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LON/00BK/LIS/2005/0064

Decision of the Leasehold Valuation Tribunal on application under s.27A and s.20C of the Landlord and Tenant Act 1985 (as amended)

Applicant:	Chesterfield Properties Ltd/Graystone Property Services Ltd
Respondent:	Mr Richard Howell
Re:	Flat 33, Eaton House, 39-40 Upper Grosvenor Street, W1K 2NG
Hearing Date:	1st, 2nd and 30th November, 2005
Appearances:	Applicant: Miss S Brown of Counsel instructed by Blount Petre Kramer She called: Mr C.J. Knighton (Graystone) Mr P.T Knighton (Graystone) Mr E.L. Gradosielski (Maracom) Mr J. Marshall, FCA (JM Associates) Mr M.R.Brown (Cluttons) Respondent: Mr S. Unsdorfer Parkgate Aspen Ltd Property Managers

Members of the Leasehold Valuation Tribunal: Mrs J. McGrandle B.Sc.MRICS MRTPI
Mrs H. Bowers B Sc (Econ) MSc MRICS
Mr D. Wilson JP

Date of decision: 26th January 2006

Ref: LON/00BK/LIS/2005/0064

The Tribunal's Decision

1.0 Preliminary

1.1. On 13th June 2005 Graystone Property Services Ltd ("Graystone") as agents for the head-lessees, Chesterfield Properties Ltd ("Chesterfield"), applied to the Leasehold Valuation Tribunal for a determination as to the reasonableness of certain service charges.

1.2. The Tribunal issued directions on 6th July 2005 following a pre-trial review ("PTR") at which both parties were present. Apart from the application for determination as to reasonableness under s.27A of the Landlord and Tenant Act 1985 ("the Act") there was at the PTR a cross-application by the respondent under s.20C of the Act to limit the landlord's costs in the proceedings. At the hearing the applicant further sought from the Tribunal an order as to costs and asked that Chesterfield be joined as joint applicants.

2.0 The Law

2.1 s. 27A of the Act states:

"27A Liability to pay service charges: jurisdiction

(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to:
(c) the amount which is payable.

(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to:
(c) the amount which would be payable.

2.2 In determining "the amount", s 19 of the Act states:

" (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period a) only to the extent that they are reasonably incurred, and b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard; and the amount payable shall be limited accordingly "

2.3 The relevant parts of s.20C of the Act state:

"(1) A tenant may make an application for an order that all or any of the costs incurred by the landlord in connection with proceedings before a leasehold valuation

tribunal ... are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant ..."

2.4 Under Schedule 12 to the Commonhold and Leasehold Reform Act 2002 the Tribunal have power to require a party to proceedings, in circumstances where that party has acted unreasonably, to pay the costs incurred by another party up to a limit of £500.

2.5 Under para. 9 of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003 the Tribunal have power to require any party to the proceedings to reimburse any other party to the proceedings the whole or part of any fees paid by that party.

3.0. Lease

3.1. Chesterfield hold a head leasehold interest from the freeholders, Grosvenor Estate, which was acquired in 1995. This interest includes not only the subject block of flats, Eaton House, but extends southwards to Reeves Mews to include a further block of flats, Reeves House, under which is a garage that extends to part of the basement of Eaton House.

3.2. All flats in Eaton House are held on leases entered into in 1970 or later for a term of 65.5 years from 1969 with rising ground rents; one flat has extended its term. There are comprehensive service charge provisions. Mr Howell, the respondent, has an under-lease of Flat 33, Eaton House, which he acquired in 2003. A photocopy of the counterpart lease as executed by the tenant in 1970 was included in the bundle (p.1).

3.3 Cl. A of the lease defines the "premises" as

"all that block of flats known as Eaton House ... "

The parts of the flat both demised, and specifically excluded, under that lease are described in Cl B1 and illustrated by coloured plan. Under Cl.B1(2) the lessee is to contribute 3.61% of

"the expenses and outgoings ... reasonably and properly incurred by the Lessor in the repair, maintenance and renewal of the premises and those parts of the flat specifically excluded from this demise ... and the provisions of services therein and the other heads of expenditure set out in the Third Schedule hereto ... "

3.4 Cl 2 (ii) states:

"(ii) That the Lessee will pay all existing and future rates taxes duties assessments charges impositions and outgoings whatsoever whether parliamentary parochial local or of any other description which now are or during the said term shall be assessed charged or imposed or payable in respect of the flat or on the Lessor tenant owner or occupier thereof".

