9050

HM Courts & Tribunals Service

HM COURTS AND TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL for the
EASTERN RENT ASSESSMENT PANEL
Landlord and Tenant Act 1985 – Section 27A
CAM/22UD/LSC/2012/0106

Property	:	**77 Thorndon Hall, Thorndon Gate, Ingrave Essex CM13 3RJ**	
Applicant	:	**Thorndon Hall Management Company Limited**	
Represented by	:	**Mr Jamal Demachkie**	**Counsel**
		Mr Alty	**Kemsley LLP**
Respondents	:	**(1) Mr Don Richard Buckingham**	
		(2) Mrs Susan Elizabeth Buckingham	
Represented by	:	**Mr D R Buckingham**	**In Person**
Date of Application:		**22 August 2012**	
Dates of Directions:		**30 August 2012**	
		31 January 2013	
Dates of Hearings	:	**31 January 2013**	
		31 May 2013	
Date of Decision	:	**7 June 2013**	
Tribunal	:	**Mr John Hewitt**	**Chairman**
		Mrs Evelyn Flint	**DMS FRICS IRRV**
		Mr Stephen Moll	**FRICS**

Decision

1. The decision of the tribunal is that:

1.1 The service charges payable by the Respondents to the Applicant for the year 2010 is the sum of £776.06 made up as set out in Appendix 1 to this Decision;

1.2 The amount currently due and payable by the Respondents to the Applicant as the date 31 May 2013 is the sum of £1,814.77 made up as set out in Appendix 2 to this Decision; and

1.3 The Respondents' application that the substantive application be dismissed as an abuse of process shall be and is hereby dismissed.

NB Later reference in this Decision to a number in square brackets ([ ]) is a reference to the page number of the hearing file provided to us for use at the hearing. The prefixes AS and RS refer to supplemental bundles provided by the Applicant and Respondents respectively.

Background

2. The Applicant (the Management Company) is the head lessee of a residential development known as Thorndon Hall. Thorndon Hall was originally built in the mid to late 1700s as a grand country residence set its own parkland. Later it became a golf club. In the mid 1980s the Hall itself was adapted and refurbished to create a number of self-contained flats. Outbuildings were also adapted to create residential accommodation and some new build took place to create a total of 71 flats and 12 cottages in all. Garages and hard standings were built and other amenities are provided in the extensive grounds.
Most of the residential accommodation comprises flats or apartments. Nearly all were or are now sold off on long leases.

3. For present purposes the development can be divided into three sectors for the purposes of computing service charges; the Blocks, the Cottages and the Estate.

4. The original lease structure was

Head lessee:	Thomas Bates and Son Limited
Management Company:	Thorndon Hall Management Company Ltd
Lessee:	A variety of occupational lessees

5. The Management Company has always been controlled by the occupational lessees. Subsequently the Management Company acquired the head lease. The Management Company thus now fulfils two roles, that of the landlord and that of the management company providing services and collecting in service charges. It is important that these two different and quite separate roles are not intermixed.

6. The Respondents are the lessees of 77 Thorndon Hall, which is one of the cottages. The lease is dated 6 December 1988. The lease was assigned to the Respondents in 1998. Prior to this the Respondents were lessees of an apartment within the main building.

7. The directors of the Management Company are appointed by the members of that company. All of those members are lessees of units within the development. The First Respondent, Mr Buckingham, was a director of the Management Company for a while but evidently resigned several years ago. There is now a good deal of antipathy between the Respondents and the current directors (or some of them) that presently have the stewardship of the affairs of the Management Company, and the appointed managing agent, Mr Alty of Kemsley LLP.

8. The parties have previously been involved in two separate sets of court proceedings in Southend County Court in 2004 and 2009 and three applications to the Leasehold Valuation Tribunal all of which were hotly contested and conducted in a rather hostile atmosphere.

9. One of the major issues between the parties has been the calculation of the contribution to the service charges payable by the Respondents. The lease granted to them contains a drafting error (as were several Cottages' leases) and omitted to oblige the lessee to contribute to certain expenditure.

