CHI/29UM/LSC/2009/0035

THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE

DECISION OF THE SOUTHERN LEASEHOLD VALUATION TRIBUNAL

FLAT 5, ROYAL FOUNTAIN MEWS, WEST STREET, BLUE TOWN, SHEERNESS, KENT ME12 1SW

Applicant:	Mr M Viegas (tenant)
Represented by:	Ms L Williams (counsel)
Respondent:	Mr J Terry (landlord)
Represented by:	Mr John Bishop (counsel, instructed by Michael French & Booth, solicitors)
Date of Hearing:	24 June 2009
Date of application:	9 March 2009

Members of the Leasehold Valuation Tribunal:

Mr M Loveday BA(Hons) MCIArb
Mr B Mire BSc FRICS

INTRODUCTION

1. This is a determination of liability to pay service charges under s.27A of the Landlord and Tenant Act 1985 ("LTA 1985"). The application dated 27 February 2009 relates to Flat 5, Royal Fountain Mews, West Street, Blue Town, Sheerness, Kent ME12 1SW.

2. A pre-trial review was held on 15 April 2009. Both parties were ordered to serve statements of case and certain documents. In the case of the landlord, the obligation in paragraph (3)(b) was to serve "*copies of demands for payment, annual service charge accounts and statements for the 2006/7 and 2007/8 service charge years, together with all vouchers invoices and receipts for payment in relation to the relevant costs in dispute*." Both parties prepared statements of case and submitted documentary evidence in accordance with the directions given at the pre-trial review.

3. A hearing took place on 24 June 2009. The applicant was represented by Ms L Williams of counsel and the landlord was represented by Mr John Bishop of counsel. The parties identified the following issues:
   (a) in relation to the 2007 service charge years, whether the relevant costs are recoverable under the applicant's lease and/or;
   (b) in relation to the 2007 service charge year, whether the relevant costs were reasonably incurred under section 19(1) of the Landlord and Tenant Act 1985.
   (c) in relation to the 2008 service charge year, whether the relevant costs were reasonable under section 19(2) of the Landlord and Tenant Act 1985.
   (d) limitation of the landlord's costs in the proceedings under Section 20C of the Landlord and Tenant Act 1985.

4. Both parties gave evidence at the hearing and submissions were made by counsel. However, at the end of the hearing, it was clear that there was a further issue relating to the apportionment of the service charges. This arose from a possible discrepancy between the area of the building described in the lease and the area of the building in the annual service charge statements. The Tribunal therefore gave further directions

on 24 June 2009 which invited written representations on this point by 9 July 2009. The Tribunal later reconvened to consider these representations to reach the determination set out below.

INSPECTION

5. The Tribunal inspected the property before the hearing in the presence of the parties.

6. Royal Fountain Mews is a prominent local landmark in Sheerness in the historic Bluetown area of the town opposite the dockyard walls. The roughly rectangular site includes four distinctive parts:

   (a) The main building is in the south east corner of the site fronting onto West Street and West Lane. This is a former hotel c.1807 of brick construction under a pitched slate roof on three storeys plus a mansard. It has been converted into 12 flats. The elevations on the two streets have been rendered at ground floor level and there are timber sash windows. Externally, the building was in poor decorative condition with missing window panes and rotted woodwork. Internally the ground floor hallway was in poor condition, with paint stains to the floor surfaces, general dirt to the floors and walls blown plasterwork to ceilings. There was evidence of damp rot to skirting boards and in places plastic tongue and groove panelling had been installed in the recent past in an apparent attempt to avoid further deterioration of wooden parts. Although parts of the interior had been newly painted, this work was of poor standard, having been done without any obvious surface preparation or lining paper. Missing staircase spindles had been replaced with sheets of timber. The building was fitted with a modern fire control system comprising a multi panel control unit in the main hallway, combi-detector/sounder units and emergency lighting in the common parts. The system appeared to have been installed in the past two years. The subject flat comprises part of the first floor of this property which we describe as "the main building".

   (b) A second "L" shaped two storey building on the south western part of the site fronting onto West Lane. This is apparently of a later construction and features

an advertisement for a brewery on the southern elevation. Again the building is of brick under a pitched slate roof. This part incorporates an arch connecting it to the main building which gives access to the courtyard behind. The property has been converted into 8 flats – but at least one flat across the top of the arch appears also to include space within the main building. We describe this as "the secondary building".

(c) A small courtyard to the rear.

(d) A separate open area to the northwest of the site on the West Street frontage which was fenced off with new security fencing. On the eastern side of this was a large single storey garage. There were weeds and spoil to the surface of this area but it appeared to have formerly been used in the past for parking.

