5170

Eastern Leasehold Valuation Tribunal File Ref No. **CAM/22UN/LSC/2010/0004**

Leasehold Valuation Tribunal: reasons

Landlord and Tenant Act 1985 sections 27A and 20C

Address of Premises	**The Committee members were**
4 Connaught House,	Mr Adrian Jack
Connaught Avenue,	Mr Richard Marshall FRICS FAAV
Frinton-on-Sea CO13 9AA	Mr David W Cox

The Landlord: **Harwoods of Essex Ltd**

The Tenant: **Wilson George Head**

Procedural

1. By an application dated 17th December 2009 the tenant sought determination of his liability in the service charge years 2001 to 2008 inclusive. The service charge year runs to 25th December. For convenience we shall only refer to the year of the relevant Christmas.

2. The Tribunal did not carry out a formal inspection of the property, but Mr Jack and Mr Marshall drove around the property on their way to the hearing held on 25th May 2010. The tenant was represented by Ms Cecily Cramplin of counsel instructed by Birkett Long, solicitors; the landlord by Mr Stephen Goodfellow also of counsel instructed by Ashton Graham.

The property

3. The precise early history of the property was not in evidence, but it is likely that the block was purpose-built in the early 1960's as a mixed commercial and residential development. It has a ground and first and second floors. On the ground floor there is one residential unit. Originally there were five commercial units on the ground floor, but over time some of the units have been knocked into one another. On each of the first and second floors there are six flats, so that there is a total of 13 residential units. The landlord runs its furniture business from the ground floor.

The law

4. The Landlord and Tenant Act 1985 as amended by the Housing Act 1996 and the Commonhold and Leasehold Reform Act 2002 provides as follows:

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent-

(a) which is payable directly or indirectly for services, repairs, maintenance,

improvement or insurance or the landlord's costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord or a superior landlord in connection with the matters of which the service charge is payable.

(3) for this purpose

(a) costs includes overheads and

(b) costs are relevant costs in relation to a service charge whether they are incurred or to be incurred in the period for which the service charge is payable or in an earlier period

Section 19

(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) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(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-

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(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.

(2) Subsection (1) applies whether or not any payment has been made.

(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---

(a) the person by whom it would be payable,

(b) the person to whom it would be payable,

(c) the amount which would be payable,

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

(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which:

(a) has been agreed or admitted by the tenant...

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason

only of having made any payment."

The issues

5. The issues raised by the tenant were set out in para 11 of Ms Cramplin's skeleton argument. In this she abandoned the application in respect of the 2001 and 2002 (which had been challenged on the basis that the limitation period had expired) and limited the issues to 2003 to 2008. The live issues raised by her were:

   (a) whether the landlord was entitled to recover accountant's fees as part of the service charges?

   (b) whether in 2006 and 2008 the landlord was entitled to recover legal fees as part of the service charges?

   (c) whether the landlord was entitled to recover a management fee of 15 percent of the service charge costs;

   (d) whether management fees were payable on the cost of the building insurance?

   (e) whether the service charges in 2007 and 2008 were payable by reason of the landlord's failure to serve the statutory summary of tenants' rights and obligations?

   (f) the total liability of the tenant in 2003 to 2008.

6. In the course of the hearing issue (e) was resolved on the basis that the summary had been subsequently served.

7. In addition the landlord raised the issue as to whether the service charges in 2003 to 2005 had been agreed or admitted by the tenant and whether the tenant was estopped from disputing the service charges demanded in respect of 2006.

Agreement or admission

8. The tenant gave evidence to us that he had bought his flat in 2000. It was common ground that he had paid his service charges regularly until 2006. The tenant gave evidence to us that right from the start he thought the landlord was "slippery". He made various generalised allegations that the landlord was guilty of dishonesty. Ms Cramplin (in our judgment quite rightly) abandoned any reliance on these allegations, for which there was no evidence in the slightest and which should never have been made by the tenant. The tenant accepted, however, that he had never told the landlord of his concerns about the service charge accounts. In late 2005 and early 2006 the tenant raised some issues with the landlord and was given sight of the landlord's file.

