2826

Ref: LON/00AP/LIS/2006/0091

LEASEHOLD VALUATION TRIBUNAL

LONDON RENT ASSESSMENT PANEL

DETERMINATION

OF ISSUES UNDER SECTIONS 27A & 20C OF LANDLORD AND TENANT ACT 1985

AND RE SECTION 94 OF COMMONHOLD AND LEASEHOLD REFORM ACT 2002

PREMISES: BARRINGTON COURT, COLNEY HATCH LANE, LONDON N10 1QG

Applicants:	BCL (RTM) Company Ltd Ms Julia Machin of Flat 90 & listed Tenants of 59 other Flats at the Premises
Representative	Mr Norman Joss of Counsel with Ms M Ward of Macrory Ward Solicitors
Respondent:	Barrington Court Developments Ltd, as Landlord
Representative	Mr Stan Gallagher of Counsel with Mr T Mukashi of Cramer Pelmont Solicitors and Mr George Georgallis, a Director of the Respondent Company
Hearing:	11& 12 October 2006
Tribunal:	Professor J T Farrand QC LLD FCIArb Solicitor Mr C White FRICS Mr E Goss

1. The Application to the Tribunal made under s.27A of the 1985 Act, dated 26 June 2006, sought a determination in relation to service charges paid in the years 2000 - 2004. Essentially it was alleged that the Respondent had unreasonably overcharged Lessees a total of £293,663 in respect of four matters and required (re)payment of that sum to the Applicant Company under s.94 of the 2002 Act.

2. The Applicant is a 'Right to Manage' Company constituted by Lessees with legal effect as from 8 September 2004. The listed Tenants of 60 Flats were named as supporting the Application without, apparently, intending to be formally joined as Applicants. Two specimen Leases were supplied to the Tribunal: one of Flat 35 dated 9 December 1936 and one of Flat 95 dated 25 April 1991, each being granted in consideration of a premium, ground rents and covenants for a term of 99 years. It was accepted that all Leases are substantially similar and that the wording of their relevant service charge provisions, referred to below, does not differ in any material respect.

3. The Respondent Company became the freeholder of the Premises as well as the Landlord in 1992 and currently retains those capacities. The Premises consist of a 1930s development comprising 102 flats a six storey linked blocks. In the Application, the name of Mr George Georgallis was added, although in brackets, as a Respondent. This was because, throughout the period in issue, he was not only the Director of the Respondent with responsibility for managing the Premises but also purported to have acted as a managing agent appointed by the Respondent as well also as the Respondent's solicitor.

4. A previous application made by the Barrington Court Residents Association under the 1985 Act concerning service charges in respect of the Premises during the period 1992-1999 has been the subject of a Determination by another Leasehold Valuation Tribunal (dated 31 October 2000; LVT/SC/021/053/99). This Determination was referred to by both sides in the present proceedings and a copy was available for consideration by the Tribunal.

5. The Tribunal understands that participating Lessees had initiated collective enfranchisement proceedings by a notice of claim dated 27 May 2003 leading to an application to court for a vesting order under s.24 of the Leasehold Reform, Housing and Urban Development Act 1993. Such an order, to be effective, involves payment into court of "the appropriate sum" determined by a Leasehold Valuation Tribunal (see para.2 of Schedule 5 to the 1993 Act). This sum comprises the enfranchisement price payable plus any amounts (eg service charges) then due to a freeholder from any tenants (see para.3 of Schedule 5). Ordinarily, therefore, an application for a determination under the provisions of the 1993 Act, instead of the 1985 Act, might have been advisable. However, where overpayments by tenants are alleged, so that no amounts would be due to a freeholder, it is anticipated that a Tribunal making a determination of the appropriate sum under the 1993 Act should be able to set off against the enfranchisement price any amounts due to any tenants from the freeholder. Nevertheless, the statutory provisions are not explicit in this respect and the question does not have to be decided by the present Tribunal.

