord incurring the expenditure. They further contended that the premiums were unreasonably high and that they had obtained alternative quotes of between £3,000 and £3,500 per year to include the residential and commercial units.

29. Mr Finch accepted that the omission of the insurance costs from the accounts to 31 March 2005 was regrettable but stressed that the property had at all times been insured at the landlord's expense. He was seeking to recover this outlay. He assumed that Oakfield had applied the service charges they had collected to cover other expenditure and arrears. He said that the premium shown in the summary included a 15% handling charge paid to Mr Duke.

Decision

30. In the Tribunal's view the position in relation to insurance contributions under the terms of the leases was highly unsatisfactory. On the face of it, on a strict construction of the residential leases alone, the lessees were liable to pay $1/17^{th}$ of the landlord's costs of maintaining and insuring the estate, which included the shops and leisure centre. The lease terms would ordinarily have to be given effect, even though this might seem inequitable if the insurance premium included the cost of cover for the shops.

31. However, the reality of the matter turned out to be different and more complicated. At least one of the shops was obliged under the commercial lease terms to pay the landlord's costs of insuring the shop premises. It seemed likely to the Tribunal that the supermarket tenants had negotiated to remove the insurance rent from that lease. The outcome was that even if the supermarket did not contribute, the landlord was effectively entitled to recover more than 100% of its insurance costs. This was unsatisfactory and unfair to the lessees. It was not known whether the tenants of shop No 1 had made any payments.

32. The Tribunal therefore concluded that it would be unreasonable in all the circumstances for the residential lessees to bear all the insurance costs. It was therefore necessary to decide on a fair apportionment. It did not regard either the lessees' or the landlord's estimates as accurate. The lessee's 10-15% was unspecific and vague, and Mr Finch was unable to justify his figure. The Tribunal's analysis of the floor areas on the lessees' valuation showed the commercial units at 10.8%, though this did not include the car park, leisure complex, or moat (if indeed the moat is part of the freehold title). Using its collective knowledge and experience, and to reach a workable solution for all the parties, the Tribunal concluded that 10% should be deducted from the total insurance premiums for the relevant years and the resulting figure divided by 17 to arrive at each lessee's share.

33. The Tribunal further noted that the position regarding repairing obligations was equally unsatisfactory. It would appear that no attempt had been made to ensure that the residential and commercial leases corresponded with each other, or reflected the complex nature of this property. For example, in the residential leases the flats are contained in "the Building", which forms only part of "the Estate". The landlord covenants to insure "the Estate", but only to maintain "the Building". The shop tenants have no corresponding exterior repairing obligations. It is therefore unclear how the exterior maintenance of the whole property is to be achieved and paid for. Ultimately, it may be necessary for all the leases to be varied. This LVT decision does not amount to a variation of the lease terms.

34. Turning to the amounts payable by the lessees in relation to insurance, the Tribunal agreed that Section 21B prevented the landlord from recovering those charges. There was no evidence in the accounts that the insurance costs had been incurred. The first demand was made on 3 May 2007 which was more than 18 months after 31March 2005. Therefore the Tribunal disallowed the insurance costs for that period.

35. The Tribunal allowed insurance costs incurred for the years 2006 and 2007. It regarded the figures in the service charge accounts as unreliable, and preferred the actual premiums shown on the insurance documents in the papers. These showed that the policy was effective from 19 October so did not accord with the accounting year, but for the sake of simplicity the Tribunal has allowed the sums in the policy. In addition to the premiums was a cost for credit, which in the Tribunal's view was not payable by the lessees, as it was not for insurance cover but for the benefit of the landlord to pay by installments.

36. The Tribunal found that the so-called handling surcharge paid to Mr Duke was unjustifiable and unreasonably incurred. Whether Mr Duke was an independent managing agent or not, the Tribunal would expect arrangement of insurance to be included in basic management fees. The surcharge provided no benefit to the lessees. Mr Finch's insurance summary was unreliable as it included a 15% surcharge without explanation. However, it was prepared to accept that the insurance had been procured in the reasonable course of business and that Mr Duke had gone to the market through a broker and with an insurer of repute. The lessees' proposed quotations were evidenced only by an email enquiry, with no claims history and no mention of the leisure complex.

37. The relevant insurance costs were: for the period to 18/10/2006: £9,295.46 and for the period 19/10/2006 to 19/10/2007: £6,132.. In deciding what was payable by each lessee as a service charge, the Tribunal deducted 10% attributable to the shop units and calculated 1/17 of that figure:

    £9,295.46 – 926.54 = £8,365.92 divided by 17 = £492.11
    £6,132 – 613.20 = £5,518.80 divided by 17 = £324.64

Ground Rent

38. The Tribunal heard that various lessees had paid ground rent even if they had withheld their service charges. However, Finch PLC had failed to distinguish between ground rent and service charges. It would appear Oakfield's accounts were in a state of disarray when handed over in March 2005. This was regrettable to say the least and it appeared that lessees had not been credited with payment of ground rent and were wrongly treated as in arrears. However, the Tribunal has no jurisdiction over ground rent and was therefore unable to make any determination in this regard.