3.5 Cl.2 (xiv) states:

"That the lessee will pay to the lessor on demand all costs charges and expenses (including legal costs and surveyors' fees) which may be incurred by the Lessor or otherwise become payable by the Lessor under or in contemplation of any proceedings in respect of the flat under Section 146 or 147 of the Law of Property Act 1925....

3.6. The Third Schedule to the lease is headed

"Lessor's expenses and outgoings and other heads of expenditure in respect of which the lessee is to pay"

and includes:

"(6) All charges assessments and outgoings (if any) payable by the Lessor in respect of all parts of the premises (other than income tax)

(7) The fees of the Lessor or its managing agents for the collection of the rents and service charges of the flats in the premises and for the general management thereof ..."

(12) The cost of taking all steps deemed desirable or expedient by the Lessor for complying with making representations against or otherwise contesting the incidence of the provisions of any legislation or orders or statutory requirements thereunder concerning town planning public health highways streets drainage or other matters relating or alleged to relate tot eh said building for which the lessee is not directly liable hereunder "

3.7. Reeves House and garage are held on an under-lease from the head lessor, Chesterfield. However, Eaton House and Reeves House are served by a communal boiler which provides the heating and hot water to both blocks of flats. Under a Deed of Variation entered into in 1985 between Graystone as lessor and the lessee of Reeves House the lessee of Reeves House pays

" ...20% of the total cost incurred by the Lessors in respect of fuel for the supply of hot water to and the heating of the whole of the said buildings.... together with 20% of the cost incurred by the Lessors in maintaining the boiler supplying the said hot water and heating..... and in particular... there shall not be included any sums in respect of capital expenditure replacement costs sinking funds or managing agents' fees...."

3.8. In 1990 Graystone obtained a licence from the Grosvenor Estate to convert "existing locker storage accommodation in the basement to an ancillary office."

4.0 Inspection

4.1 The Tribunal inspected Eaton House (" the property") on the morning of the hearing in the company of the applicant. The respondent was not present

4.2. The property is a substantial 1930s block of 28 flats located in the centre of Mayfair and within a short distance of Park Lane. Faced in stone and with a marble-faced entrance with canopy and potted shrubs, it was arranged on basement, ground and seven upper floors, the top two floors of which were recessed in a mansard roof. Internally, the foyer was in art deco style and the common parts, carpeted and heated, had been recently refurbished to a high standard. There was a small porter's desk and telephone in the foyer

and the Tribunal also inspected the roof and saw the rear external staircases. There were two lifts, one passenger and one goods. The basement contained the boiler room, the manager's office and sundry storage lockers. The former contained four boilers, three of which were functioning, one for hot water and two for heating. The manager's office contained three inter-connecting rooms. Here there was very poor natural light, no proper ventilation and heating was via electric power points ie not off the communal boiler. Internal access to the basement offices was via a flight of stairs adjacent to the entrance hall of the block; there was also a secondary external access at the front of the block.

4.3 The Tribunal also visited Reeves Mews and noted Reeves House, a 3-storey and mansard block with a substantial garage at ground and basement level. Reeves House is used as staff accommodation and garaging for Grosvenor House hotel.

5.0. Issues

5.1. The service charge years:

2002/3
2003/4
2004/5
2005/6

and within these years all, some or one of the following items:

Porters' wages
Telephone
Electricity
Boiler repairs
Boiler replacement
Asbestos replacement
Bank charges
Legal fees
Management fees

5.2. A further issue raised by the respondent was that as the applicant occupied basement offices and derived benefits from that occupation in the form of services provided for the whole block, the applicant should make a contribution towards the cost of those services.

6.0 Hearing

1) Background

6.1 The applicant, Graystone, had been managers of the block since 1978 and subsequently occupied offices in the basement from which they managed the block and from which they also ran other companies. In 1995 Chesterfield, which is an associate

company of Graystone and is the joint applicant in this case, acquired the head leasehold interest comprising both Eaton House and Reeves House. In 1985 there was a Deed of Variation executed by Graystone concerning apportionment between Reeves House and Eaton House of the running costs of the communal boilers and it was Graystone who obtained the licence from Grosvenor in 1990 to convert the basement storage to offices.