The Lease – the Cottage

10. As stated above the lease now vested in the Respondents is dated 6 December 1988. A copy is at [226]. It was originally granted to David Ronald Maunder and Christine Maria Maunder.

11. So far as material the lease provides as follows:

12. **Definitions** [226]:

'The Development' :	the land edged red on the Site Plan; effectively the of the whole site;
'Blocks':	the three blocks of flats + entrance halls, staircases and passageways thereof;
'The Premises':	all the Premises described in the First Schedule;
'The Cottage':	that part of the Premises firstly described in the First Schedule;
'The Cottages':	all the cottages forming part of the Development shown on the Block Plan;
'The Flats';	all the flats in the Blocks;
'The Other Premises':	all the Flats in the Blocks, the Cottages and the Garages but does not include the Reserved Parts;
'The Reserved Parts':	the gardens, lawns, woods, access roads, car spaces, lobby halls, terraces, basement areas, staircases passages and lifts and all parts of the Blocks or of the Development which are used in common by the owners, lessees or occupiers of any two or more of the Flats or Cottages or by their visitors and the main structural parts of the Blocks, Cottages and

Garages, including the roof, main walls, parapets, foundations and exterior parts thereof (but not the glass in the windows of the Flats, Cottages and Garages;

13. A term of 125 years from 1 February 1980 at a ground rent as set out in the Sixth Schedule [248].

14. The lessee's covenants with the lessor are set out in clause 4 [231].

15. The lessee's covenants with the lessor and the Management Company are set out in clause 5 [234].
Clause 5(i) is a covenant to pay to the Management Company a contribution to towards the costs, charges and expenses referred to in the Fourth Schedule.
Clause 5(ii) reads as follows:

> *"To pay to the Management Company from 1st January 1989*
> *(a) An amount equal to: [blank space]*
> *(b) An amount equal to w/z times such of the costs expenses outgoings and matters mentioned in the Fourth Schedule hereto as are referable to the whole of the Development other than those which are solely referable to the Blocks where w is the floor area of the Cottage as shown in the First Schedule hereto and z is the total area of the Flats and Cottages"*

The detailed provisions for the provision of budgets, payments on account by two instalments on 1 February and 1 August in each year and for balancing debits and credits were not in dispute at the hearing. It should perhaps be noted that clause 5(v) [236] provides that as soon as reasonably practicable after the end of the calendar year the actual amounts of the Management Company's expenses and outgoings shall be ascertained and the Lessee is to pay any balance due to the Management Company on demand. Should there be a balancing credit; the amount of it is to be entered as a credit in the Management Company's books.

16. The Management Company's covenants with the lessee are set out in clause 7 [238]. Subparagraph (a) is a covenant to insure the Development against the risks specified. There follow provisions to carry out repairs and redecorations and to provide services, none of which were in dispute. The expenses incurred by the Management Company to which the lessee is to contribute are set out in the Fourth Schedule to the lease. Included is:

> *"3. The costs of employing a Porter in connection with the management of the Development and of providing accommodation for him and his family"*

17. Due to the drafting error in the lease vested in the Respondents they are only obliged to contribute to certain expenditure relating to the Estate and to the Cottages.

A lease of a flat

18. By way of contrast it may be helpful to set out here the equivalent provisions of clause 5 (ii) of a lease of a flat within the main building.

> *"(ii) To pay to the Management Company from 1st January 1986*
> *(a) An amount equal to:*
> *x/y times (such of the costs expenses outgoings and matters mentioned in the Fourth Schedule hereto as are referable to the maintenance management and insurance of the Blocks*
> *where x is floor area of the Flat as shown in the First Schedule hereto and y is the total area of the Flats plus*
> *(b) An amount equal to w/z times (such of the costs expenses outgoings and matters mentioned in the Fourth Schedule hereto as are referable to the whole of the Development other than those which are solely referable to the Blocks referred to in sub clause (a) hereof where w is the floor area of the Flat as shown in the First Schedule hereto and z is the total area of the Flats and Cottages"*

The 2010 Application

19. In 2010 the Management Company made an application to a Leasehold Valuation Tribunal pursuant to sections 35 and 40 Landlord and Tenant Act 1987 to vary the terms of the Respondents' lease in an effort to correct the drafting error. The Case Reference is CAM/22UD/LVL/2010/0002.