THE FACTS

7. There are no significant factual issues between the parties. As far as title is concerned, the tenant provided some additional documentation with its written submissions. These included office copy entries (but no file plans). Title number no.K598259 relates to land to the west side Union Street in Sheerness. The property register notes that certain land has been removed from the title and registered under title no.K757267. In turn, title no.K757267 is the respondent's freehold title which is described as relating to "Royal Fountain Mews, West Street, Sheerness." The charges register shows that the freehold title includes 21 flats and numbered 1-20 and Flat A[1] - some of which are split between floors. There is no dispute that the respondent is the freehold owner of both the main building and the secondary building and the courtyard which together include 21 flats. It appears that the car park is not part of the landlord's freehold title but that it has (at least until recently) been leased from Swale BC.

8. By a lease dated 21 July 1989, the applicant's flat was demised for a term of 99 years from 25 March 1989. The first recital to the lease is as follows:

[1] Flat 13 was re-numbered as Flat 14A

"(1) The Lessors are registered at Her Majesty's Land Registry as proprietors of the freehold property comprised in the title above referred to[2] known as The Fountain Hotel Bluetown Sheerness consisting of 12 flats known as numbers 1 to 12 (all which premises are hereinafter referred to as "the Mews" and the building of which the flat herein demised forms part is hereinafter referred to as "the building").

By clause 1 the lessor demised:

"...ALL THAT the flat 5 (hereinafter called "the Flat") shortly described in the Fifth Schedule hereto the situation whereof is shown on the plan annexed hereto and thereon edged red."

There is a site plan in the lease which shows the four component parts described above. The outer walls of the main building are edged with a heavy line, presumably being red in the original. The car park and the garage are both marked as for the use of residents.

9. Clause 2 of the lease requires the lessee to pay a service rent representing 7.3% of the landlord's expenditure. The machinery of the service charge provisions appear at clauses 2(ii) and (iii):

"(ii) The service expenses for each calendar year shall be estimated by the Lessors' managing agents (hereinafter called "the managing agents") or if none the Lessors whose decision shall be final) as soon as practicable after the beginning of the year and the Lessee shall pay the estimated contribution by two equal instalments on the 25th day of March and the 29th day of September in that year.
(iii) As soon as reasonably may be at the end of the year 1989 and each successive year when the actual amount of the service expenses for the years ending on the 31st Day of December 1989 or such succeeding year (as the case may be) hos been ascertained the Lessors shall give notice thereof to the Lessee and the Lessee shall forthwith pay the balance due to the Lessors or be credited in the books of the managing agents or if none the Lessors with any amount overpaid ..."

10. The relevant costs appear in Part I of the Fourth Schedule. We shall set out almost the entirety of this in full:

    1. *The expenses of maintaining repairing and redecorating and renewing*

[2] Title number was given as K598259

(a) *the roofs main structure gutters rainwater pipes communal entryphone and television aerial systems or systems (other than the wires of such system or systems serving the [sic] only one flat in the building);*

(b) *the water and gas pipes drains and electric cables and wires in under and upon the Mews serving the whole or part or parts of the building (other than those serving only one flat or one garage in the building).*

(c) *The entrances entrance halls landings and staircases of the building leading to the flats.*

2. *The expenses of lighting and cleaning the entrances entrance halls landings and staircases of the building leading to the flats.*
3. *The expenses of decorating the exterior of the building forming part thereof heretofore or usually painted.*
4. *All rates taxes and outgoings (if any) payable in respect of the parts of the building other than the flats forming part thereof.*
5. *The expenses of maintaining repairing and renewing*
   (a)The boundary walls of the Mews and
   (b)The access ways of the Mews
6. *The expenses of keeping the access ways of the Mews in good condition and order.*
7. *All rates taxes and outgoings (if any) payable in respect of the parts of the Mews other than the buildings and garages forming part of the Mews (including any water rate for water supplied to the Mews)*
8. *The cost of insurance against third party risks and public liability in respect of the Mews if such insurance shall in fact be taken out by the Lessors.*
9. *The rent for the car parking referred to in the lease dated 12th October 1978 made between Swale Borough Council (1) Shepherd Neame Brewery (2)."*
10. *The fees and disbursements paid to any managing agents appointed by the Lessors in respect of the Mews and in connection with the collection of rents.*
11. *The fees and disbursements paid to any accountant solicitor or other professional person in relation to the preparation auditing or certification of any accounts of the costs expenses outgoings and matters referred to in this Schedule and the collection of the contributions and payments due under sub-clause (iii) of Clause 5 of and the rents reserved by the Lease and the leases of the other flats and garages in the Mews.*
12. *...*
13. *Such sum as shall be estimated by the managing agents or if none the Lessors to provide a reserve to meet part or all of the all some or any of the costs expenses outgoings and matters mentioned in the foregoing paragraphs of this Schedule which the managing agents or if none the Lessors anticipate will or may arise during the remainder of the term granted by this Lease.*
14. *...*
15. *So long as the Lessors did not employ managing agents they shall be entitled to add the sum of Fifteen per cent to any of the [relevant cost] items for administration expenses.*
16. *...*
17. *..."*