6.2 Historically the budgets and accounts had always been discussed and agreed with the tenants' representatives, latterly the chairman of the Eaton House Tenants Association ("EHTA") and there had been no disputes. In early 2003 the block began to see changes. The chairmanship of the EHTA changed and a number of flats were gutted and modernised during the year including that of the respondent at No 33. All this made extra demands on management time. It was stated that a number of flats were bought in anticipation of the new enfranchisement provisions open to leaseholders under the Commonhold and Leasehold Reform Act, 2002. It was common ground that the occupation of the block was changing with fewer owner/occupiers and more absentee landlords. The present composition of flats was:

6 let on ASTs
10 owner/occupied as main residence
12 owned by absentee landlords and left vacant. Those owned by absentee landlords, comprising approximately 40% of the block, were left vacant for 8 months of the year, the owners coming to London for the summer months only.

2) Disputed items

6.3. Mr Unsdorfer for the respondent had helpfully produced for the Tribunal at the start of the hearing a Scott schedule setting out all the items in dispute for each of the four service charge years in question. During the hearing the applicant was requested by the Tribunal to produce receipts reconciling all the sums demanded in the service charge accounts. This was done, although in three cases the reconciliation was not complete. The production of the Scott schedule by the respondent and the subsequent reconciliation of the figures by the applicant was of considerable benefit as it resulted in a narrowing of the issues and the Tribunal thanked both parties. The outstanding issues are drawn from a twice revised Scott schedule attached to Mr Unsdorfer's closing submissions and represent on the one hand a clarification of the figures by the applicant and on the other hand a consequential narrowing of the issues by the respondent. The figures including the Tribunal's determination are summarised in Appendix 1; in each case the sum determined is the reasonable cost as reasonably incurred

6 4 Before dealing with each item at issue, it might be appropriate at this point to deal with the question of evidence. As a quasi-judicial tribunal the Tribunal are not bound by the rules of evidence normally applicable in a court of law. The procedure for tribunal hearings under S 27A of the Act is set out in Leasehold Valuation Tribunals (Procedure) (Eng) Regs. 2003. Under Reg 14(7)

"(b) a person appearing before the tribunal may do so either in person or by a representative authorised by him, whether or not that representative is a barrister or a solicitor; and

(c) a person appearing before the tribunal may give evidence on his own behalf, call witnesses, and cross-examine any witnesses called by any other person appearing."

In this particular case, Mr Unsdorfer appeared as the representative or advocate of the respondent, who was not present; he did not in this case set out to give evidence on his own behalf. In admitting evidence the Tribunal must observe the principles of natural justice and any evidence which Mr Unsdorfer might be perceived to have given has been ignored by the Tribunal because this evidence was not open to cross-examination. The Tribunal's main task is to ascertain the facts and then apply the law in order to reach a decision. For the avoidance of doubt the Tribunal have based their decision on 1) the documentation in the trial bundle [1]2) the further documentation submitted at the request of the Tribunal during the hearing 3) answers given by the applicant's witnesses during the hearing either in cross- examination, re-examination or as a result of questioning by the Tribunal 4) the inspection. Further, the Tribunal are in technical terms an "expert" tribunal, that is to say they are not bound to consider only the evidence they hear but can use their own relevant expert knowledge. This should have been a relatively simple case – four service charge years with a number of repeat items in each year - and yet unfortunately there was a considerable amount of documentation which was totally irrelevant to the issue of the reasonableness of the service charges.

a) Porter's Wages

6.5

	Sum demanded £	Sum acceptable £
2002/03	86,715	78,043
2003/04	89,865 + 1,162*	80,879
2004/04	94,223 + 297*	84,801
2005/06	90,247	81,222

6.6. The applicant stated that three porters were now employed at the block, although previously there were four. Twenty-four hour coverage was provided and all porters were trained by the head porter and given job descriptions and contracts. All porters were engaged fully on Eaton House matters. Porterage costs and performance were matters frequently discussed with EHTA. It was stated by the applicant that no porter, apart from sorting the daily post and receiving the occasional first-time visitor, undertook duties concerning Graystone's other companies.