6. At the Hearing, only four aspects of the service charges were in issue: management fees; legal costs; a lift consultancy fee; and entry phone rental. These will be considered separately.

Management Fees

7. In the specimen Leases, the Lessees covenant to pay Maintenance Contributions to the Lessor in Clause 4, the Lessor covenants to perform specified services, not mentioning management, in Clause 6 and the computation of the charge is stated in Part I of the Fourth Schedule. Part II of that Schedule is headed "Expenses incurred by Lessor to be re-imbursed by Maintenance Contribution" and the first two paragraphs are as follows:

- "the performance by the Lessor of its obligations under Clause 6 of this Lease
- "the employment and remuneration of a Surveyor or Estate Agent to manage the Lessor's Property and to carry out such other duties as may from time to time be assigned to him by the Lessor or are otherwise imposed on him by the provisions of this Lease"

In addition, the sixth paragraph of Part II of the Fourth Schedule adds:

- "all legal and other costs incurred by the Lessor (a) in the running and management of the Building ..."

8. According to his oral evidence at the Hearing, Mr Georgallis was paid an annual salary of £10,000 as the Director with a management role. His wife, as the other Director and also Secretary of the Respondent Company was paid the same annual salary but there was no evidence or suggestion that she undertook any part in the management of the Premises. However, those payments of £10,000 to him, although shown in the Respondent Company's accounts, were not included in any service charge accounts relating to the period in issue. Instead, those accounts included a fee of 10% of other expenditure, except that in the account for 2000-2001 the other expenditure was shown as totalling £217, 716 but the management fee charged was not 10% but £31,639. In every year the fee charged substantially exceeded £10,000 (except for the final part year, 31 March to 10 September 2004, when it was £4,969), the total actually charged being £159,517.

9. In his evidence, Mr Georgallis referred to the LVT Determination in 2000 in which, as to management fees 1991-1999, it had simply been stated (page 20):

> "The parties had agreed that these costs should be 10% of the costs which the Tribunal decides are recoverable."

He confirmed that he "had not deviated from the Tribunals finding" (Witness Statement para.16). In support, Mr Gallagher did not argue that a binding agreement or estoppel existed for future fees but submitted that, in reliance on the 2000 agreement and the absence of apparent challenge, it was reasonable for the Respondent to make a management charge of 10% of other expenditure.

10. Mr Georgallis conceded that he was not a Surveyor but asserted that, although he had primarily been a conveyancing solicitor, he had also been an Estate Agent, by virtue of managing various properties, and that the Respondent had employed him as its managing agent within the terms of the Lease.

11. The Tribunal did not accept that Mr Georgallis could properly be regarded as an Estate Agent within the ordinary understanding of that expression or as used in the Leases. It may be relevant although not decisive to read the Terms of Reference of the Ombudsman for Estate Agents which include the following:

> "Estate Agency Work" means any things done by any person in the course of a business (including a business in which he is employed) pursuant to instructions received from a Consumer (the "client") who wishes to sell or purchase any residential property in the United Kingdom:
>
> - for the purpose of, or with a view to, effecting the introduction to the client of a third person who wishes to purchase or, as the case may be, sell such residential property; and
> - after such an introduction has been effected in the course of that business, for the purpose of securing the sale or, as the case may be, the purchase of that property;"

There was no evidence that Mr Georgallis undertook any such work on behalf of the Respondent or anyone else.

12. Further, however, there was no evidence that Mr Georgallis had ever been employed by the Respondent otherwise than as a Director of the Company with a management role. He accepted that no written contract appointing him as its managing agent existed, despite RICS recommendations, and no Company minutes or resolutions as to giving him this capacity were produced. None of the numerous letters, invoices and estimates supplied with the papers was addressed to him or replied to by him otherwise than as a Director of the Respondent Company. Nor was any cogent evidence adduced that the Respondent had ever made any payments of fees to him on the basis of 10% of other expenditure. Indeed, when Mr Joss, cross-examining for the Applicant, put it to him that, since the Respondent only paid him £10,000 per year, this percentage charging basis had resulted in an overall profit for the Company, he agreed without hesitation, observing: "there's nothing wrong with profit".

