CHI/43UM/LSC/2007/0003, 0042 & 0043
CHI/43UM/LSC/2008/0006
CHI/43UM/LSC/2008/0001

DECISION OF THE RESIDENTIAL PROPERTY TRIBUNAL ON APPLICATION UNDER SECTION 27A OF THE LANDLORD & TENANT ACT 1985

Address:	Flat 1A, Woodbury, Castle Road, Woking, Surrey, GU21 4ET
Applicant:	Mr J H Arthur
Respondent:	Miss S Skuse
Applications:	9 January 2007 & 4 May 2007
Inspection:	28 April 2008
Initial hearing:	29-29 April 2008
Adjourned hearing:	27 June 2008
Reconvene:	1 July 2008

Appearances:

Landlord

Mr Grant	Counsel
Mr Willis	Solicitor of Property & Commercial Solicitors
Mr J Gray	Managing Agent of Galebaron Management Services
Mr Horton	Insurance broker of St Giles Insurance & Finance Services Ltd
Mr S Gray	Photographer

For the Applicant

Tenant

Miss S Skuse	Leaseholder
Mr Poppitt	

For the Respondent

Members of the Tribunal

Mr I Mohabir LLB (Hons)
Mr N I Robinson FRICS
Miss J Dalal

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IN THE MATTER OF SECTION 27A OF THE LANDLORD & TENANT ACT 1985

AND IN THE MATTER OF FLAT 1A WOODBURY, CASTLE ROAD, WOKING, SURREY, GU21 4ET

BETWEEN:

JOHN HAY ARTHUR

Applicant

-and-

SANDRA SKUSE

Respondent

THE TRIBUNAL'S DECISION

Introduction

1. Unless stated otherwise, the page references herein are to the pages contained in the trial bundles.

2. This litigation between the parties has a lengthy and contorted history. The Applicant had initially commenced proceedings in the County Court to recover arrears of ground rent and service charges for the service charge years 1998 to 2003. Those amounts are claimed in relation to the premises known as Flat 1A, Woodbury, Castle Road, Woking, Surrey, GU21 4ET ("the subject premises"). The Respondent defended the claim and counterclaimed in damages for breach of contract, statutory duty, negligence and/or negligent misstatement. Those disputed service charge claim was transferred to the Tribunal by an order made in the Guildford County Court on 9 January 2007 so that a determination could be made as to the Respondent's liability to pay

and/or the reasonableness of those charges pursuant to s.27A of the Landlord and Tenant Act 1985 (as amended) ("the Act").

3. The Respondent applied to have the proceedings transferred back to the County Court. By an order made on 29 October 2007, the Court directed that an application for relief and/or damages in the County Court, proceedings that fell outside the Tribunal's jurisdiction, be stayed until such time as these proceedings were concluded. By a further application to the Tribunal dated 4 May 2007, the Applicant also sought a determination under s.27A of the Act in respect of further service charges claimed for the years 2004 to 2006.

The Lease Terms

4. The Respondent, as the present lessee, occupies the subject premises by virtue of a lease dated 1 November 1979 granted by the Applicant to James Sydney Sumner Annandale for a term of 99 years from 31 July 1973 ("the lease"). The Applicant remains the lessor and freeholder.

5. By clause 2(18) of the lease, the lessee covenanted, *inter alia*, to:

> *"... contribute and pay annually a rateable proportion as certified by the Lessor's Accountants on the 31 day of December in each year of the costs and expenses of keeping in good repair and condition the main walls timbers and roofs and all external parts of the Building.....and for all costs charges and expenses incurred by the Lessors in connection with the management of the said Building including a management fee and the charges of any Agents or Solicitors and to pay to the Lessors on account thereof such sum as they shall reasonably require."*

6. By clause 2(19) of the lease, the lessee covenanted not to park more than one private motor car in the designated parking space in the driveway of the property, as provided for in the lease.

The Costs in Issue

7. As a matter of convenience, these are set out in relation to each of the relevant service charge years in the Schedule annexed to this Decision. In the main, these costs are claimed by the Applicant as relevant service charge expenditure and/or, where relevant, as administration charges within the meaning of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 ("Schedule 11"). The Schedule was amended to show that the administration charges claimed in respect of a s.146 Law of Property Act 1925 notice was in fact £888.25 and not £881.25. Accordingly, the total sum claimed against the Respondent was £10,348.55. Each head of claim is considered in turn below by the Tribunal.

8. As the Tribunal understands it, the challenges made by the Respondent at the hearing were that she (a) had no liability to pay the costs claimed under the terms of her lease and/or (b) they were not reasonable. These are considered in turn below by the Tribunal.