[1] The only other document apart from this was the "made up" lease attached to the respondent's closing submissions

6.7 It was the respondent's case that there should be for each of the four years in question a reduction of 10% in the cost of porterage as the landlord derived benefit from this service.

Decision

6.8. Once the full set of receipts had been produced to Mr Unsdorfer he did not question the reasonableness of the charges per se. While Mr C.Knighton accepted that the porters provided certain services to him, which would include his other business interests, there was no evidence that the extent of those services was other than minimal. Therefore the Tribunal determine that the sums demanded in each of the years are reasonable and reasonably incurred.

b) Telephone

6.9.	Sum Demanded	Sum acceptable
	£	£
2003/04	2,258 less 1,162*	1,910
2004/05	2,888 less 297*	2,005
2005/06	2,888	2,105

* Contra items representing the costs of personal telephone calls

6.10 Telephones were a porter's landline in reception; a pay phone for residents in reception put in some years previously at the tenants' request and mobile phones for porters. Mr P. Knighton stated that because of the modernisation of a number of flats phone calls were excessive in 2003/04 and 2004/05. The cost of all private calls made by porters was recovered.

6.11 It was the applicant's case that the sum demanded was excessive for a block of flats only half occupied. The sum of 2002/03 was acceptable but for the three subsequent years the increase should only be 5% per annum.

Decision

6.12 The Tribunal has examined in particular the bills relating to the payphone in reception. Including the year 2002/03, a year not at issue for this item, these reveal the following trend:

Total	of which cost of calls
£	£

2002/03	512.25	7.38
2003/04	511.13	3.75
2004/05	510.87	0.29

Having looked at the cost of the calls in relation to the cost of providing the payphone, the Tribunal determines that the total cost of the payphone is unreasonable and should be deducted be deducted from the sums charged for the years in question, including the estimated cost for 2005/06. The payphone may have been requested by the tenants at some time in the past but clearly this would have been before the advent of mobile phones. Therefore the Tribunal have deducted the sum of £511 from the sums demanded for each of the years 2003/04, 2004/05, 2005/06 (estimate).

c) Electricity

6.13	Sum demanded £	Sum acceptable £
2002/03	3,100	2,790
2003/04	1,200	1,080
2004/05	1,200	1,080
2005/06	3,425	3,083

6.14 The respondent directed the Tribunal to a number of electricity bills where the applicant was in credit, in one case to the tune of £2,670.61, by virtue of paying by monthly direct debit. He stated that this was a wasteful use of leaseholders' money. He also stated that in the majority of cases the 5% VAT concessionary rate had not been obtained on the bills. Further, there should be a 10% discount off the bills in recognition of the cost attributable to Reeves House of powering the boilers.

6.15 Mr P Knighton advised the Tribunal that the 5% concessionary VAT rate related to consumption and had been obtained where applicable. It was also stated by the applicant that there was no legal basis for apportioning to Reeves House the cost of electricity powering the boilers.

Decision

6.16 A number of the electricity receipts produced did incorporate the 5% concessionary rates and the Tribunal accepts the applicant's explanation. The Tribunal determines that

a deduction of £100 pa for the electricity running costs of the boiler for each of the years in question is reasonable. That a substantial credit was allowed to be built up on so many of the electricity bills is a reflection on management and is dealt with later in this decision.

d) Boiler repairs

6.17	Sum demanded £	Sum acceptable £
2002/03	19,100	17,246
2004/05	10,179	7,884

6.18. Under the terms of the 1985 Deed of Variation (see para. 6.1 earlier) 20% of the cost of boiler repairs, but not capital items relating to the boiler, are chargeable to Reeves House. This deduction is shown in the service charge accounts for Eaton House and the Tribunal have worked on the figures *after* the 20% deduction. The respondent conceded by dropping all objections to routine boiler repairs, the only outstanding issues being 1) a writ for £2,318 for year 2002/03 concerning replacement of waste pipes at two flats and 2) a survey report on the state of the boilers costing £2,869.35 for year 2004/05. In the latter case, the respondent stated that if there had been proper annual maintenance the plant would not have deteriorated and there would have been no need for the report.