13. It follows, in the Tribunal's judgment, that the management fees calculated and charged on the 10% of other expenditure basis cannot be regarded as costs which have been "reasonably incurred" so as to be payable by Lessees as service charges within s.19(1)(a) of the 1985 Act. In fact, no costs at all have been incurred on that basis. Despite Mr Georgallis's observation that profits are allowable, this is not the accepted view. The following passage from the leading textbook *Woodfall's Law of Landlord and Tenant* (para.7.175) is instructive:

> "**Profit not allowed**
>
> The general purpose of a service charge clause is to enable the landlord to recoup the cost of services supplied. It is thought that, in the absence of

> a special context or clear words, service charge provisions will not be construed as entitling the landlord to recover a profit element over and above the costs actually incurred in providing services. In one case, provisions for the recovery from tenants of the increased cost of fuel for central heating were construed as entitling the landlord to recover only the actual cost of fuel supplied."

The case referred to had also been cited to the Tribunal: *Jollybird v Fairzone* [1990] 2 E.G.L.R. 55, where the Court of Appeal made its decision after construing the particular words used in a lease rather than by reference to any general principle relating to profit. However, not only does that principle seem implicit in the judgment of Lord Justice Slade but also there are no words in the present Leases which could conceivably entitle a landlord to profit from management fees.

14. On the face of it, this finding means that the total sum of £159,517 has been overcharged by and overpaid to the Respondent. However, it has not been disputed that the Respondent has paid £10,000 a year to the Respondent for performing his role as Director in charge of the management of the Premises. The period during which he undertook the running and management of the Premises, not in the capacity of a separately appointed managing agent but as an employee of the Respondent, lasted effectively 5½ years. Accordingly, the Tribunal considers that that the Respondent would have been entitled to include a total of £55,000 in the service charge accounts as costs it had incurred in management. In the result, this means that the overpayment of service charges in respect of management fees is reduced to **£104,517**.

15. This conclusion renders it unnecessary for the Tribunal to consider whether, had Mr Georgallis genuinely been appointed as a managing agent with a contract entitling him to charge fees on the basis of 10% of other expenditure, these costs would have been reasonably incurred by the Respondent. Mr Eric F Shapiro had submitted a Report and given oral evidence at the instance of the Applicant in which he concluded persuasively that a realistic standard management fee would be at the rate of £200 per flat as at 2006 rates (inclusive of VAT) but with an additional supervision fee for major works at 10% of their cost unless a surveyor or architect had supervised them. Making appropriate adjustments, Mr Shapiro had calculated the total overcharge of management fees at £40,722. The Tribunal might have been prepared to accept this calculation, derived from a Report which had not been countered by any expert evidence brought by the Respondent. Nevertheless, on the Tribunal's findings about Mr Georgallis's actual capacity, it would merely represent the answer to a hypothetical question.

Legal Costs

16. It is not disputed that legal costs incurred by the Respondent as Landlord in the management of the Premises are recoverable from Lessees as service charges (or Maintenance Contributions) under the relevant provisions of the Leases (see para.7 above). This view was also taken in the LVT Determination in 2000 (page 17) and has not been challenged. For the Applicant it has been stated that: "The real issue is whether the costs claimed are reasonable in amount" (Written Closing Submissions).

17. The legal costs claimed in the service charge accounts for 'Legal and professional' expenses were £24,613 (including accountants' fee of £1,410) for 1999-

2000 and £88,331 (including accountant's fee of £1,762) for 2000-2001. Accountant's fees alone were charged in subsequent years but these have not been challenged. Thus the total amount in issue under this head of legal costs should total £109,772 (ie excluding accountant's fees). This is, indeed, the figure/amount challenged in the Application to the Tribunal.