11. In respect of the 2007 service charge year, the landlord relies on an expenditure account certified by SK Thakrar & Co accountants dated 29 June 2008 for the period 14 November 2006 to 31 December 2007. This refers to a number of items of relevant costs incurred by the landlord during this period totalling some £52,007.48. These were:

(a)	Cleaning common area contract	£ 4,598.03
(b)	Electrical maintenance	£ 617.00
(c)	Electricity	£ 446.00
(d)	Water rates	£ 3,651.95
(e)	Repairs and maintenance	£10,523.81
(f)	Car park rental	£ 1,410.00
(g)	Building insurance	£ 7,524.30
(h)	General reserve	£15,000.00
(i)	Accountancy fee	£ 998.75
(j)	Administration and management	£ 7,237.51

The service charge adjustment schedule attached to the statement makes it clear that these relevant costs related to both the main building and the secondary building containing all 21 flats. The tenant's contribution towards these costs is given as 7.3%. The date that the statement was sent to the applicant is unclear, although in evidence the landlord stated that he believed it had been sent in July 2008. The statement showed that interim charges exceeded the certified expenditure, so the excess was credited to the service charge account in accordance with clause 2(iii) of the lease.

12. In respect of the 2008 service charge year, a statement of estimated charges was prepared and sent to the lessee under cover of a letter dated 20 February 2008. The statement demands payment of £2,777.65 by equal instalments on 25 March 2008 and 29 September 2008. The amount represents 7.3% of total estimated relevant costs of £38,050.

(a)	Cleaning common parts	£ 4,500.00
(b)	Electrical maintenance	£ 750.00
(c)	Electricity	£ 700.00
(d)	Water charges	£ 4,200.00

(e)	Repairs and maintenance	£10,000.00
(f)	Car park rental	£ 1,200.00
(g)	Building insurance	£ 6,000.00
(h)	General reserve	£ 5,000.00
(i)	Audit fee	£ 750.00
(j)	Administration/management fees	£ 4,950.00

2007 RELEVANT COSTS

13. The Tribunal notes that the statement from Thakrar & Co purports to certify expenditure for a period which exceeds one year. The landlord explained in his evidence that this was because he acquired the reversion on 15 November 2006 and that the accountants had included the short period to the end of the 2006 service charge year in the 2007 accounts. However, clause 2(iii) of the lease makes it clear that the statement should properly have been computed only for the 2007 calendar year. Mr Bishop accepted that this was the case, but submitted that the Tribunal could make a *pro rata* reduction from the accountants' figures to reflect the extra 6 weeks included in their accounts in order to arrive at the relevant costs for the 2007 service charge year.

14. Cleaning common area contract (£4,598.03). The applicant admitted that these costs were recoverable under the terms of the lease (subject to the landlord providing receipts for expenditure). He further accepted that the costs were reasonably incurred.

15. The landlord stated that there was a cleaning contract and he produced invoices rendered by messrs Harris & Sons for cleaning during the course of 2007. These amounted to £4,124.71. No invoices were provided for any cleaning during the period 14 November 2006 to 31 December 2006. Mr Bishop submitted that no alternative costings had been put forward by the applicant and that the relevant costs were therefore reasonably incurred.

16. The lessee accepts he is liable to contribute to the relevant costs of cleaning. In this instance, expenditure receipts have been provided for the 2007 calendar year, and it is therefore unnecessary to make the *pro rata* reduction suggested by Mr Bishop. The Tribunal allows relevant costs of £4,124.71 for cleaning in the 2007 service charge year.

17. Electrical maintenance (£617). The applicant submitted that there was no evidence of what this item of cost was for and it did not appear that it was recoverable under the terms of the lease.

18. The landlord stated that the electrical maintenance costs related to repairs to the fire control system in the property, but he was unable to produce any receipts for this expenditure (they were still with the accountants). Because of riotous behaviour by tenants, the system had been damaged and required repairs. Mr Bishop submitted that the costs were recoverable under paragraph 1(b) of Part 1 of the Fourth Schedule to the Lease.