Decision

6.19 1) The writ concerned recovery of plumbing costs of work within two flats. This cost had already been acknowledged by the applicant as being recoverable from the tenants concerned. The Tribunal determine that the cost should be disallowed from the service charge account. 2) The boilers were ten years old and although they had been regularly serviced a prudent landlord would call for a comprehensive survey once it became apparent that there was a problem. Therefore the Tribunal allow the cost of the survey report; once again, for the avoidance of doubt, the figures quoted are *after* the Reeves House 20% deduction.

e) Boiler replacement

	Sum demanded £	Sum acceptable £
2004/05	31,596	18,957

6.20Mr Gradosielski of Maracom was called to give evidence on behalf of the applicants, suppplemented by Mr P. Knighton on the chronology. In 1994, to the specification of Ove Arup who were chosen by EHTA or their predecessors, a new boiler system to serve both Eaton House and Reeves House was installed. The system comprised 4 boilers, 1 for hot water and three for heating. No evidence as to its costs was available although an estimate of some £200,000 at today's prices (including fees and VAT) was given at the hearing by Mr Gradosielski.

6.21 Under the terms of the 1985 Deed of Variation the cost of fuel and maintenance was shared between Eaton House and Reeves House in the proportion 80:20. Thus Eaton House bore the whole cost of any capital works to the system and indeed any contribution from Reeves House was specifically excluded from the Deed of Variation.

6 22 Marcom, a highly reputable firm of heating engineers, had maintained the system over the past 10 years under a maintenance contract; certain concerns over the design had been expressed by them at the outset. Boiler section plates had been replaced 5 times over the past 11 years at a cost each time of £1,500 a section.

6.23. In May 2002 Mr P. Knighton alerted the tenants that there would be a need to carry out major repairs to 2 of the 4 boilers during the winter. Nothing appears to have been done, due in some measure to a lack of response from the tenants, until March 2004 when a report was prepared by Maracom in association with KLA. By this time 2 of the 3 heating boilers had been waiting to be repaired for 18 months and the electric immersion heaters had been disconnected during a recent flood. There had, however, been no break in supply.

6.24 The 2004 report identified water treatment shortcomings which could have contributed to a shorter life factor for the plant: faults with the design leading to thermal shock and pressure on the system caused by numerous flat modernisations in the block. Three options were recommended including a system modification @ £34,000 or a replacement system @ £120,000.

6.25. Discussions ensued with EHTA who wished to see only one boiler replaced. In August 2004 a quote was obtained from Maracom and by November 2004 the boilers were all functioning properly

6.26. It was the respondent's case that the cost of the boiler replacement - £31,596 – levied on the leaseholders should be reduced by 25% to reflect lack of maintenance and by a further 20% as a contribution from Reeves House not withstanding the Deed of Variation.

Decision

6.27 There is no legal basis for any contribution from Reeves House towards the cost of boiler replacement The sum of £31,596 was the total of three invoices, two of which totalling £8,405 are deemed by the Tribunal as reasonable and therefore recoverable as

they involved work to rectify design faults arising from the 1994 installation by a firm chosen by the tenants. The final invoice, totalling £23,191, was for the complete replacement of one boiler. The respondent required a 25% reduction on the total cost (ie the £31,596) to reflect landlord's alleged neglect. Some of the problems undoubtedly arose from the extra pressure put on the system by flat modernisations and a more intensive use of heating and plumbing installations within the block. The introduction by the management of untreated water could have been a contributory factor, together with the initial design faults, and undoubtedly the applicant should have been alerted earlier to the need for a survey report once the section plates started to need replacement. The Tribunal have concluded however that on balance there is insufficient justification for any reduction in the sums charged.

f) Asbestos removal

	Sum demanded	Sum acceptable
	£	£
2002/03	8,460	Nil

6.28. In 2002 two flats, Nos 11 and 61, incurred costs for asbestos removal. The cost, invoices for which had been produced, had been charged to the service charge accounts as the leaseholders involved refused to accept liability. The leaseholders were still being pursued/ the views of EHTA were still being sought by the applicant but in three years no writ had been issued.

6.29 Mr Unsdorfer stated that Mr Howell had in 2003 paid for his own asbestos removal (see original Scott schedule) and it was improper that costs attributable to individual leaseholders should be included in the service charges.