The Law

9. Whether the Tribunal's determination takes place under s.27A of the Act or Schedule 11 in relation to the disputed costs, it is not coincidental that the determination must be made in the same way, namely:

   (a) the person by whom it is payable,

   (b) the person to whom it is pyable,

   (c) the amount which is payable,

   (d) the date at or by which it is payable, and

   (e) the manner in which it is payable.

10. Where the reasonableness of service charges is challenged under s.27A the statutory test is set out in s.19 of the Act. This provides that only such sums that are reasonably incurred or, where they are incurred on the provision of services or the carrying out of works, are of a reasonable standard. Paragraph 2 of Schedule 11 also provides that only such administration charges that are reasonable may be recovered by a landlord. However, there is no express statutory test of reasonableness within Schedule 11. Nevertheless, it is the

Tribunal's view that, by extension, the same test set out in s.19 of the Act must apply because the determination under s.27A and Schedule 11 is to be made in the same way.

Inspection

11. The Tribunal inspected the property on 28 April 2008. It comprised a Victorian detached house converted into five flats off an unadopted road. The house was generally considered in fair condition. There is also a block of four garages to the rear of the property but these are retained by the freeholder. The flat lessees therefore park in the driveway in front of and to the side of the house. There are no marked spaces.

Hearing

12. The hearing in this matter also commenced on 28 April and concluded on 27 June 2008. The Applicant was represented by Mr Grant of Counsel. The Respondent, although she appeared in person, was represented by Mr Poppitt, as a lay person. Both parties had provided the Tribunal with written skeleton arguments and/or submissions and these were of great assistance to the Tribunal in the context of this particular case.

(a) Liability

Sections 47 & 48 Landlord & Tenant Act 1987

13. For the service charge years 2002 to 2006, the Respondent submitted that she had no liability to pay the service charges and/or administration charges claimed because the relevant service charge demands only provided a P. O. Box number as being the Applicant's address. This did not comply with either s.47(1)(b) or s.48 of the Landlord and Tenant Act 1987 and the sums claimed were irrecoverable. The Respondent contended that there was a statutory requirement to provide a residential address and not a P.O. Box number. In support of this proposition, the Respondent contended that this was a requirement of CPR 6.5(3).

14. The Tribunal did not accept the Respondent's submissions as being correct. Materially, the Respondent had argued the same point in an earlier application

made to acquire the right to manage the property. At paragraphs 10 and 11 in the decision dated 19 October 2004[1], the Tribunal rejected this argument and held that the Applicant's P.O. Box number was a valid postal address for the purpose of sections 47 and 48 of the Landlord and Tenant Act 1987. The matter was effectively *res judicata* and could not be revisited by this Tribunal.

Demands Not Signed (All Years)

15. This point does not appear to have been argued by the Respondent. Nevertheless, the Applicant submitted that there was no requirement that a demand for service charge or administration charge be signed. For the avoidance of doubt, the Tribunal accepts that there is no such requirement either in the lease or otherwise.

Due Date for Payment (All Years)

16. The Respondent submitted that on the clause 2(18) of the lease, the service charge contribution is payable in arrears and does not fall due until 31 December in each year, being the last day of the service charge period. The effect of this is that the service charge account in each year should relate to the preceding 12 months. The requirement for a payment on account in clause 2(18) would be unnecessary if the service charge was payable in advance. Therefore, in practice the service charge accounts which were served in February or March each year relates to the period of 12 months ending in the following December.

17. The Tribunal concluded that the Respondent's construction of clause 2(18) of the lease was incorrect whether it has taken generally in relation to all of the service charge demands for the disputed service charge years or individual service charge years. Whilst the clause is not well drafted, nevertheless, its meaning is clear. The accountant's certificate relates to the expenditure incurred in the preceding year. Indeed, the relevant service charge demands appear to have been prepared on this basis because they specifically referred to in the preceding year. It follows from this that a demand can include any

[1] see page 188

shortfall in the service charge contribution collected in the preceding year on account once the accounts had been certified. On the face of it, it is also quite clear that the clause allows the lessor to demand a further sum on account for estimated expenditure for the forthcoming year. In any event, the Tribunal accepted the Applicant's submission that, even on the Respondent's own case, all of the service charges claimed must now be due because the last demand was for the year ending 2006.

Wrong Period (All Years)

18. The Respondent submitted that under clause 2(18) of the lease there is a contractual requirement to prepare the service charge accounts ending on the 31 December of each year. The Applicant has prepared the service charge accounts up to 25 December in each year. It was further submitted that this was a condition precedent to the lessee's liability to pay a service charge contribution and, therefore, the service charge accounts are invalid or unenforceable.