19. The Tribunal considers that the costs of maintaining the fire control system in the property properly falls within paragraph 1(b) of Part I of the Fourth Schedule to the Lease. The fire control system can be described as *"electric cables and wires"*.

20. The difficulty here is that the landlord has provided no evidence of any *"vouchers invoices [or] receipts for payment in relation to [these] relevant costs in dispute"* notwithstanding the direction given on 15 April 2009. Nevertheless, it was clear on inspection that there was a functioning fire control system in the premises. Some cost would have been incurred in respect of the relevant service charge year. The tribunal therefore does its best to arrive at a reasonable figure for the costs of maintaining the system serving 21 flats. Using its own experience the Tribunal considers the sum charged by the landlord not to be excessive and allows £617 under this head.

21. Electricity (£446.00). Ms Williams accepted that these costs were recoverable under the terms of the lease (subject to the landlord providing receipts for expenditure). She further accepted that the costs were reasonably incurred.

22. The landlord produced a single electricity bill dated 10 April 2007 for £256.64. The bill was marked as being for "L/Lords lighting" and included standing charges for the period 7 November 2006 to 20 March 2007 (133 days). Mr Bishop submitted that this was one of two bills for 2007.

23. The landlord has partially discharged the burden of proving that the relevant costs were incurred and that they were "*reasonably incurred*" within the meaning of section 19 of the Landlord and Tenant Act 1985. He has produced one bill for electricity and it is unclear whether any other bills fell due for payment during the 2007 service charge year. There is no other evidence of any "*vouchers invoices [or] receipts for payment in relation to [these] relevant costs in dispute*" notwithstanding the direction given on 15 April 2009.

24. The lessee accepts he is liable to contribute to the relevant costs of electricity. However, the Tribunal limits this contribution to the costs for which receipts have been provided – since it is far from clear whether any further costs were incurred in the 2007 calendar year. It therefore allows £254.64 for electricity in the 2007 service charge year.

25. Water rates (£3,651.95). Ms Williams submitted that there was no provision in the lease which enabled the landlord to recover the cost of water rates.

26. The landlord stated that there was a single water meter for the whole building. He did not produce any receipts because they were with the accountants. Mr Bishop submitted that the water was for the ordinary water domestic water consumption in the flats. Water rates were recoverable under paragraph 4 of the Fourth Schedule to the lease.

27. The Tribunal does not consider that these costs are recoverable under the terms of the lease. The proviso to paragraph 4 of the Fourth Schedule makes it abundantly clear that the lessees must contribute to rates and taxes – which include water rates – but this is subject an express proviso that the obligation does not extend to such costs which relate to the flats themselves. This is not rescued by paragraph 7 of the Fourth Schedule since the two provisions when read together still exclude the recovery of water rates payable for the flats. It should also be noted that there is an express obligation on the part of the lessee to pay water rates for the flat: see clause 4(i)(b). In this instance, it is common ground that the water rates included in the service charges relate to water supplied to the flats, not to the landlord's retained parts. It follows that they are not recoverable under the terms of the lease.

28. Repairs and maintenance (£10,523.81). The tenant gave evidence that few repairs had been carried out. It appears that some of the works included in this head of expenditure related to work allegedly carried out by a contractor MCG Builders. In fact, that firm simply refurbished the landlord's own flat and did private work for other lessees. It was not a genuine head of expenditure. Ms Williams accepted that these costs were recoverable under the terms of the lease. However, there was no evidence about what these costs were for or whether the landlord had tendered for the repairing costs. Insofar as they were major works, the landlord had not complied with the consultation requirements under s.20 of the Landlord and Tenant Act 1985. Furthermore, there should have been moneys in the reserve fund to discharge these costs.

29. The landlord produced a written narrative of works dated 31 December 2007 which he confirmed in evidence. He stated that it had been prepared on his computer and added to each month as works were carried out before being printed out in December 2007. The narrative gave details of a number of routine repairs carried out in each month such as supplying new post boxes in the hallway, jetting of drains, repairing and replacing pipe work, repairs to security gates and so on. The invoices for these works existed, but they were with the landlord's accountants. They were a series of minor works, rather than a single set of major works. When the landlord provided the

individual receipts to the accountants, they pointed out that some items were not recoverable under the terms of the lease (such as CCTV and iron gates) and the accountant had therefore not included these in the service charge statement. The landlord used local contractors. He had a number of other properties in London, Hastings Folkestone and Surrey, so he was aware of what was a reasonable rate for repairs. If a contractor suggested the cost would be more than £100, he would obtain a specification of works and invite tenders. All the 2007 works were under £100, so he had never had to tender.