Decision

6.30 Irrespective of the respondent's actions, this is work within the demise of individual lessees and not within the definition of common parts in the lease. Indeed, the lessee's liability was accepted by Mr P. Knighton in his statement of case. The Tribunal notes that this matter has now been outstanding for three years but they were informed at the hearing that despite the lapse of time no writ to recover the sum had been issued by the applicant. The sum is disallowed.

g) Bank Charges

	Sum demanded	Sum acceptable
	£	£

2002/03	922	Nil
2003/04	748	Nil
2004/05	691	Nil
2005/06	732	Nil

6.31. The applicant contended that bank charges were recoverable under para. 6 of the Third Schedule to the respondent's lease and under para. 2 of the respondent's lease (p.50 of bundle). Further, bank charges had traditionally been levied as part of the block's service charges and the respondent was therefore estopped from disputing his liability.

6.32. The respondent stated that all bank charges should be disallowed as they were not recoverable under the lease.

Decision

6.33 At risk of repetition, para. (6) of the Third Schedule to the respondent's lease states, under the heading "Lessor's expenses and outgoings and other heads of expenditure in respect of which the lessee is to pay"

> "(6). All charges assessments and outgoings (if any) payable by the Lessor in respect of all parts of the premises (other than income tax)"

while Cl. B1 (2) states that the lessee is to contribute 3.61% of

> "the expenses and outgoings ... reasonably and properly incurred by the Lessor in the repair, maintenance and renewal of the premises and those parts of the flat specifically excluded from this demise... and provisions of services therein and the other heads of expenditure set out in the Third Schedule hereto ... "

6.33 It was stated in the applicant's closing submissions that the respondent's lease falls to be construed contra proferentum (sic). This means that any ambiguity in the lease should be resolved restrictively in favour of the tenant because of the superior bargaining power of the landlord. In practice any obligation on the part of a tenant to contribute to landlord's costs should be in clear and unambiguous terms. Authority for this is given in *Sella House Ltd v Mears* (1989) 12 EG 67..... and in *Gilje v Charlegrove Securitie* (2000) 44 EG148 ..... where in the latter case it was stated:

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

The Tribunal has examined closely the clauses in the lease relied on by the applicant as justification for payment of bank charges but have concluded that there is no clear and unambiguous provision for these charges. They are therefore disallowed for all the years in question. On the question of estoppel, this is an

equitable remedy which is not open to the Leasehold Valuation Tribunal which is a creature of statute. Therefore the Tribunal disallow bank charges for the years in question and these should be deducted from the service charges.

h) Legal fees

	Sum demanded £	Sum acceptable £
2003/04	3,175	Nil
2004/05	1,964	Nil
2005/06	5,000	Nil

6.34 These fees comprised advice on enfranchisement rights under the 2002 Act. The levy for 2005/06 had been agreed with the EHTA. The applicant contended that legal fees were recoverable under Cl.B1(2) of the lease, alternatively under para. 12 of the Third Schedule to the lease and in any event had been incurred at the request of the tenants when contemplating their enhanced rights under new legislation.

6.35 The respondent stated that all legal fees should be disallowed as they were not recoverable under the lease.

Decision

6.36 For reasons given in the earlier para. 6.33 dealing with bank charges and the principle of *contra proferentem* the Tribunal determine that these costs be disallowed as there is no clear and unambiguous provision for them in the lease. Further, these are costs which would not normally be associated with service charges. They are covered under s. 33 of the Leasehold Reform, Housing and Urban Development Act, 1993 which deals with the costs of enfranchisement including the liability of the nominee purchaser for those costs.

Management fees

	Sum demanded £	Sum acceptable £
2002/03	21,865	13,160
2003/04	16,800	13,160
2004/05	17,305	13,160

2005/06	17,823	13,160

6 37 In 1993 a management fee of 12.5% of expenditure had been agreed by the applicant with the then tenants' representative, the previous fee having been 15%. This arrangement, which resulted in a fee of £21,865 for 2002/03, was revised to £600 per flat inclusive of VAT (plus inflation) in May 2003 following a meeting with the chairman of the EHTA, resulting in a fee of £16,800 for 2003/04, index linked for the two subsequent years. The benefits of having on-site management was stressed by the applicant.

6.38 Mr M. Brown of Cluttons was called to give evidence in support of the management fee of £21,865 for 2002/03 (£780 per flat inclusive of VAT). His firm were responsible for managing blocks on the Hyde Park Estate and he produced service charge accounts for two blocks showing fees per flat of £300 + VAT. He stated that this was a concessionary rate applicable to a bulk instruction and he would not expect that rate to apply to a one-off block such as Eaton House. This was a prestige block and he supported the fee as reasonable.