The application was opposed. The tribunal which heard that application concluded that it should be dismissed because the circumstances did not fall within the statutory provisions as properly construed in accordance with the relevant judicial guidance. In paragraph 43 of that tribunal's Decision it stated that:

> *"43. We do wish to record however that it is plain that the result produces an element of unfairness to the flat lessees and no doubt also to the other Cottages lessees who have agreed voluntary lease variations, who are plainly, to some extent, subsidising the Respondents. In any community, such as Thorndon Hall, it is only right that all members of it should stand on their own two feet and pull their weight. Self-respecting members of the community would wish to do so. We would urge the Respondents to reflect on their position and we very much hope that the parties may be able to achieve a compromise which is considered fair to all."*

In case of any issue over the present application the full decision in the 2010 is worth study.

The 2011 Application

20. This application was made on 3 February 2011. The Management Company sought a section 27A determination as to the service charges payable by the Respondents for the years 2004 to 2009 inclusive. The Case Reference is CAM/22UD/LSC/2011/0017

21. The Respondents wished to include the years 1998 to 2003 on the basis that they believed they may have overpaid in each of those years. In the event the Management Company did not object to the years 1998 to 2001 and 2003 being included but it did object to the year 2002 being re-opened because, it submitted, the service charges payable for that year had already been determined by a court (the 2004 judgment) and thus the tribunal did not have jurisdiction to make a determination in respect of that year. This position was hotly contested by Mr Buckingham but the tribunal concluded that the Management Company's submission was correct and the tribunal had no jurisdiction to re-open the 2002 year.

22. The statements of case originally served by the parties showed that over the twelve years or so in contention there was only a few hundred pounds in issue between the parties.

23. As the application progressed the Management Company felt able to make further concessions on two separate occasions. As the hearing progressed both parties felt able to make further concessions and the matters in issue between them were reduced to:

    23.1 The amount payable in respect of caretaking services in 1999;
    23.2 The amount (if any) payable in respect of Refuse Disposal; and
    23.3 Whether the Tribunal could re-open the amounts payable for the year 2002.

    In particular it was agreed that the Respondents' contribution to expenditure was 0.8648% which is calculated by reference to floor area.

24. The Decision in the 2011 application is dated 19 July 2011 and determined the services charges payable for each of the years in issue and also settled a cash account as between the parties. This recorded that at as 31 December 2009 there was a balance of £43.67 payable by the Respondents to the Applicant.

25. Again insofar as may be necessary for further detail of the history between the parties the full Decision on the 2011 application is worthy of study.

The present Application – the 2012 Application

26. This application was made on 22 August 2012. The application form appeared to suggest that the Applicants sought a determination of the service charges payable for the years 2010 and 2011 and the amounts payable on account for the year 2012. At the hearing and as a preliminary point it became apparent that the Applicants may not have served upon

the Respondents the revised or adjusted year end accounts for 2011. Mr Buckingham claimed not to have seen them, and although copies were in the trial bundle, Mr Buckingham claimed that he had not prepared his case to consider in detail the actual year-end service charge figures and he claimed he would suffer prejudice if the tribunal went on to make determinations on them. Having adjourned to consider the rival submissions the Tribunal decided not to make a determination of the actual service charges payable for 2011 but it would determine what sums (if any) should have been paid on account of the 2011 service charges.

Preliminary issue – abuse of process

27. Mr Buckingham raised a preliminary issue. He submitted that the 2012 application should be dismissed as an abuse of process. His written submissions on the issue are set out in paragraphs 17-23 of his statement of case [20].