9. On 23rd February 2006 after this inspection the tenant wrote to the landlord and said:

> "May I express my gratitude for your time and explanations. For the present I accept your efforts to clarify the details relative to the 'statement' though I am sure that the majority of leaseholders, including myself will have some reservations regarding the water charges until Mr Platt [of the landlord] has concluded his

consultations... I enclose my cheque to value £788.57p."

10. No issue as regards water charges has been raised before us. In our judgment the letter indicates clearly that the tenant is satisfied with the service charge accounts which have been produced. Particularly when coupled with the tenant's uncomplaining payment of the service charge, the Tribunal has no hesitation in finding that the tenant has admitted and agreed the 2003, 2004 and 2005 accounts. There is no ground for reopening those years and we make no disallowance of any items in those years.

Accountancy fees

11. The lease is dated 18th January 1962 and granted a term of 99 years from Christmas 1961. The ground rent reserved was £15 0s 0d per annum, a substantial sum in those days. It was common ground between the parties that there was no express reference to accountancy fees in the lease and no express term allowing the recovery of accountancy fees. (The landlord did not pursue an argument based on clause 4(18) of the lease, wisely in our view.)

12. The landlord relied on *Universities Superannuation Scheme Ltd v Marks & Spencer plc* [1999] L & TR 237 at 243 for the proposition that "[s]o far as the scheme, context and language of [the service charge] provisions allow, the service charge provisions should be given an effect which fulfils rather than defeats their evidence purpose. The service charge provisions have a clear purpose: the landlord who reasonably incurs liability for expenditure in maintaining the [premises] for the benefit of all its tenants there should be entitled to recover the full cost of doing so from those tenant..."

13. In our judgment, this, however, begs the question whether "the scheme, context and language" of the current lease permits an implication that the landlord's accountancy costs are recoverable. The lease has to be construed as at the time it was made in 1962. At that time there was no statutory obligation for a landlord to obtain an accountant's certification. Moreover the ground rent was sufficient to cover any incidental costs of the landlord, such as his employment of a accountant. In our judgment there is no proper basis to imply a term that the tenants should reimburse the landlord for its accountancy fees.

14. In an agreed note sent to us after the hearing, counsel agreed that under section 21(6) of the Landlord and Tenant Act 1985, if the tenant requested a summary, the landlord was obliged to have the summary certified by a qualified accountant. Failure to do so is criminal offence. However, this is not in our judgment sufficient to permit the landlord to recover the cost through the service charge in the absence of a term to that effect.

15. Mr Goodfellow, as a fall-back argument, sought to argue at the hearing that the change in the legislative picture was such that there was a "radical change", which meant that the lease stood to be construed to allow recovery of these fees. He based this argument on *Pole Properties Ltd v Feinberg* (1982) 43 P & CR 121. In that case the tenant in 1958 took a seven year lease of one of four flats in a converted house and held over under a Rent Act protected tenancy. The heating was provided by boiler which burnt hard fuel. The tenant agreed to pay two-sevenths of any increase in the price of coke above £8 2s 5d

a ton of coke or fuel oil above 1s 1¾d (some 6 new pence!) a gallon. In 1967 the landlord had purchased an adjacent property and installed a new oil fired boiler which serviced both properties. The Court of Appeal concluded that the old formula was unworkable, so that a reasonable and fair method of calculation needed to be adopted instead.

16. In our judgment there is no radical change in the current case. It is naturally hard that the landlord has by law potentially to incur accountancy fees whereas it did not in 1962 when the lease was granted, but Parliament made no provision for a landlord to make a claim over against tenants when it introduced the new provisions in the 1985 Act. The change is simply one of the numerous provisions which over the years have made a landlord's tasks more onerous than previously. In the absence of a term of the lease permitting the recharging of accountancy fees, the landlord cannot in our judgment recover this head of costs.