6.39 Mr Unsdorfer for the respondent stated that the management fee should be no more than £500 per flat (+ VAT) for an outside-based agent and only £400 per flat (+ VAT) for the in-house operation run by the applicant. The operation provided amenities and services – uniformed porters – floral displays – water rates – heating from which Graystone benefited either directly or indirectly. It was only right that the cost of management fees to the tenants was offset by a deduction for landlord's use, a common practice elsewhere. Mr Unsdorfer suggested that this discount should be 1/56 of the total service charge costs, to be offset against the fee of £400 per flat (+ VAT). In justification of this offset, Mr Unsdorfer stated that a basement storage room belonging to the respondent had in the past been converted for the use of the applicant as an estate office.

Decision

6 40 Up until 2003 there was a consensual arrangement with the tenants over the management which seemed to work well, one example being the successful completion in 2002 of an internal decorations contract. From the beginning of 2003 the occupation of the block began to change and this put extra demands on the management especially when works were carried out by lessees without permission. When the new lessees began to demand a more commercial approach to the running of the block this should have alerted the applicant to the need for a closer scrutiny of the figures in the service charge accounts. The LVT hearing revealed a number of management shortcomings including the following :

1. A failure to respond to the need for an earlier survey report of the boiler once the section plates started failing

2. A failure to recover costs for asbestos removal from two individual tenants, although the Tribunal appreciate that

one of these tenants was the chairman of the EHTA and the other was a member.

3. A failure to recover costs of a writ in connection with plumbing to two individual flats, again one flat being owned by the chairman of the EHTA.

4. A failure to establish whether provisions in the leases enabled legal fees incurred on behalf of the tenants to be recovered from the service charge accounts

5. A failure to establish whether bank charges incurred as a result of a shortfall in the accounts could be recovered from the service charge accounts

6. A failure to scrutinise the telephone bills to see if savings could be made

7. A failure to scrutinise the electricity bills to see if savings could be made

6.41 Having considered the evidence carefully, the Tribunal have determined that a management fee of £500 + VAT per flat for each of the years in question is reasonable and reasonably incurred. This fee recognises that the applicant enjoys certain services which would normally form part of office overheads.

6.42 Dealing now with Mr Unsdorfer's request for an offset against the fee, the Tribunal were supplied by the applicant in the bundle with a photo-copy of the respondent's counterpart lease as executed by the tenant. The Tribunal consider it appropriate to have regard to the photo-copied counterpart lease rather than a copy of a "made up" lease provided by the respondent with his closing submissions and on that basis the basement storage room was not included in the demise and the tenant was not granted a right to use it. Expressed alternatively, the applicant as head leaseholder has the right to use all that part of the premises not demised to the individual lessees.

6.43 If the respondent considers that the lease fails to identify either the demise or the rights granted with it his remedy is to seek rectification before the courts.

Legal costs

6.44 The applicant stated that the Tribunal should award all the legal costs of the application including the pre-trial review, with interest, as it was entitled to do under para. (6) of the Third Schedule to the respondent's lease and under Cl. 2(ii) of the lease. Further, in support of its application for legal costs, the applicant through its counsel argued that a determination of the service charges was required before forfeiture proceedings could take place. The cost of taking the application to the leasehold

valuation tribunal to secure this determination was, it was argued, permitted under Cl.2(xiv) of the respondent's lease which stated:

> "That the lessee will pay to the lessor on demand all costs charges and expenses (including legal costs and surveyors' fees) which may be incurred by the Lessor or otherwise become payable by the Lessor under or in contemplation of any proceedings in respect of the flat under Section 146 or 147 of the Law of Property Act 1925 ....."

In support of the application for legal costs, the applicant cited *Staghold v Takeda* (2005) PLSCS160 where it was held that para. 10(4) of Schedule 12 to the 2002 Act did not preclude the landlord from recovering legal and other costs as a service charge.

6.45 It was the respondent's case that the lease did not permit the recovery of the applicant's legal costs from the respondent and he referred the Tribunal to *Sella House Ltd v Mears* (1989) 1 EGLR 65 where the Court of Appeal held that there had to be a clear and unambiguous reference in the lease to legal costs in taking action against a defaulting lessee.