18. In his Witness Statement, Mr Georgallis explained that the costs related to two previous service charge cases, one in 1999 (LVT/SC/021/100/98) and the other, already referred to, in 2000. In neither of these cases had an order been made (under s.20C of the 1985 Act) precluding the recovery of the costs of the proceedings as service charges, although an application for such an order had been made in the 2000 case. What were described as Bills of Costs in respect of each case were exhibited with the Witness Statement.

19. In relation to the 1999 case, Mr Georgallis stated: "Part of the costs of £2,211.94 related to an application by the Barrington Court Residents Association for an appointment of a manager, which was withdrawn, and the balance was in relation to the application under Section 19 of LTA 1985" (para.4 of his Witness Statement).

20. In relation to the 2000 case, Mr Georgallis pointed out that service charges exceeding £600,000 had been challenged and that "the total amount of £57,016.34 was deducted, of which £28,540.00 was deducted by ourselves further to an extensive re-examination of the accounts going back eight years" (para.6).

21. Generally, Mr Georgallis made the following observations (para.14 of his Witness Statement):

> "At the time I was mostly a conveyancing solicitor, and throughout these matters I had a litigation solicitor acting. There was an advantage in my firm acting for the company, as being the managing agent I was more informed in relation to the matters concerning Barrington Court Management, and in this way the time costs element expended in instructing another firm of solicitors to act, were kept to a minimum. Further the legal costs would have been at least the same if not higher if another firm of solicitors acted. As I stated above throughout 1999 to 2004 the only legal fees charged to the service charges were in respect of those two cases. Countless of letters in relation to claiming service charges involving hundreds if not thousands of hours work, which could have been charged to the service charges, but were not, and in this manner a substantial saving was obtained. In the current situation where a different firm of solicitors is instructed by the residents in the event of claiming service charges, the costs that are not recoverable from other sources would normally be chargeable to the service charges."

22. These observations were accepted as helpful by the Tribunal even though - or particularly since - Mr Georgallis could be regarded as acting throughout, not as a managing agent, but as the Director of the client Company in charge of management of the Premises. Accordingly, the Tribunal has examined the exhibited 'Bills of Costs' in

the light of this evidence from his Witness Statement. However, certain difficulties were encountered.

23. The Exhibit (GG 1) in relation to the 1999 costs begins with a statement as to legal and professional costs for the period 1 April 1999 to 31 March 2000 which incidentally demonstrates that the sum of £24,613 included in the accounts for that year had involved double charging of the accountants' fee of £1,410. Since the fee was charged for examining the 2000 service charge accounts, this error must undermine confidence in those accountants' certificates.

24. Further, what was attached, although it had been described as a "Bill of Costs", was no such thing. Although there was a copy detailed statement, apparently prepared by costs draftsmen (V A Orphanou), detailing work done with amounts charged and disbursements, this undated document was patently not an account which could have been signed and delivered by a solicitor to his client. It was stamped as paid but by whom and when was not indicated.

25. Nevertheless, the amounts shown in that document totalled £19,581.21 (including VAT), which was one of the two sums (other than the accountants' fee) included in the statement of legal and professional costs. It plainly related to the 1999 case and the Tribunal has considered its contents (see below).

26. The remaining sum included in the exhibited statement was the £2,211.94 to which Mr Georgallis had adverted (para.19 above). However, there was no document of any sort, neither a bill of costs nor costs draftsmen's details, exhibited in support of this last sum and no invoices or receipts for disbursements were produced. In this situation, the Tribunal cannot find that this sum had been reasonably incurred and properly charged and, therefore, it as well as the duplicated accountants' fee must be treated as not having been payable as service charges.