Legal fees

17. The landlord's argument on the recovery of legal fees was the same as for the accountancy fees and for the same reasons we reject the tenant's liability for them. Indeed the case on legal fees is even weaker than that for accountancy fees, since there is no statutory requirement for the landlord to employ lawyers. Accordingly we disallow the legal fees.

Management fee

18. The tenant's lease provides in clause 4(18)(a), (b) and (c) for various repairs and maintenance to be reimbursed by the tenant, but the proportions are different: one thirteenth under (a) and (b) and one eighteenth under (d). Clause 4(18)(d) then provides that the tenant would pay "an annual sum equal to five per centum of the cost of maintaining repairing and decoration the said block of flats in accordance with the landlord's covenant herein contained." The sub-clause concludes: "The amount of such proportions and management fee shall be determined by the landlord's surveyor whose decision shall be final and binding upon the landlord and tenant."

19. The landlord sought to rely on this last sentence for the proposition that the landlord's surveyor could determine some other proportion that the one thirteenth, one eighteenth and 5 per cent. The landlord claimed management fees at 15 per cent on all the expenditure. We disagree that the landlord could increase the management fee in this way. The last sentence of clause 4(18) is merely a means of determining the total amount payable by each tenant. In effect it is a form of certification, where the landlord's surveyor states the amount spent under each head of clause 4(18). In our judgment it does not permit the landlord's surveyor to vary the proportions or the percentage; it merely allows him to do the relevant accounting exercise. Were it otherwise, then (as Ms Cramplin argues) the landlord's surveyor could fix any percentage, even as high as 100 per cent.

20. We should add that on the facts we have no evidence that the landlord's surveyor did change the percentage as alleged. The current landlord purchased the freehold in 1973. Since then there has never been a "landlord's surveyor". There is no evidence that the

landlord before 1973 had a surveyor or that, if there was a surveyor, the surveyor had altered the percentage.

21. Accordingly in our judgment the landlord was only entitled to charge 5 per cent by way of management fee.

22. We should add that we have some sympathy for the landlord, because Mr Pratt of the landlord, when he gave evidence to us, seemed confused as to what should properly constitute "management services". He appeared to think that matters like cleaning the common parts or replacing light bulbs which he and his staff did would fall to be treated as a management expense. In fact, however, management relates solely to the administration. Cleaning etc falls under clause 4(18)(b), but the landlord did not charge the tenant separately for this service.

23. The landlord had also been charging management fees on the cost of the insurance which the landlord was obliged to obtain on the block. In our judgment clause 4(18)(d) only permits management fees to be raised on expenditure falling under clause 4(18)(a), (b) and (c). There is no provision for management fees to be raised on insurance.

24. Again the lease has to be construed as at the time it was made in 1962. At that time, it was common for a landlord to have his own agency with an insurance company, so that the landlord would receive the commission on the insurance. It is thus readily explicable that the lease makes no provision for a management charge to be levied on the insurance. Against that background the Tribunal cannot find such a term by implication.

Estoppel

25. In relation to 2006, the landlord seeks to rely on an estoppel resulting from the tenant's acceptance in his letter of 23rd February 2006. Following that letter, the tenant paid the service charges for 2006 (albeit after a statutory demand in bankruptcy was served on him). It was only in the subsequent years 2007 and 2008 that the landlord realised that there was a dispute.

26. "Estoppel" is a Norman-French word meaning "prevented" or "stopped". If a party can establish what in this case is technically a promissory estoppel, then the other party is prevented from relying on their strict legal rights. In order to establish an estoppel, the party seeking to rely on the estoppel must show (a) that the other party made a representation, (b) that he relied on that representation (c) to act to his detriment.