30. The Tribunal accepts that some minor repairs and maintenance were undertaken in 2007 as suggested in the narrative produced by the landlord. It further accepts that it was reasonable for the landlord to incur such relevant costs. The real difficulty is that the landlord has produced no *"vouchers invoices [or] receipts for payment in relation to"* repairs notwithstanding the direction given on 15 April 2009. Furthermore, the explanation given by the landlord – that he entered into numerous informal minor contacts with tradesmen at under £100 is wholly untenable. This explanation would mean that over 100 separate repairing contracts were made with contractors in 2007 to reach a figure of £10,523.81. There is no evidence or tenders or consultation for major works under s.20 of the Landlord and Tenant Act 1985. The tribunal therefore does its best to arrive at a reasonable figure for minor routine repairs which could be undertaken without formal tendering procedures for a property of this kind. Using its own experience the Tribunal allows £4,000 for routine minor repairs and maintenance for both parts of the property in 2007.

31. Car park rental (£1,410). Ms Williams accepted that these costs were recoverable under the terms of the lease. She submitted that the car park was in poor condition.

32. The landlord explained that this was rental for the car park area under a lease with Swale BC. At the hearing, the landlord produced three receipted invoices from Swale BC in respect of a lease of land at West Street for use as a car park.[3] These were:

[3] Ms Williams did not object to these going before the Tribunal

Date	Period of lease	
3 October 2006	12 October 2006 to 11 October 2007	£528.75
19 February 2007	1 October 2003 to 30 September 2007[4]	£705.00
24 September 2007	1 October 2007 to 30 September 2008	£705.00

It therefore appears that the relevant costs in the 2007 service charge accounts were the latter two sums.

33. Mr Bishop submitted the cost was recoverable from the lessee under paragraph 9 of Part I of the Fourth Schedule. At the end of this period the landlord gave up his right to use the car park so there had been no further charges to the lessees after that date.

34. The landlord has discharged the burden of proving that the relevant costs were incurred and that they were *"reasonably incurred"* within the meaning of section 19 of the Landlord and Tenant Act 1985. He has produced bills for the car park rental and it appears they fell due for payment during the 2007 service charge year.

35. The lessee accepts he is liable to contribute to the relevant costs of the car park. In this instance, expenditure receipts have been provided for the 2007 calendar year. The Tribunal allows relevant costs of £1,410 for car park rent in the 2007 service charge year.

36. Building insurance (£7,524.30). Ms Williams accepted that these costs were recoverable under the terms of the lease. She stated that the landlord had provided a certificate of insurance a month before the hearing (although no copy was produced to the tribunal). The applicant was prepared to pay for insurance, but the cost was excessive. The insurance for 2008 was only £4,484.19 so it was incumbent on the landlord to explain why the premium was so much higher the year before.

37. The landlord's evidence was that historically the building insurance premiums had been high because of a poor claims history. When he acquired the property, he tested

[4] Described as "additional rent on lease"

the market by going to a number of brokers. The landlord produced the following insurance Schedules:

(a) A schedule issued by AXA issued on 6 February 2007 for the period 20 October 2006 to 20 October 2007 (£6,179).

(b) A schedule issued by Norwich Union on 7 October 2008 for the period 20 October 2008 to 19 October 2009 (£4,484.19).

When cross examined, the landlord was unable to say why the 2007 service charge accounts stated the insurance to be £7,524.30.

38. The landlord has only partially discharged the burden of proving that the relevant costs of insurance were incurred and that they were "*reasonably incurred*" within the meaning of section 19 of the Landlord and Tenant Act 1985. He has produced only one insurance schedule which appears to have fallen due for payment during the 2007 service charge year. There is no other evidence of "*vouchers invoices [or] receipts for payment in relation to [these] relevant costs in dispute*" notwithstanding the direction given on 15 April 2009. Although the tenant criticised the amount of the premium by comparing it with the premium payable in the following year, the premium compared favourably with that paid in the previous year. The tenant did not produce any other evidence (such as alternative quotations for insurance premiums) to suggest the cost was excessive.

39. The Tribunal therefore allows relevant costs of £6,179 for insurance in the 2007 service charge year.

40. General reserve (£15,000). The applicant's evidence was that when he discussed the reserve fund with the landlord in April 2007, he had been told there was £47,000 in the reserve fund. Whenever he asked for proof of the moneys in the fund, the landlord had always fobbed him off with excuses. Ms Williams accepted that these costs were recoverable under the terms of the lease. However, she submitted they were not reasonably incurred. There should have been moneys in the reserve fund and it was therefore unnecessary to top it up any further. In any event, the landlord

had refused to provide bank statements to show what was in the reserve fund on the basis that there was a security risk.