27. The costs draftsmen's document stated in the Narrative part that the matter was "very complicated" and of the utmost importance to the client Company (ie the present Respondent which had been the Applicant in 1999) "thereby necessitating to exercise the greatest care by the Senior Solicitor (Principal) and Assistant Solicitor who had conduct of the case throughout". The charging rates were then stated to be:

> "Time charged at £180 per hr
> Letters out at £18 each
> Telephone calls at £18 each
> Travelling and waiting at £100 per hr"

Presumably, Mr Georgallis was the Principal and the only sum attributed to him is £90 for 30 minutes "Preparing and checking the Bill".

28. The Tribunal considers that it was not unreasonable for the Respondent to use Mr Georgallis's firm in respect of the 1999 proceedings and that the employment of an Assistant Solicitor to conduct the case at the rates indicated should be accepted as a reasonable. Further, the Tribunal has considered the total calculated in the costs draftsmen's document, namely £19,581.21, which includes significant disbursements (eg Counsel's fees and expert witness's costs) and concluded that it has not been shown that this amount was incurred unreasonably.

29. Consequently, the only overcharging of service charges found as by the Tribunal as to the 1999 service charge account is the £1,410 accountants' fee double charged and the £2,211.94 not substantiated, which total £3,621.94.

30. The Exhibit (GG 4) in relation to the 2000 costs consists of a similar copy detailed statement, apparently prepared by costs draftsmen (V A Orphanou), detailing work done with amounts charged and disbursements. This document was undated and unsigned. Also it was not stamped as paid. The total costs payable were shown as £86,569 (including VAT but excluding the accountants' fee of £1,762). This sum corresponds with the figures shown in the service charge accounts for 2000-2001.

31. The Narrative part of costs draftsmen's document contained the same words as to the matter being complicated and important "thereby necessitating to exercise the greatest care by the Senior Solicitor (Principal) **("GG")** and Assistant Solicitor **("RF")** *who had conduct of the case throughout*" [italics supplied for emphasis]. The charging rates were then stated to be:

> "**GG** time charged at £225 per hr
> Letters out at £22.50 each
> Telephone calls at £22.50 each
>
> **RF** time charged at £180 per hr
> Letters out at £18 each
> Telephone calls at £18 each

The Tribunal was informed that **"GG"** referred to Mr Georgallis himself.

32. It was seen that, despite Mr Georgallis's evidence that he was mostly a conveyancing solicitor so that he had a litigation solicitor acting throughout, as emphasised in the document's Narrative, charges were included for him at his higher rate for hours matching exactly those of RF. This, if accurate, would have more than doubled the solicitors' costs incurred, in the Tribunal's opinion,both unnecessarily and unreasonably. The Tribunal takes the view that the participation of Mr Georgallis in these proceedings should be regarded as that of an employee attending in the capacity of client: he was, essentially, acting as a Director of the Respondent giving instructions rather than as a solicitor giving advice and representation in the proceedings. Indeed, this had apparently been recognised as the position in relation to the costs of the 1999 case: virtually no charge had been made in respect of participation by Mr Georgallis.

33. The Tribunal has concluded that the amounts attributed by the costs draftsmen to 'GG' (plus VAT and their own 6% fee) should be deleted from the calculation of legal costs for the 2000 case otherwise payable by the Lessees as service charges. The total to be deleted on this basis is £36,569.13.

34. It was also noted that there had ceased to be a lower rate (£100 per hour for RF) charged for travelling and waiting. However, no grounds were presented to the Tribunal on which to find that this aspect was out of line with ordinary practice or resulted in costs being incurred unreasonably.

35. After deducting the amounts attributed to Mr Georgallis from the computation, the legal costs incurred by the Respondent for the 2000 case, including disbursements (eg re Counsel and expert witnesses) would come to a round figure of £50,000. The Tribunal

is sufficiently satisfied that this amount would represent reasonable costs to incur so as to be properly payable by Lessees.

36. In the result, the Tribunal has determined that the amount overcharged as service charges under the head Legal costs is the aggregate of £3,621.94 (see para.29) and £36,569.13 (se para.33), which is effectively **£40,191**.