19. The Tribunal accepted the Applicant's submission that the period over which the accounts are prepared is irrelevant as long as they relate to the service charges incurred in each year. The Applicant correctly submitted that there is nothing in the lease which sets out the period over which the service charges are to be calculated. The only relevance of the date of 31 December in clause 2(18) is that this is the earliest date when the lessee's liability to pay a service charge contribution can arise. A proper reading of this clause reveals that there was no express provision requiring the service charge accounts to be prepared on 31 December of each year. Moreover, it is clear that the service charge demands had been prepared on the same basis by the Applicant up to 1998. This point was not taken by the Respondent and that she had paid the service charge demands after this time. In the Tribunal's view, it is arguable that an estoppel arises, but this point does not appear to have been expressly argued behalf of the Respondent. In any event, it is not necessary for the Tribunal to consider this in the light of its finding above.

Accounts Not Certified (All Years)

20. The Respondent submitted that clause 2(18) of these required the amount of the service charges due in each year to be certified by the Applicant's accountants, as a condition precedent to liability. It was also submitted that the accounts were not certified until two months after the commencement of the County Court proceedings. Further certificates were not produced until three years after the commencement of those proceedings. In addition, all of the certificates are absolutely identical and appear to have been prepared on a single occasion in 2005 but dated to make it appear as if they had been served earlier.

21. The Applicant simply submitted that the accounts had been certified for all years and that the certificates had been provided to the Respondent. In addition, there is no provision in the lease or in section 21 of the Act which required a certificate to be provided to the Respondent or allowed the Respondent to withhold payment of the service charge if this had not been provided.

22. The Tribunal found that there was nothing on the face of the accountant certificates disclosed by the Applicant that demonstrated they had been prepared at the same time. Even if the Respondent was right about that, it was not fatal to be able to subsequently recover the service charges claimed once the accountant certificates had been served. The Tribunal accepted the Applicant's submission that there was no requirement in clause 2(18) to serve the Respondent with copies of their certificates. The only requirement was to have the service charge account certified. The delay in doing so would only prejudice the landlord because the tenant has no liability to pay until the accounts have been so certified. The Respondent accepted that all of the relevant service charge accounts have now been certified and, therefore, the *liability* to pay has now arisen under clause 2(18) of the lease.

No Statutory Accountant's Certificate

23. The Respondent contended that for written requests had been made to the managing agents pursuant to section 21 of the Act to provide a summary of the

costs on which the service charge was based for the years ending December 2000-2003 and 2007. The Applicant did not comply within one month of the requests all within six months of the end of the relevant service charge period. It was submitted that this was a condition precedent to liability to pay and when the County Court proceedings commenced on 1 April 2004 no such liability existed on the part of the Respondent.

24. It was clear that the Respondent's submission was based on the provisions of the "new" section 21A as amended by the Commonhold and Leasehold Reform Act 2002. However, the Tribunal agreed with the Applicant's submission that the provisions of the "new" section 21A application to the service charge years 2000-2002 because it did not come into force until September 2003. Therefore, there was no sanction on the part of the Respondent to withhold service charge payments for these years because there was no provision in the "old" section 21 to do so.

25. For the service charge years 2003-2006, the Respondent accepted that the accountant's certificates had been provided, whether on 20 June 2004 or in May 2006. The effect of the "new" section 21A is that if a landlord does not provide the information requested by the tenant within six months of the end of a service charge period, there was no liability on the tenant to pay the service charge demand for that period of time. However, as in this case, when the accountant's certificates were served on the Respondent, her liability to pay the service charges for the years 2003-2006 arose. There is nothing in the "new" section 21A that prevented the Applicant from being able to recover the service charges claimed for this period once the accountant's certificates had been served, albeit outside the required six month period. Accordingly, the Respondent's *liability* to pay a service charge contribution for the disputed service charge years has arisen.

Previous Payment

26. The Respondent submitted that a payment of £464.06 made by her on 20 August 2001 was accepted by the managing agents in full and final settlement of any service charge arrears for the period 1998 to 2000. Therefore, after the

year 2000, no sum should have been carried forward in the service charge accounts.

27. The Tribunal had little difficulty in rejecting the Respondent's submission. It is beyond doubt that the payment of £464.06 by the Respondent on 20 August 2001 was not accepted by the Applicants managing agents in full and final settlement of all service charge arrears for the period 1998 to 2000. The last paragraph of the letter written by the managing agents dated 17 September 2001 expressly stated that the Respondent had 14 days in which to pay the outstanding balance of her service charge account in the sum of £916.98[2]. On any view, this cannot be construed as an act of acceptance on the part of the managing agents. Accordingly, the Respondent's *liability* to pay a service charge contribution prior to 2000 remains.