27. Ms Cramplin disputed each element. In relation to (a), she said that the letter of 23rd February 2006 simply referred to the 2005 service charge year and had no application to 2006. As to (b) and (c), she said the landlord would have behaved just the same, even if the tenant has said he disputed, eg, his liability for a 15 per cent management fee.

28. The Tribunal does not agree. The tenant had owned his lease since 2000 and the landlord had not changed its method of calculating the service charge in that time. The 23rd February letter in our judgment shows the tenant agreeing with that method of calculation, not just for the past but also for the future. That is reinforced by the fact that he actually paid the 2006 service charge account in full (albeit under compulsion of law).

29. As to (b) and (c), it is true that under cross-examination Mr Pratt of the landlord gave evidence that "if Mr Head had said he would not pay 15 per cent I would not have changed anything." However, this single answer cannot be taken out of context. It is clear to us that the landlord wanted to draw a line under the service charge accounts for 2006 and employed its solicitor for that purpose in order to serve a statutory demand and get the money in. None of that expense would have been incurred, if the landlord had realised that there was a substantial dispute about the terms of the lease and the amounts properly recoverable. In our judgment there is reliance and detriment. The tenant is in our judgment estopped from denying that the monies he paid in respect of 2006 were payable.

30. Ms Cramplin raised a suggestion that the landlord was using estoppel as "a sword not a shield." What this means is that a landlord cannot claim money based on an estoppel, but he can use estoppel as a defence against a claim by the other party. In other words, if the tenant here had not paid for 2006, then the landlord could not rely on estoppel to establish the cause of action against the tenant. However, here the tenant has paid for 2006. What the tenant wants is his money back. The landlord here is using estoppel as a defence, which in our judgment is wholly legitimate.

Conclusion

31. Accordingly for the periods 2003 to 2006 inclusive, the Tribunal disallows nothing.

32. In 2007 the amounts claimed and the amounts allowed are as follows:

	Claimed	Allowed
Shared costs	316.49	316.49
Less accountant's fee		(23.08)
Buildings insurance	266.51	
Window cleaning	30.00	30.00
	613.00	323.41
Management fee	91.95	16.17
	704.95	339.58
Building insurance		266.51
	704.95	606.09

33. In 2008 the amounts claimed and the amounts allowed are as follows:

	Claimed		Allowed
Shared costs	504.50		504.50
Less accountant's fees		37.56	
Less legal fees		235.00	(272.56)
Buildings insurance	260.93		
	765.43		231.94
Management fee	114.81		11.60
	880.24		243.54
Building insurance			260.93
	880.24		504.47

Costs

34. The Tribunal has a discretion as to who should bear the cost of the fees payable to the Tribunal. These comprise the application fee of £100 and the hearing fee of £150.

35. In the current case, the tenant has lost in relation to the six years 2001 to 2006 inclusive and has had some modest measure of success in relation to the two years 2007 and 2008. In addition, the tenant also made wholly inappropriate and unjustified allegations of dishonesty against the landlord. Taking these considerations together, we consider that the tenant should bear these costs. Accordingly we make no order for costs in relation to these fees.

36. The tenant seeks an order under section 20C of the Landlord and Tenant Act 1985 so as to prevent the landlord recovering its costs of the current proceedings against him through the service charge account. Since we have held that the landlord is not entitled to recover its legal costs under the provisions of the lease, we do not have to make such an order. If it had been relevant, we would still have refused such an order for the same reasons we have set out in relation to the Tribunal's fees.

DECISION

The Tribunal accordingly determines:

a. **that nothing be disallowed in the service charge years ending 25th December 2003 to 2006 inclusive;**

b. **that the tenant is liable to pay the landlord £606.09 in the service charge year ending 25th December 2007 and £504.47 in the service charge year ending 25th December 2008;**

c. **that there be no order for costs and no order under section 20C of the**

Landlord and Tenant Act 1985.

Adrian Jack

Adrian Jack, chairman 12th July 2010