Safety Telephone in Lift

39. The lessees' case was that the emergency telephone in the lift was disconnected in 2003 and not reconnected until early 2008. The managing agents were aware of the problem but failed to resolve it. This was evidenced by minutes of a residents association meeting and a letter from Oakfield dated 25 March 2003 to the effect that the telephone line was "terminated" because of a BT bill not paid by Finch PLC. Nonetheless, telephone costs appeared in all the annual accounts. Mr Finch said he thought the BT bills had been paid by Oakfield before March 2005 and by Finch PLC after that. In a letter to the lessees of Flat 9 dated 18

December 2007 Mr Finch wrote that Oakfield's call-out number was cancelled but "the phone line remained with a quarterly charge of £48.35. However he added that "the line was disconnected some time ago". At the Tribunal's request he produced some BT bills of various dates and amounts. Those preceding March 2005 were stamped as paid by Oakfield but there was no evidence that the later bills had been paid and no receipts were produced.

Decision

40. In the absence of any evidence to the contrary the Tribunal accepted the lessees' evidence that the telephone was not working and that they had not received a service which had been charged to the service charge account. Mr Finch's evidence was confusing and contradictory. It appeared Oakfield and Finch both blamed each other for non -payment of BT bills and each had separately stated to the lessees that the telephone line was disconnected, so this was the only information the lessees had to go on. Therefore the Tribunal disallowed all the telephone charges as the cost had not been reasonably incurred and no service had been provided.

General maintenance: Hire of Cherry Picker

41. In general the lessees were not satisfied with the standard of maintenance and contended that routine maintenance had not been carried out, especially to the pool and gym area. The Tribunal pointed out that it could not deal with disrepair as this was an allegation of breach of the landlord's repairing obligation for failure to carry out work, rather than unreasonably incurred service charges for work done to a poor standard. The refurbishment of the leisure centre following the sewage flood in 2005 had been paid for by insurers and was therefore not a service charge matter.

42. The accounts contained a heading for "general maintenance". The lessees disputed the cost for hire of a cherry picker. In 2005 work was carried out by Dovetails, run by Mr Finch's brother, to jet wash the exterior and clear gutters. The lessees contended that Dovetail had used the cherry picker to carry out other work to shops in the area and been paid by those shopkeepers, but the full hire costs had been wrongly passed to the service charge account. Initially they though the total cost of the work was £2420.72, as stated by Mr Duke in an explanation of the accounts to 30 June 2006, but when they looked at the invoice this only showed £1,500.

43. Mr Finch produced 3 documents: an undated estimate from Dovetails for £1,400, an invoice dated 31/12/2005 for £1,400 with a hand-written extra £100 "cash – materials" totaling £1,500, and a hire invoice from Gamble Jarvis Plant Hire dated 19 December 2005 showing a cost of £1,081.85 for the cherry picker for the period 01/12/2005 to 08/12/2005. These costs formed part of £4,338.14 general maintenance in the accounts to 30 June 2006. He was unable to explain the additional £100 charged by Dovetails. He thought his brother had been approached by neighbours to carry out some work and been paid £100 each by 3 shops. He said Finch PLC had paid for the hire of the cherry picker.

Decision

44. The documents were not self-explanatory, but it appeared to the Tribunal that the cherry picker had been used for more than just the exterior jet wash and gutter clearance. Had the hire been solely for this work, it would have expected either to see the equipment hire charge in the estimate, or the comment "plus equipment hire". Neither was this included in the Dovetails invoice. It saw no justification for the extra £100. It accepted that Mr Finch's

brother had received money from other shops. Overall the Tribunal inferred from the length of the hire that the cherry picker was used by Finch PLC (and/or Dovetails) for more than just the invoiced work to Marine Gate. In the absence of any satisfactory evidence on the actual use of the cherry picker, the Tribunal allowed £1,400 for the work but disallowed £1,081.85 equipment hire. It therefore deducted a total of £1,181.85 from the general maintenance charge of £4,338,14 leaving the total payable for that year of £3,156.29.