Electricity for Lighting the Common Parts (All Years)

28. The Respondent simply submitted that the cost of electricity for lighting the common parts did not fall within the service charge covenant in clause 2(18) of the lease and as such was not recoverable by the Applicant.

29. It is arguable whether the cost of lighting the common parts fell within the express wording of clause 2(18) *per se*. However, it was not necessary for the Tribunal to construe this clause because it was quite clear that the Respondent, in the years preceding 1998, had paid the electricity to light the common parts, as part of her service charge contribution. This was accepted by her in evidence. Therefore, the Tribunal concluded that she was now estopped from denying liability for these costs and they were recoverable by the Applicant.

Landlord's Costs of Maintaining Insurance (All Years)

30. These costs related to a charge of 15% made by the managing agents for arranging the buildings insurance. The Respondent submitted that these costs also did not fall within clause 12(18) of the lease because this only related to the buildings insurance premium and nothing else. It was also submitted that

[2] see page 136

these costs were not a management fee because this was claimed separately as part of the overall service charge expenditure.

31. The Applicant submitted that these costs did fall within clause 2(18), as it expressly provided for this. Moreover, clause 1 of the lease reserves as rent and requires the Respondent to pay all such sums incurred by the lessor for insuring and keeping insured the premises. Mr Gray gave evidence that he liaised with the present insurance broker, Mr Horton, and any other broker to ensure that the buildings insurance premiums were competitive. It was, therefore, submitted by the Applicant that whether these costs fell within clause 2(18) or clause 1 of the lease, they were recoverable.

32. The Tribunal accepted the Respondent's submission that these costs did not fall within clause 2(18) of the lease. They are not the direct costs of insurance that can be recovered under this clause, but should fall within the management fees as part of the managing agent's functions. The Tribunal also did not consider that it had jurisdiction to determine whether these costs were recoverable under clause 1 of the lease because this clause fell outside the service charge covenant given by the lessee. Therefore, the costs, if recoverable, were not recoverable as service charge expenditure within the meaning of the lease. They would only be recoverable as a debt owed to the landlord. Nevertheless, the Tribunal's *prima facie* view of clause 1 was that it was concerned with the recovery of the direct costs of insurance, for example, the buildings insurance premium or possibly the cost of an insurance valuation for the purpose of arranging the billets insurance policy. Accordingly, the Tribunal disallowed these costs.

Buildings Insurance

33. The Respondent contended that the Applicant had breached clause 4(2) of the lease by failing to provide her with copies of the policies of insurance and receipts for the years 2001-2004 and 2007. It was submitted that this was a condition precedent to liability to pay the service charge for this head of claim.

34. The Tribunal had little difficulty in rejecting the Respondent's admission. A proper reading of clause 4(2) does not limit the Respondent liability, as was submitted. If the Respondent's contention is correct, then the failure to provide copies of the policies of insurance and receipts for the relevant years amounts to a breach of covenant, which is not actionable in these proceedings. The Applicant, therefore, is *prima facie* entitled to recover these costs. The issue of the reasonableness of these costs is considered later in this Decision.

Costs of Disputes with Other Tenants

35. The Respondent contended that the service charge accounts included the costs incurred in disputes between the Applicant and the former tenants of Flat 3. These costs related to photography and surveillance regarding the unauthorised parking by tenants outside their allocated parking space, legal fees and statutory management costs. Again, it was submitted that these costs were not recoverable under clause 2(18) of the lease. There was no clear contractual provision to do so[3]. In the alternative, it was submitted that the lease does not reserve to the landlord a right of entry onto the property for photographic surveillance. Therefore, any costs incurred by the landlord, effectively as a trespasser, cannot be recoverable.

36. It was submitted by the Applicant that these costs, relating to possible breach of covenants on the part of the Respondent and other tenants, were recoverable as part of the management charges pursuant to clause 2(18) of the lease[4].

37. Materially, in evidence, the Respondent accepted in principle that the Applicant was entitled to take steps to investigate a possible breach of covenant by a tenant. This is precisely what the Applicant did here and the Tribunal accepted the submission made on his behalf that it fell within the management function permitted by clause 2(18) of the lease. It must follow that the Applicant is entitled to recover the costs of doing so. Under the terms of the leases, the Applicant can elect to either recover these costs either under clause 2(18) or directly from the lessee concerned under clause 2(21) of the

[3] see ***Sella House Ltd v Mears***

leases. The Tribunal, therefore, determined that all of these associated costs were recoverable by the Applicant under clause 2(18). The statutory management costs of £12.50 are not claimed as a separate amount in the service charge account. The inference to be drawn is that it is not claimed as part of the management fee and is recoverable under this clause. Where the reasonableness of any of these costs is challenged by the Respondent, this is dealt with below.