41. The landlord stated that to bring the property up to a reasonable condition would cost over £50,000. He was warned by his solicitors that there was a risk that he was in breach of covenant to repair the building. He had therefore commissioned a surveyor's report which had been sent to the lessees including the respondent. He intended to go through a full consultation process under s.20 of the Landlord and Tenant Act 1985. There was only £23,800 in the reserve fund at present, and he had produced a bank statement to the applicant to show this at the pre-trial review. In May 2008 there had been £18,424. In fact, he had been in dispute with the previous landlord because at the time of purchase about the fund. They had stated there was some £44,000 in the reserve fund, but only £18,000 was handed over at the date of completion less costs. This meant there had only been some £8,500 in the reserve in late 2006 and this had to be built up. When cross examined, the landlord stated he kept the reserve fund in a separate bank account. Mr Bishop submitted that the property plainly needed a great deal of work to be done to it and this required a substantial provision to be made. £15,000 was a reasonable annual figure to be provided towards the cost of the works. The existing moneys in the reserve fund were inadequate.

42. It is clear that the lease allows a reserve fund under paragraph 14 of the fourth Schedule. This provision gives the landlord a wide discretion on the amount of the reserve fund contribution. There is plainly an issue about whether or not more moneys should be in the reserve fund account. However, even if there were more significant sums in the account, it is clear that very significant works are required to the property – the landlord's figure of £50,000 is perhaps conservative given the condition of the property on inspection. A contribution of £15,000 in a year towards such costs does is not excessive.

43. Accountancy fee (£998.75). This is not disputed.

44. Administration and management (£7,237.51) Ms Williams objected to two aspects of the management fees. First, she submitted that it was not reasonable to allow a 15% management fee to be imposed on contributions to the reserve fund. In effect, the lessees paid fees on the same sums twice – once when the moneys were transferred to the reserve fund, and a second time once the sums in the reserve fund were expended on repairs.

45. Secondly, Ms Williams referred to a document recently produced by the landlord for the 2008 service charge year headed "summary or work and expense". This included a large number of individual items of administration which were plainly not recoverable under the terms of the lease – such as phone charges and "office services". Paragraph 15 of Schedule 4 allowed a 15% charge to be made on other heads of expenditure – and it was not permissible to charge these administration costs as well. Ms Williams accepted there was no similar schedule for 2007.

46. Mr Bishop rejected the contention that it was unreasonable to charge a management fee on the contribution to the reserve fund. The administration of a reserve fund required management time and the lease fixed the remuneration for this. Although in some instances, a management fee based on a percentage of expenditure would reward the landlord for doing little work, such a fee structure would also under pay him on other occasions. As Mr Bishop put it the landlord "wins some and loses some".

47. As far as the first objection is concerned, the 15% management fee on the reserve fund contribution amounts to the single largest element of the management fees (£2,250). On balance, the Tribunal considers that such a cost is reasonably incurred for the reasons given by Mr Bishop. Such percentage fees are now discouraged by the RICS Residential Service Charge Code of Practice but that is the fee fixed by the lease in this instance. Such a percentage fee is bound to reward the landlord with generous remuneration on some items and inadequate remuneration on other items. There is also work involved in maintaining the reserve fund and considering such matters as the statutory trust which applies. The cost is not therefore unreasonably incurred.

48. As to the second objection, the administration and management costs of £7,237.51 in the 2007 accounts exceed 15% of the other relevant costs. It therefore appears that some other items were included in the figure for administration and management. Paragraph 15 of Schedule 4 of the lease limits these fees to 15% of other relevant costs. Since the Tribunal has allowed £32,584.10 for these other relevant costs (see above), it follows that £4,887.62 should be given for the relevant costs of administration and management.

49. The total relevant costs for administration and management in 2007 are therefore £37,471.72.

2008 SERVICE CHARGES

50. As stated above, the estimated relevant costs for 2008 amounted to £38,050.

51. The landlord stated that he had based the estimated 2008 charges on the actual expenditure in 2007 and that he had done so with the help of his accountants. This was not challenged by the lessee.

52. The process adopted by the landlord is an entirely unobjectionable one and is in accordance with the terms of the lease. Furthermore, the sums calculated on account of service charges in 2008 are not obviously excessive. They were close to the figure we have found as being reasonably incurred in 2007. The 2008 accounts have not as yet been certified and it may well be that issues of whether those costs have been reasonably incurred will arise at that stage.