Household Cleaning

45. The lessees contended that a number of cleaners had been retained by Finch PLC under contracts which were Qualifying Long Term Contracts so that Finch should have carried out statutory consultation under Section 20 of the 1985 Act. However, they were unable to explain precisely why there was a contract amounting to a QLTA within the meaning of the statutory regulations. They had not seen or requested a contract. One cleaner was in place for over a year. The cost for the period 1 April 2005 to 30 June 2006 was £10,739.20. The information from Mr Duke stated that general cleaning had been carried out by "directly employed operatives" of Finch PLC but "later they became self-employed and undertook the work on a contract basis of £150 per week". The lessees thought they could get the cleaning done at a cheaper price but did not contend that the service was not of a reasonable standard.

46. Mr Finch's case was that Finch PLC did not employ anyone on a long term contract and there was no QLTA in place. He said until March 2005 Oakfield had supplied cleaners, then Finch PLC directly employed a cleaner who worked at more than one property and the cost had been apportioned. From April 2006 the same person carried out the cleaning for a weekly payment of £150 and her retainer could be terminated at any time. This covered cleaning common parts, stairs, leisure centre and some glass with window cleaners to clean the larger glass areas. He submitted this was a reasonable charge and that the work was carried out to a reasonable standard.

Decision

47. The Tribunal accepted Mr Finch's evidence on the basis upon which the cleaners were retained. The word "contract" had loosely been used by Mr Duke but this did not mean there was a written long term fixed contract. The Tribunal therefore concluded that there was no QLTA in place requiring statutory consultation. It further concluded that the cost on balance was not unreasonable for the extensive cleaning required, given the size and nature of the property including the leisure centre and common parts. It therefore allowed all the cleaning costs in the annual accounts.

Management costs

48. The lessees had not historically challenged management charges, but when looking into the purchase of the freehold, had obtained a quote from Godfrey John & Partners of Bexhill for £160 per flat. Mr Okines of Arko charged from May 2008 a basic fee £156 per flat plus VAT which included collection of service charges, preparation of accounts, dealing with cleaning and minor repairs. A reasonable total cost would therefore be between £3,100 and £3,200 so they were being overcharged. Looking at the accounts, the lessees did not dispute £1,723 for estate management for the period ending 31/12/2002. For the period to 31/12/2003 the cost tripled to £4,140. To 31/12/2004 the cost was £3,167, from 01/01/2005 to 31/03/205 it was £903.18, from 01/04/2005 to 30/06/2006 it was £2,399, and to 30/06/2007 it was £5,520.

49. From April 2005 the lessees believed that the property was managed in-house by Finch PLC and dealt with by a Mr D Duke who told them he was from Finch PLC. They produced letters on Finch PLC headed paper signed by either Mr Duke or Finch PLC, including one where Mr Duke signed himself as "senior surveyor, Finch PLC". They also produced service charge demands signed Finch PLC, and a "ground rent and service charge statement" dated 8 December 2006 sent to individual lessees, showing a "closing balance" under "Oakfield Management Ltd to 31 March 2005" with a sub-heading stating "Finch PLC Management from 01 April 2005". They had also received letters from Mr Finch in person about management matters and arrears.

50. The lessees had repeatedly requested explanations of the management charges but this had not been provided. They thought the charges from 1 April 2005 must be Finch PLC's charges in which case they were excessive. Mr Okines submitted on behalf of the lessees that Mr Duke was not an independently employed managing agent but part of Finch PLC. As a matter of law if a landlord managed a property it could not recover in-house costs. Under the lease terms the landlord was only entitled to employ independent agents.

51. Mr Finch was unable to explain the estate management charges in the accounts. He said that Finch PLC had terminated Oakfield's appointment at the lessees' request. Subsequently Finch PLC had appointed Mr Duke, a self-employed contract surveyor who had carried out a variety of work for the company but who was not directly employed by it. Mr Duke was not a Chartered Surveyor but held a building qualification. His appointment was intended to be a temporary measure until the lessees acquired the freehold. On questioning, it emerged that Mr Duke was based 3 days per week in Finch PLC's offices and only carried out work for one other company, Acorn. The lessees contacted Mr Duke through Finch PLC and had no other way of contacting him.

52. There was no written management contract between Finch PLC and Mr Duke. He did not know the basis of Mr Duke's charges; it could have been £300 per unit or a lump sum, but he contended the overall charges were fair. He produced some invoices from Mr Duke. He admitted writing to the lessees but said he did not directly undertake management and only became involved to try and sort out arrears and other problems. In answer to questioning from the Tribunal as to whether Mr Duke held service charge moneys in a separate account on trust for the lessees, Mr Finch said that service charges and ground rent were both paid direct into Finch PLC's company account.