Management Fee

38. The Respondent submitted that, under clause 2(18), and the Applicant was only entitled to recover one item of management fees and not other management costs under other heads of claim, as it was seeking to do in this matter.

39. The Applicant made no submissions on this point. Nevertheless, the Respondent's admission is not understood by the Tribunal. It appears to be a general submission that did not require a determination from it, as the issue of liability is dealt with generally in this Decision.

Advance Service Charge

40. The Respondent's challenge was limited to the service charge account for the year ending 25 December 2007. The Respondent submitted that clause 2(18) of the lease did not entitle the Applicant to demand in advance and interim service charge on account. The clause could only be construed as allowing a payment on account in relation to the current service charge year and not the subsequent year.

41. This submission already appears to have been considered and rejected by the Tribunal at paragraph 18 above. The Tribunal has already found that the service charge accounts relates to the expenditure incurred by the lessor in the preceding year. It follows that the payment on account referred to in clause 2(18) must be an interim payment on account for the anticipated expenditure

[4] see ***Canary Riverside PTE Ltd v Schilling***, paras 13-14

to be incurred in relation to the service charge year in which the demand is made.

Section 20B-18 Month Time Limit

42. The Respondent submitted that the service charge accounts dated March 2003 or February 2005, 24 February 2004, 1 February 2006 and 8 February 2007 had not been served by the Applicant within the 18 month time limit required by section 20B of the Act. Therefore, the costs claimed in each of these accounts was not recoverable.

43. The Applicant submitted that these service charge accounts had been served on the Respondent as evidenced in the bundles. It was highly unlikely that the Applicant would not have done so given that they were sent every year to all of the tenants in the building. In addition, given the arrears and the commencement of debt recovery proceedings, the Applicant would have served the relevant service charge demands prior to taking this action against the Respondent.

44. The Tribunal did not accept the submission that the Respondent had not received the service charge accounts for 2003 or 2005. Indeed, in correspondence with the Applicant[5] she specifically referred to them. Even if the Respondent's assertion that she had not been formally served with these demands was correct, the Tribunal found that she was estopped from relying on this technical point because she had certainly seen and was in possession of the relevant service charge demands at the time she corresponded with the Applicant about them.

45. The Tribunal made the same finding in relation to the service charge account dated 24 February 2004. It had already decided that the Respondent had received the 2003 service charge account and this account on the first page sets out her accrued service charge arrears. Behind that is the Respondent's actual service charge account for 2002/03 (not 2003/04 as stated). This

[5] see pages 415 & 418

includes the actual expenditure incurred in the year 2002/03 and the interim service charge demand on account[6]. Therefore, the 18 month time limit had no application because the Respondent was on notice about the relevant service charge expenditure that had been incurred within the meaning of section 20B(2) of the Act.

46. As to the service charge account dated 1 February 2006, this appeared on the face of it to be properly addressed to the Respondent. Therefore, there is a rebuttal presumption that the Respondent had received them. Her mere assertion that she did not receive them, in the absence of any other evidence, does not rebut that presumption. Therefore, on balance, the Tribunal accepted that this account had been served on the Respondent. As stated above, the account makes reference to the accrued service charge arrears and this amounted to notice within the meaning of section 20B(2) and the 18 month time limit its of no effect.

47. In relation to the service charge account dated 8 February 2007 and served on the Respondent on 10 February 2007, the Tribunal accepted the Applicant's admission that the sum of £13.54 for adjustments made to the 2004 and 2005 accounts was caught by section 20B and was irrecoverable. The Respondent however, remains liable for the remainder of the costs claimed.

Service Charges and/or Administration Charges

48. The costs claimed by the Applicant either as service charges and/or administration charges are set out in the Schedule annexed to this Decision, which makes reference to it. It was the Applicant's case that the costs claimed as administration charges were legal costs, the costs incurred in contemplation of proceedings pursuant to section 146 of the Law of Property Act 1925 and photography and surveillance charges. The costs incurred in the LVT and Lands Tribunal applications are not administration charges within the meaning of Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

[6] see page 275

49. The Respondent made a number of general submissions in relation to the administration charges claimed by the Applicant. Firstly, that the Respondent had not been served, with the relevant service charge accounts after 30 September 2003, a summary of the leaseholder's of rights and obligations pursuant to Schedule 11 paragraph 4 of the Commonhold and Leasehold Reform Act 2002. Therefore, the Respondent was entitled to withhold payment and it was now too late for the Applicant to remedy that failure. However, the Tribunal did not accept this submission because it was quite clear that such a notice had been served on the Respondent in respect of the administration charges claimed[7].