APPORTIONMENT

53. The service charge accounts and estimated expenditure relate to the whole of the landlord's freehold property, which include the main building, the secondary building and the courtyard which together comprised 21 flats. The tenant objects to paying 7.3% of the relevant costs incurred by the landlord in relation to all these parts. He argues he is only liable to pay 7.3% of expenditure in relation to the main building comprising 12 flats.

54. At the outset, Ms Williams suggested that it was open to the tribunal to vary the service charge percentage under Part IV of the Landlord and Tenant Act 1987. However, she accepted that no separate application had been made in this respect. Ms Williams therefore fell back on a second argument that the relevant costs for the secondary building were not contractually recoverable under the terms of the lease and that it was necessary to apportion the amount claimed by the landlord before applying the percentage of 7.3% in the lease of flat 5.

55. This argument was put in the following way. Ms Williams contended that the service charge was payable as the specified fraction (7.3%) of *"costs expenses outgoings and matters"* set out in Part I of the Fourth Schedule to the lease: see clauses 2(i) and 5(iii). Part I of the Fourth Schedule referred throughout to costs etc in relation to *"the building"*. The issue was therefore what *"the building"* in fact meant. The reference to the title number K598259 in the recital to the lease did not define *"the building"* since this has since been replaced by the newer title number K757267. However, the recital refers to *"the building of which the flat forms part"* which at the time of grant included no more than 12 flats.

56. Mr Bishop agreed that the issue was the meaning of the words "the building" in the lease: see paragraphs (5) (6) and (7) of the respondent's further written submissions. He contended that factually the two parts of the property were joined by Flats 14A and 25 so that both the main building and the secondary building in fact formed one contiguous building. Furthermore, the wording of recital refers to *"the building of which the flat herein forms part..."*. His written further submissions gave details of other leases. Flats 1-12 used similar phraseology to the subject lease. Flats 14, 15 and 20 refer to *"7 flats known as numbers 14-20"*, Flats 14A, 17, 18 refer to *"20 flats known as numbers 1-10"*, 16 and 19 refer to *"5 flats known as numbers 16-20."* The lease of Flat A refers to *"12 flats known as numbers 1-12"*. *"The Mews"* meant the secondary building as opposed to the main building. Although there were constant references to *"the Mews"* in the lease this was just laziness or inadvertence on the part of the draftsman – since some of the flats were manifestly in the main building. Mr Bishop therefore submitted that *"the building"* in Schedule 4 meant both

parts containing all 21 flats. The percentage of 7.3% was unhelpful since this percentage was not one twelfth of the total.

57. The Tribunal was referred to correspondence passing between the parties. In particular, there is a letter dated 24 November 2008 where the landlord admitted that that the lease provided for the applicant to pay 7.3% of expenditure on the block of 12 flats. The landlord had also offered to enter into a deed of variation to reduce the percentage to 3%, but asked the applicant to pay £4,000 for this deed of variation. Other lessees in the building had accepted similar proposals – and it is clear from the schedule attached to the 2007 service charge statement that six lessees have had their contributions reduced to only 1%. Notwithstanding this, the total percentage of relevant costs which it sought to recover or lessees in 2007 was 107.8% of his actual expenditure. When cross examined about the letter dated 24 November 2008, the respondent stated that the percentage of 7.3% was now "*outdated*".

58. As far as the meaning of "*the building*" is concerned, the Tribunal prefers Ms Williams submissions for the following reasons:

    (a) The first recital refers to two matters. Firstly, "*the Mews*", which is defined as "*the Freehold property comprised in [title no. K598259] known as The Fountain Hotel Bluetown Sheerness consisting of 12 flats known as numbers 1 to 12*". Secondly, it defines the building as "*the building of which the flat herein demised forms part*." The draftsman therefore goes to some length to distinguish between the "*Mews*" (which comprises the whole of the landlord's freehold title including both the main building and the secondary building) and "*the building*" (which plainly comprises a subsidiary part of "*the Mews*"). The only likely candidate for "*the building*" is the main building which at the time of the lease included flats 1-12. We reject the suggestion that this distinction was included by inadvertence or laziness on the part of the draftsman.

    (b) This distinction is preserved by Part I of the Fourth Schedule. The majority of the recoverable relevant costs specifically relate to "*the building*": see paras 1(a), 1(b), 1(c), 2, 3 and 4. However, some recoverable relevant costs refer to "*the Mews*": see paras 5, 6, 7, 8, 10, 11 and 12.

(c) The Tribunal rejects the landlord's argument that "*the Mews*" means only the secondary building. The draftsman plainly applies this label to the whole of the landlord's freehold title comprised in title no.K598259 which includes the main building, the secondary building and the courtyard.