Lift Consultancy Fee

37. An amount of £12,716 was included on the service charge account for 2003-2004 under the sub-head "Major works expenditure" as paid to FLM Associates. The payees are a firm of Chartered Engineers & Project Managers and their invoice, dated 15 August 2003, had related to lift consultancy services. These services evidently were for a Tender Report for works of repair and replacement of lifts which, it was not disputed, had become necessary. From the evidence of a Dr Andrew Hunt, Corporate Restructuring Professional and partner of Ms Machin, it was understood that the Lessees' objections were to the appointment of FLM Associates without consultation and to payment being made at a time when enfranchisement proceedings had commenced.

38. The Tribunal accepted Mr Gallagher's submission that the statutory consultation requirements had not applied to consultancy contracts at the date of FLM Associates appointment (citing *Marionette v Visible Information Packaging Systems* [2002] EWHC 2546). The Tribunal also noted that the date of their appointment, 29 October 2002, had long pre-dated the initial notice, 27 May 2003, which had begun the enfranchisement. It was also noted that the fee, invoiced in August 2003 (and paid by cheque in November 2003), related to work "completed to date" and was, therefore, only 65% (plus VAT) of the contractual sum.

39. The Tribunal has received no evidence, expert or otherwise, on which it could properly be found that this consultancy fee constituted an unreasonably incurred cost. On the contrary, in the light of the Tribunal's general knowledge and experience, it appeared to be reasonably necessary expenditure. Accordingly, it is not found that any overcharging of service charges occurred under this head.

Entry Phone Rental

40. The service charge accounts for the years in issue (except the final part year) all include an item sub-headed "Hire of equipment" and relating to "Interphone" or "Entryphone". For 1999-2000 the amount was £3,240; for 2000-2001 it was £3,285; for 2001-2002 it was £3,331; for 2002-2003 it was £3,377; for 2003-2004 it was £3,425; but for 2004-2005 (part year) it was nil. The total charge challenged under this head should come to £16,658. Curiously, however, the figure challenged was put at £11,658 in the Application, which appears to be an error.

41. The 2000 Determination had also considered charges made under this head for the years 1995-1999. The Tribunal recorded in its Determination that "an assignment of the hire/rental agreement contract had been successfully negotiated at a cost £1,149.01" before observing (at p.17):

> "Having regard to the age of the equipment, and the likely cost of a new installation, the Tribunal believe that the "rental value" is nominal, and no evidence was given whatsoever of the competence of the present company

to carry out the essential maintenance duties contained in the contract. It also appeared, and certainly no evidence was given to the contrary, that no consultation had taken place with the tenants. It was the view of the Tribunal that the tenants should have been consulted before a new arrangement had been entered into."

Nevertheless, somewhat surprisingly, that Tribunal then concluded:

> "In all the circumstances the Tribunal considered that a reasonable sum for the Entryphone service would be £1,000 p.a for the years 1995/1996/1997/19981 and 1999."

42. No documentary or other evidence has been produced to the present Tribunal which could conceivably justify more than tripling the previous annual cost even if there really had been a change of ownership of the entry phone system, particularly if this transaction had been for a consideration of only £1,149.01. As to this no documents evidencing ownership or leasing of the entry phone system or the contractual position as to the alleged rental entitlement were made available to this Tribunal.

43. In these circumstances, the Tribunal considered that a heavy burden of proof lay on the Respondent to support or even explain the costs charged. In the absence of any reliable evidence from the Respondent, the Tribunal was unable to conclude that the costs charged had actually been incurred, never mind reasonably incurred.

44. Mr Gallagher for the Respondent seemed to submit that inclusion of the sums in question in certified accounts was conclusive that they had been paid. He cited commentary in *Woodfall* (at para.7.180) in support. However, that commentary concludes: "A certificate cannot be made conclusive in relation to the matters covered by s.19 of the Landlord and Tenant Act 1985." This is such a matter. Further, as he will appreciate, the ordinary practice is for invoices and/or receipts to be produced to Tribunals in order to prove actual payment of disputed costs. The present Tribunal has seen no such proof.