50. Secondly, the Respondent submitted generally that the administration charges incurred by the Applicant in a dispute with the lessees of another flat should not be payable by the Respondent. The Tribunal also rejected the submission because, as it understood, the Applicant was only seeking to recover those administration charges incurred in relation to the Respondent and not another lessee.

51. Thirdly, the Respondent submitted that the administration charges claimed were irrecoverable because the Applicant had not referred this dispute to arbitration, in breach of clause 5 of the lease. Again, the Tribunal rejected this submission. It was a matter of common ground that the right to arbitration was removed by section 27A(6) of the Act, which came into force on the 30 September 2003. Although this dispute concerns service charge and administration costs prior to this date, it was clear that proceedings to recover arrears were not commenced by the Applicants until on about March 2004. Therefore, as the Applicant correctly submitted, the arbitration clause in the lease was void by virtue of section 144 of the Commonhold and Leasehold Reform Act 2002, which was in force at the time proceedings were issued.

52. The Tribunal then considered the specific administration charges challenged by the Respondent.

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[7] see pages 1035-1036

Section 146 Notice

53. A section 146 Law of Property Act 1925 notice was served on the Respondent on 13 March 2003. The sum of £888.25 was claimed in the accounts dated February 2004 for the cost of preparing and serving the notice. The Respondent made a number of submissions that these costs had not been reasonably incurred.

54. Firstly, the submission about the failure on the part of the Applicant to refer the dispute to arbitration pursuant to clause 5 in the lease, as a condition precedent to recoverability, was repeated. Therefore, the notice was invalid and the Applicant is not entitled to recover the cost thereby incurred.

55. The Tribunal rejected this submission for the reasons submitted by the Applicant. No court action was taken in respect of the section 146 notice and consequently there was no breach of clause 5 in the lease. Further, it was correctly submitted that the arbitration clause related to matters touching and concerning the lease and not a breach of covenant because only a court could order forfeiture of the lease.

56. Secondly, the Respondent submitted that the notice did not comply with section 146(1) of the Law of Property Act 1925 because he did not specify the particular breach alleged. Again, the Tribunal had little difficulty in rejecting this submission. Having regard to the notice[8], it was quite clear the breach been complained of by the Applicant.

57. Thirdly, the Respondent submitted that forfeiture was not avoided because she did not make a request to the Applicant to waive the alleged breach, which was a requirement of section 146(3) of the Law of Property Act 1925. In the Tribunal's judgement, this submission also fails because whether or not the Applicant waived the alleged breach is irrelevant. Clause 2(21) of the lease clearly provides that the lessor may recover any such costs incurred in

[8] see page 138

contemplation or incidental to taking forfeiture proceedings whether or not forfeiture is otherwise avoided. Therefore, the Applicant's entitlement to recover these costs remains.

58. The Respondent then went on to submit that the costs claimed in relation to the preparation and service of the section 146 notice had not been reasonably incurred and was unreasonable as to quantum. It was asserted that the Respondent had committed no breach of covenant by parking her vehicle in the designated parking space and no details had been provided as to how the costs claimed had been calculated.

59. The Tribunal found that these costs had been reasonably incurred because in evidence the Respondent admitted that she had parked two vehicles in the driveway of the property until 2003 and despite the reasons advanced by her concerning the lack of parking space, this appeared to be a *prima facie* breach of the lease. The Applicant was entitled to take such steps as were necessary to remedy the breach. As to the costs incurred in relation to the notice, the Tribunal heard evidence from Mr Willis, the Applicant's solicitor, of how these costs have been incurred. The Tribunal accepted his evidence. A mere assertion on the part of the Respondent that the costs were unreasonable as to quantum was not evidence that they were. Accordingly, the Tribunal allowed the costs of £888.25 as being reasonable and payable by the Respondent.

Surveillance Photography

60. The sums of £21.12 in the service charge account dated 25 November 2000 and £987.84 in the accounts from 2002 to 2006 claimed by the Applicant as administration charges for the cost of surveillance photography carried out by David Jackson Photography. It seems that this surveillance photography was carried out by Mr S. Gray, the son of the managing agent, as part of the investigation into whether or not the Respondent had breached one or more terms of the lease by parking other than in her designated parking space.

61. The Respondent submitted that these costs have not been reasonably incurred because the Applicant had not proven the breach. This submission was not

accepted by the Tribunal in the light of the admission made by the Respondent in evidence that she had possessed more than one vehicle until 2003.