(d) The recital to the lease makes it plain that at the date of demise there were 12 flats in the building.

(e) Similar wording is contained in the extracts from the original wording of the leases of all 12 flats in the main building (as helpfully explained by Mr Bishop). By contrast, the flats in the secondary building use different wording.

(f) It can be presumed that the draftsman intended that the landlord ought not be entitled to recover over 100% of his total expenditure. Even with the reduction of percentage contributions in respect of six flats resulting from deeds of variation, the landlord is still entitled to 107.85% of total outlay on services to the property. This is unlikely to have been the intention of the draftsman. The explanation for this absurdity is not that the lease percentages are "*outdated*" - as suggested by the landlord. It is rather that the leases of flats 1-12 were intended to require the lessees to contribute towards the costs of the main building alone. It is probable that the original percentages of these twelve flats amounted to 100% - but regrettably there is no evidence before the Tribunal on this point.

(g) Another minor matter which points in this direction is the lease plan. This shows the area of the main part of the property edged in red. The habendum at clause 1 suggests the marking gives the area of the demise – but that cannot be the case since Flat 5 is much smaller than the area outlined in red. The most likely explanation is that the draftsman wished to show the extent of "*the building*" when he made the markings. That was the main building containing the 12 flats.

59. It follows that where the landlord is entitled to recover relevant costs for "*the building*", those costs may only relate to the main building containing the original 12 flats. Since a proportion of the relevant costs in the service charge accounts relate to the secondary building, these costs should be apportioned to remove this expenditure.

60. It is unlikely that it would be possible to identify with any degree of precision the amount of the relevant costs which are properly attributable to the main building and what is attributable to the secondary building. The Tribunal adopts the most obvious way of doing this, by allocating 12/20 or 60% of relevant costs to the main building and allocating 40% of the relevant costs to the secondary building.

61. It follows that the Tribunal allows relevant costs of £22,483.03 (£37,471.72 x 60%) for the 2007 service charge year and £22,830 (£38,050 x 60%) for interim charges in 2008. The tenant is therefore liable for 7.3% of these relevant costs, namely £1,641.26 in 2007 and £1,666.59 in 2008.

s.20C APPLICATION

62. The applicant sought an order that the landlord's costs in connection with the application should not be added to the service charges under s.20C of the Landlord and Tenant Act 1985. Ms Williams submitted that the landlord had wholly failed to comply with previous directions and had not included most of the vouchers and receipts for the relevant costs. The bundle was deficient and was sent late. The service charge costs had been calculated on a wholly erroneous basis.

63. The respondent accepted that the bundle was deficient and that basic documents were missing. However, the tenant had brought the application and the landlord had acted quite properly in incurring professional costs to resist the application. The applicant's request for information had become increasingly demanding. Mr Bishop referred to correspondence about these requests.

64. Having regard to the guidance given by the Lands Tribunal in ***Tenants of Langford Court v Doren*** LRX/37/2000 the Tribunal considers it just and equitable to make an order under s.20C of LTA 1985. The applicants have succeeded in relation to the most significant issue, namely the apportionment. The landlord has sought to levy charges which appear to result in more than 100% recovery of relevant costs and maintained before the Tribunal that this was the intention of the draftsman of the lease. Furthermore, there has been a clear breach of the directions in the failure to disclose

almost any basic documents evidencing the costs. It would not be fair and just to allow it to recover costs in connection with the application from the lessee in these circumstances.

CONCLUSIONS

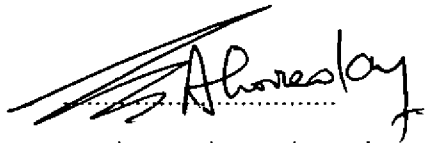
65. Ms Williams was initially involved in the matter through the College of Law's Tribunal Representation Service scheme, but she had ceased to be a student at the College before the hearing took place. She was therefore under no obligation to continue to act for the tenant but nevertheless represented Mr Viegas at the hearing *pro bono*. The Tribunal would like to express its appreciation to Ms Williams for acting in these circumstances, and for her helpful submissions.

66. The Tribunal's decision is therefore:

    (a) The applicant is liable to pay a service charge of £1,641.26 for the 2007 service charge year.

    (b) The applicant is liable to pay interim service charges of £1,666.59 for the 2008 service charge year.

    (c) The Tribunal determines under section 20C of LTA 1985 that no part of the landlord's relevant costs incurred in the application shall be added to the service charges.



Mark Loveday BA(Hons) MCIArb
Chairman
18 August 2009