Decision

6.46 The Tribunal have looked very carefully at all the clauses in the lease relied on by the applicant and have determined that these costs are not recoverable under the lease because there is no clear and unambiguous provision for them. In coming to this decision, the Tribunal are aware of the need to construe the service charge provisions restrictively or *contra proferentem*.

6.47 In connection with the forfeiture proceedings, the Tribunal determine that any costs incurred or to be incurred here are not a service charge but are costs between the landlord and an individual tenant and are recoverable from that tenant, not the 28 lessees of the block.

s.20C application

6.48 The respondent made a counter-application under s.20C of the Act. A decision by the Tribunal under this provision is only called for where the lease entitles a landlord to put professional fees and expenses incurred in the proceedings through the service charge account. As the Tribunal have determined that the lease does not make such a provision, no decision is called for. However, were the Tribunal to be proved wrong, then they would have determined that the applicant would have been entitled to include in the service charges the following:

Legal costs (solicitor and barrister):	60%
Professional witnesses:	
Mr Marshall (accountant)	100%
Mr Gradosielski (engineer)	100%
Mr Brown (Cluttons)	50%

Any permissible costs would not necessarily equate to the sums billed as they would of course be subject to the test of reasonableness under s.19 of the Act.

Application fee

6.49 It would appear that an application fee of £350 was incurred by the applicant. The Tribunal determine that 60% of this fee be re-imbursed by the respondent to the applicant under the provisions of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003

s. 22 Landlord and Tenant Act 1985

6.50 This covers the cost to the applicant of providing information to the respondent and is outside the jurisdiction of the Tribunal.

Penal costs under Schedule 12 to the 2002 Act

6.51 It is not clear from the applicant's closing submissions whether these costs, which refer to frivolous, vexatious, abusive, disruptive or otherwise unreasonable behaviour, are being sought. For the avoidance of doubt the Tribunal dismiss this application. These proceedings were highly contentious and it is the Tribunal's view that the conduct of the respondent did not come within any of the criteria set out in para. 10 of Schedule 12 to the 2002 Act.

Apportionment of service charges

6.52 The Tribunal have not done a precise calculation of any sums owing to the applicant by the respondent. They have summarised in Appendix 1 their determination, as to whether reasonable and reasonably incurred, on each of the service charges at issue; the contribution of the respondent to these charges is of course set out in Cl. B1(2) of his lease.

CHAIRMAN J. McCrandle.

DATE 26TH JANUARY 06

Appendix 1

Leasehold Valuation Tribunal for the London Rent Assessment Panel

Schedule of service charge payments in respect of Eaton House, 39-40 Upper Grosvenor Street, London W1K 2NG
Case Number LON/00BK/LIS/2005/0064

S.C. Year	Applicant's Figure	Respondent's Figure	LVT Decision
Porter's Wages			
2002/03	£86,715	£78,043	£86,715
2003/04	£89,865 + £1,162	£80,879	£91,027
2004/05	£94,223 + £297	£84,801	£94,520
2005/06	£90,247	£81,222	£90,247
Telephone			
2003/04	£2258 - £1,162	£1,910	£585
2004/05	£2,888 -£297	£2,005	£2,080
2005/06	£2,888	£2,105	£2,377
Electricity			
2002/03	£3,100	£2,790	£3,000
2003/04	£1,200	£1,080	£1,100
2004/05	£1,200	£1,080	£1,100
2005/06	£3,425	£3,083	£3,325
Boiler Repairs			
2002/03	£19,100	£17,246	£17,246
2004/05	£10,179	£7,884	£10,179
Boiler Replacement			
2004/05	£31,596	£18,957	£31,596
Asbestos Removal			
2002/03	£8,460	Nil	Nil
Bank Charges			
2002/03	£922	Nil	Nil
2003/04	£748	Nil	Nil
2004/05	£691	Nil	Nil
2005/06	£732	Nil	Nil
Legal Fees			
2003/04	£3,175	Nil	Nil
2004/05	£1,964	Nil	Nil
2005/06	£5,000	Nil	Nil

Management Fees

2002/03	£21,865	£13,160	£16,450
2003/04	£16,800	£13,160	£16,450
2004/05	£17,305	£13,160	£16,450
2005/06	£17,823	£13,160	£16,450

Source: LVT