62. The Respondent also submitted that these costs have not been reasonably incurred because the lease did not reserve to the Applicant a right of entry to the property and by incurring these costs, he had trespassed. The Tribunal considered this submission to be wholly without merit. It is beyond doubt that clause 1(iv) of the lease reserves the right in common with the lessor the right to use the roads, footpaths and drives. The Tribunal's opinion, the Respondent, in taking this point, appeared to be simply "arguing a case". The Respondent did not contend that these costs were unreasonable in amount and, accordingly, the Tribunal determined that they were payable by her as claimed.

Parking Control Services & Apollo Investigations

63. The costs are claimed as service charges in the sum of £236.88 and £99.60 respectively in the accounts dated 8 February 2007. They are associated costs arising out of the parking dispute and the allegation of breach of covenant against the Respondent. They were incurred as a result of further investigations taken by the Applicant regarding the parking arrangements at the property and the erection of new signage to deal with this.

64. The Respondent repeated the same submissions made in relation to the costs of the surveillance photography and for the same reasons set out above the Tribunal also rejects the submissions. Again, the Respondent did not challenge the quantum of these costs and the Tribunal determined they were payable by her as claimed, as they touched directly upon the good management of the property within the meaning of clause 2(18) of the lease.

Other Legal Fees

65. These costs were £144 and £112.80 claimed in the service charge account dated 8 February 2007 for solicitors costs incurred in the pending County Court proceedings and Counsel's fees respectively. These costs are claimed as service charges.

66. The Respondent submitted that the Applicant had no entitlement to these costs because the County Court proceedings were still ongoing and no award for costs had been made in those proceedings. This submission appears to misunderstand the costs position in the proceedings and those costs that are recoverable as a matter of contract under the terms of the lease. The fact that no *inter partes* costs order may have been made in the County Court proceedings, did not prevent the Applicant from being able to recover any such costs that had been incurred in the meantime through the service charge account. The Tribunal accepted the Applicant's admission that those costs directly concerned the management of the building and were recoverable under clause 2(18). As the quantum of those costs had not been challenged by the Respondent, the Tribunal determined they were payable by her as claimed.

(b) Reasonableness

66. It should be noted here that, unless stated otherwise above, only the reasonableness of the service charges set out below were challenged by the Respondent.

Buildings Insurance (All Years)

67. It was submitted by the Respondent that the Applicant had a statutory duty to obtain buildings insurance on reasonable terms[9] and he had failed to do so by obtaining the insurance at a lower cost. This was because he had a vested interest in obtaining a larger insurance commission. In support of this submission, the Respondent relied on comparative quotes obtained by her that were approximately one third lower than the premium claimed by the Applicant.

68. The Tribunal heard evidence from the present insurance broker, Mr Horton, about how the buildings insurance had been obtained. He accepted that all insurance brokers earned their income from the commission paid by the relevant insurance company. However, under the FSA rules, he was obliged

[9] see ***Forcelux v Sweetman***

to give best advice to his client and always recommended the cheapest quote that had been obtained. Whilst he accepted that the Respondent's alternative quote of £721.36 including IPT from Zurich Insurance PLC was significantly cheaper than the current premium of £2062.79, he could not be sure that this quote was based on the same policy terms and level of cover. In placing the current buildings insurance policy, he had gone to the market and sought quotes from five major insurance companies. He had done so because they had a good insurance rating and were competitive on price. He did not use these companies simply to obtain the best commission.

69. It was submitted on behalf of the Applicant that because cheaper quotes can possibly be obtained on the insurance market, it did not necessarily mean that the buildings insurance premium obtained was unreasonable[10]. The Applicant had employed the managing agent who had instructed independent insurance brokers to arrange the insurance. Both parties had investigated the market to ensure that a reasonable premium was obtained.

70. There was no evidence before the Tribunal that the Respondent's insurance quote had been obtained on a "like-for-like" basis. There was no evidence as to the level of cover provided by the alternative quote, the policy terms, the level of excess and whether it was based on the claims history of the property. In the absence of this evidence, the Tribunal placed no reliance upon it. The case of ***Berrycroft*** is now the leading authority regarding the recovery of buildings insurance premiums by landlords as service charge expenditure. It was held in that case that provided a landlord arranged the buildings insurance in accordance with the lease terms, a tenant could not challenge those costs as being unreasonable even though the premium paid was higher than could otherwise be obtained. In the present case, the Tribunal heard evidence from Mr Horton that he had gone to the market and obtained quotes from five leading insurance companies before selecting the cheapest quote. It seems that, in doing so, he had properly tested the market. There was no evidence before the Tribunal to support the Respondent's assertion that it was in the

[10] see ***Berrycroft Management v Sinclair Gardens Investments (Kensington) Ltd***

Applicant's financial interest to obtain a higher quote because of the commission paid. Accordingly, the Tribunal determined the insurance premiums claimed by the Applicant for the relevant service charges were reasonable and payable by the Respondent.