45. In the result, therefore, the Tribunal finds that there has been overcharging by the Respondent under this head in the period in issue of an overall amount totalling **£16,658.**

Overcharged Service Charges

46. The Tribunal has determined that the following amounts were not reasonably incurred or for other reasons not properly payable by Lessees as service charges in the years 2000-2004:

Management Fees -	£104,517
Legal Costs -	40,191
Entry Phone Rental -	16,658
	£161,366

47. These amounts have been included in payments of service charges already made and repayment is sought. It was not suggested by Mr Joss that the Tribunal had any power to direct repayment to Lessees. Instead, the contention was that payment of the overcharged sum should be made to the Applicant 'Right to Manage' Company as

"accrued uncommitted service charges" within s.94 of the 2002 Act, which imposes a duty as to such payments.

48. By way of definition, it is provided that (s.90(2)):

> "The amount of any accrued uncommitted service charges is the aggregate of-
>
> > (a) any sums which have been paid to the person by way of service charges in respect of the premises, and
> >
> > (b) any investments which represent such sums (and any income which has accrued on them),
>
> less so much (if any) of that amount as is required to meet the costs incurred before the acquisition date in connection with the matters for which the service charges were payable."

49. Under s.90 of the 2002 Act the amount of any payment to be made may be determined by a Leasehold Valuation Tribunal, although no power is conferred on a Tribunal to direct or enforce payment.

50. Mr Joss's essential argument was as follows (Closing Submissions dated 25 October 2006):

> "It is submitted that amounts paid as a service charge which is subsequently found not to be recoverable should be treated in exactly the same way as any other amounts of advance or interim service charge paid to landlord which is subsequently found to have been overpaid and repayable to the lessees, i.e. under the annual accounting provisions in a lease (such as in paragraph 5 of Part 1 of the Fourth Schedule to the Barrington Court leases)."

51. Persuasive though this argument appeared, the Tribunal prefers Mr Gallagher's opposing position (Closing Reply dated 7 November 2006):

> "If it is correct (as the Applicants contend) that any overpayments (resultant upon the Tribunal disallowing sums that have been charged and paid) are recoverable by the lessees [or the former lessees who made the overpayment] - that is a compelling reason why the sums should not be paid over to the RTM Company - on what basis does the RTM Company operate as trustee or collection agent for the current and former leaseholders? Similarly, if the payments were (when paid and prior to being declared not properly due and payable) not in fact recoverable, that does not convert the payments into 'uncommitted service charges', rather, it would convert these sums from being service charges at all.
>
> If there have been overpayments then, subject to equitable defences, the remedy is for the overpaying party to seek restitution (in the Civil Courts), not for the RTM Company by an ingenious, though it is submitted, wrong argument, to stake a claim to the overpayments. Rightly or wrongly, Parliament has not given the LVT jurisdiction to entertain

restitutionary claims. To use section 94 as the basis to garner such jurisdiction by a side wind (at best) cannot reflect Parliament's intention."

52. Accordingly, the Tribunal confirms that it has only determined that the sum of £161,658 was not payable by Lessees as service charges (ie under s.27A of the 1985 Act) and that it has not determined that such sum is the amount of accrued uncommitted service charges (ie for the purposes of s.94 of the 2002 Act).

Section 20C Order

53. In the original Application, the Lessees indicated that they wished to make a s.20C application for an order, in effect, preventing the Respondent from including its costs of the proceedings as a service charge because this would not be just and equitable in the circumstances. However, no submissions have been received by the Tribunal from either side as to this aspect and the reasons shortly stated in the Application are not regarded as sufficient in themselves to justify such an order.

54. Accordingly, no order is made. Nevertheless, it should be understood that that any such costs which are included as future service charges may again be challenged as not having been reasonably incurred.

CHAIRMAN

DATE **22 November 2006**