Decision

53. The Tribunal considered that under Clause 7 and Schedule 5 of the lease, service charges for management costs were payable only where the landlord employed a managing agent. The issue here was whether or not Mr Duke was employed as an independent managing agent. Although he was self-employed and not a direct employee of Finch PLC, he was not a professional or qualified managing agent. The Tribunal gave weight to the fact that there was no written contract or any clear terms of engagement. It was clear that from the lessees' point of view, all the evidence suggested that management had been taken over by Finch PLC, that Mr Duke was part of the company and holding himself out as such. It was wholly unsatisfactory and in breach of legal requirements for service charges to be paid into Finch PLC's company account and no reputable managing agent would either have done this or indeed had access to that account. Therefore taking into account all the circumstances, the Tribunal disallowed estate management fees from 1 April 2005.

54. The Tribunal allowed £4,140 for the period ending 31 December 2003, £3,167 for 2004 and £903.18 to 31 March 2005. From its collective knowledge and experience the Tribunal considered that the normal range of fees for a property of this size and type would be between £150 to £220 per unit, with possible extra costs attached to management of the leisure centre. Although Mr Finch could not explain any of the figures, £4,140 broke down to £207 per flat plus VAT which was not unreasonable, and the other figures were less than that.

Reserve Fund

55. The lessees were concerned that sums had been demanded over some years for a reserve fund, but that despite their enquiries it was not clear whether a separate reserve fund actually existed and if so how much money was held in it. The accounts to 30 June 2007 appeared to show a "sinking fund" of £15,999.93, but the lessees were alarmed by the contents of a letter dated 6 July 2007 from Mr Finch stating that "demands for the reserve fund for the estate stands at £22,000", that Oakfield "returned the account to us with the reserve fund standing at a nil balance" and that future reserve funds "will now be held in an escrow account by a solicitor". They were also concerned that money demanded as a reserve was being used to cover day to day expenditure.

56. Mr Finch admitted that until June 2007 there had never been a separate reserve fund. The appearance on the accounts to the contrary was an accounting exercise. All sums received from lessees were paid into his company's general account. He submitted that because some lessees had withheld payment, in April 2005 Finch PLC had inherited a position where there was not enough money in the service charge account to meet the day-to-day expenses of running the property. When Finch PLC took over from Oakfield they produced a statement showing a nil balance for each lessee, but in some cases arrears had built up since then.

Decision

57. The Tribunal had serious concerns about Finch PLC's accounting procedures which concealed the fact that reserve fund payments made by lessees had not been properly held in a separate account. The accounts were misleading, as in real terms there was no reserve fund. It would appear that the service charge accounts were in deficit when Finch PLC took over from Oakfield, and despite the ongoing healthy appearance of the accounts, the problems had not been rectified. The creation of a "nil balance" was an artificial accounting device which solved nothing but added to the confusion. The evidence was that any payments made by lessees had been used by Finch PLC to meet daily running costs although the purpose of a reserve as provided by the lease is to meet anticipated future costs (paragraph 5 of the 5th Schedule). By the date of the hearing the company was in voluntary liquidation. Against this background it was impossible for the Tribunal to identify, calculate or attribute any reserve fund so it makes no determination.

Service Charge Determination

58. The Tribunal went though the service charge accounts for each of the years in dispute and deducted the sums disallowed above. The total allowed expenditure is divided by 17 to arrive at the service charge payable by each lessee as follows:

31/12/2002	£ 9,518	1/17 = £ 559.88
31/12/2003	£20,777	1/17 = £1,222.18
31/12/2004	£34,378	1/17 = £2,022.24

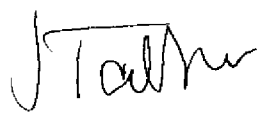
01/01/2005-31/03/2005	£ 6,014.58	1/17 = £ 353.80
01/04/2005-30/06/2006	£31,852.66	1/17 = £1,873.69
	+ insurance	£ 492.11
30/06/2007	£26,131.36	1/17 = £1,537.14
	+ insurance	£ 324.64
Total payable		£8,385.68

59. Therefore the total service charge payable for each lessee for the period August 2002 to 30 June 2007 is £8,385.68. As explained above this does not include ground rent. All the lessees have made some payments over that period. It is a matter for the parties to make adjustments accordingly to ascertain if any further payments are due.

Section 20C

60. The lessees made an application under Section 20C of the 1985 Act for an order that any costs incurred by the landlord in connection with these proceedings should not be regarded as relevant costs to be included in any future service charges payable by him. At the hearing Mr Finch confirmed that he had not incurred any professional costs and did not therefore intend to charge any costs to the service charge account. In view of the fact that the lessees had succeeded on all the disputed items except cleaning costs, the Tribunal made the order under Section 20C as sought.

Dated 4 February 2009



Ms J A Talbot
Chairman