Management Charges (All Years)

71. The managing agents, Galebaron Management Services had charged a flat fee or £75 per flat in 1995 rising to £122.55 per flat at the present time. The Respondent submitted that this was unreasonable having regard to the significant management failures on the part of the managing agent. These included a disregard for the relevant legislation and a failure to carry out any necessary repairs or maintenance. The only function performed by the managing agent was to arrange the buildings insurance.

72. The Applicant simply submitted that the management fees claimed were not unreasonable, in particular, ensuring compliance with the covenants in the lease and arranging the building insurance given that the Applicant was not resident in this country. The Tribunal determined that the management fees were reasonable. The managing agents did have duties to perform and, in the Tribunal's experience, the management fees were competitive.

Section 19(1) Generally

73. The Respondent went on to make a number of general submissions that the service charge costs incurred and the services provided were not of a reasonable standard because the Applicant had acted in bad faith. The Tribunal considered the submissions to be irrelevant because they were completely unsubstantiated and the issue of reasonableness had already been considered as part of the Tribunal's determination above.

Payment on Account

74. The Respondent repeated the same submission made under the heading "wrong period" above in relation to the service charge accounts dated 8 February 2007 and, in particular, the demand for an interim service charge

payment on account. It was not necessary for the Tribunal to consider this point further, as it has already been dealt with above.

Interest & Ground Rent

75. Both of these matters are mentioned in the Respondent's written submissions, but the Tribunal has no jurisdiction to make a ruling in relation to these matters because neither fall within the definition of "relevant costs" under section 18 of the Act. These are matters for the County Court if this matter is remitted back to it.

Calculation of the Amount Payable

76. The Respondent invited the Tribunal to make an order that payment of the arrears of service charges and administration charges be made conditional upon the outcome of her counterclaim for damages in the County Court proceedings and that enforcement be suspended pending the outcome of those proceedings. In the Tribunal's view, it does not have power to make an order in those terms, but it seems that the County Court proceedings have been stayed pending the Tribunal's determination. The Respondent's counterclaim is made by way of a set off against her liability for the arrears of service charges and administration charges and, therefore, it would seem that the Applicant will not be able to enforce this determination until such time as the Respondent's final liability is known once the counterclaim has been dealt with.

Section 20C & Fees

77. As part of the substantive application, the Respondent made an application under section 20C of the Act for an order that the Applicant be prevented from recovering all or part of the costs it may have incurred in bringing these proceedings. The test to be applied by the Tribunal under this section is whether it would be just and equitable having regard to all the circumstances to make an order.

78. In support of this application, the Respondent made three submissions. These were:

(a) that there was no contractual entitlement under the terms of the lease.

(b) whether the costs were reasonably incurred or of a reasonable standard.

(c) it would be just and equitable to make an order.

79. Dealing with the first submission, the Tribunal was satisfied that clause 2(18) of the lease expressly allowed the Applicant to recover the costs it may have incurred in these proceedings. This clause clearly states that the lessor can recover the charges *"of any agents or solicitors"*. The Tribunal considered this wording to be sufficiently widely drafted to include the costs of these proceedings.

80. As to the second submission made by the Respondent, this appeared to be misconceived, as the Tribunal is not concerned with the reasonableness of the costs that may have been incurred. It will simply be dealing with the Applicant's *entitlement* to its costs.

81. As to the third submission made by the Respondent, she contended that proceedings in the Tribunal took place in a no costs environment. In addition, before this case was transferred from the County Court, it had been allocated to the Small Claims Track, where costs are generally not awarded. It was admitted that the same approach should be adopted by the Tribunal. The other arguments advanced by the Respondent essentially concerned the position of the successful tenant and costs fall to be considered. For reasons that will become apparent below, those arguments are irrelevant.

82. The Tribunal had no difficulty in concluding that it would not be just and equitable in this case to make an order preventing the Applicant from being able to recover his costs in these proceedings. The Respondent had taken every point that could possibly be taken and had almost exclusively been unsuccessful. The majority of the points taken by the Respondent were without merit. The Applicant's costs had, as a result, been increased significantly than would otherwise have been the case. In the circumstances, it would not be just or equitable to deprive the Applicant of the opportunity to recover his costs. Accordingly, the Tribunal makes no order under section

20C of the Act. The Tribunal makes it clear that in making no order it also does not make a finding that the Applicant's costs are reasonable. As stated earlier, the Tribunal is simply concerned with the entitlement to those costs and nothing else.

Dated the 6 day of October 2008

CHAIRMAN.....

Mr I Mohabir LLB (Hons)