28. Initially Mr Buckingham claimed that he was lawfully withholding service charges pursuant to section 21A(1) of the Act. Mr Buckingham appeared to accept this provision was not yet in force and he changed tack. The gist of his revised submission was that his lease was defective and that the tribunal had no discretion. He cited a Lands Tribunal decision in support of his submission – *Southend-On-Sea Borough Council v Skiggs & others* LRX/110/2005. His case appeared to be that the tribunal had no discretion to construe his lease because it was a defective lease, thus we could not make a determination of any service charges payable.

29. We dismissed the application. Mr Buckingham's lease is not defective in the sense that the lease is of no legal effect or is unenforceable. The lease is a valuable legal lease and it is registered at the Land Registry. The lease contains a drafting error the effect of which is that the Respondents pay a smaller percentage of service charge expenditure than the original service charge regime had intended. In pure money terms this operates in favour of the Respondents and to the detriment of their fellow lessees but it does not render the lease defective or unenforceable.

30. The tribunal is perfectly well able to construe the lease according to the usual rules of construction of written instruments insofar as there might be any dispute as to certain provisions of the lease. In the event there were few and, in particular, Mr Buckingham agreed, as he did in the 2011 application, that his service charge liability was limited to 0.8648% of certain expenditure. We conclude that Mr Buckingham may have misunderstood the effect of the *Southend* decision. In that decision it was held that that if a lease, properly construed provides for sums to be payable on a certain date or at a certain time a tribunal does not have the discretion to make an order that the sums be paid at some different or later time. We would not disagree with that proposition. That is different from Mr Buckingham's case where the parties are agreed as to the percentage contribution payable and are agreed as to the dates when on account payments are due and are agreed that any balancing payment is payable on demand once the amount of it has been ascertained. We

would also agree, and it was not in dispute that the demands for the on account payments and the demands for any balancing debits must be in conformity with the several relevant statutory provisions. We agree with Mr Buckingham that the task before us is to construe the subject lease, applying the proper approach to and principle of construction, but in doing so we are not entitled to alter those terms of the lease which are clearly and plainly set out.

31. Having rejected Mr Buckingham's application to dismiss the 2012 Application we proceeded to hear evidence on the sums in issue.

Service Charges 2010

32. The accounts for the year 2010 are at [11]. They are summarised on the Schedule attached to this decision which shows the amount of the contribution payable by the Respondents. The items in dispute are highlighted in yellow. They are as follows:

    Caretaker Salary;
    Garden;
    Audit Fee;
    Management Fees; and
    Reserves

    We shall take each one in turn.

Caretaker Salary

33. The Caretaker Salary expenditure amounted to £31,437.26 in 2010. Mr Alty explained that this sum included the salary of the full time caretaker and the salary of the part-time caretaker who generally worked 2 days per week on caretaking duties. The costs of employing them, included employers National Insurance contributions. Other incidental expenses incurred by them were also included. The expenditure is summarised at [83]. Mr Alty took us through the supporting documentation [84-152].

34. Mr Alty was cross-examined by Mr Buckingham as to the nature of the caretaker's role. Mr Alty said that the caretaker had a number of roles and his job title might more accurately be that of Estate Coordinator. The current job holder was found to be conscientious and over time his role has developed when he demonstrated the ability to take on more responsibility. In his current role in addition to his straightforward caretaking duties he identifies works which are required, obtains quotes from local contractors and submits them to management with recommendations; he coordinates, oversees and supervises small works projects carried out on the buildings or in the grounds. Whilst he does not undertake a full project management role he has demonstrated the ability to take a supervisory role. Mr Alty said that in consequence many smaller projects did not need to be managed by a building surveyor employed or engaged by Kemsley and thus costs of such a surveyor were avoided to the benefit of the service charge account.

35. Mr Alty explained that on a day to day basis the caretaker is managed by the directors of the Management Company who prioritise the tasks he is required to carry out.

36. Mr Alty said that the caretaker was provided with a rent free flat within the main block. His salary is to the order of £16,000. Mr Alty agreed with Mr Buckingham that the caretaker's employment package was probably to the value of about £40,000 per year. Mr Alty did not know if this was a reasonable sum as he had no experience of other similar developments with a resident caretaker.

37. Mr Alty explained that many of the day to day functions carried out by the caretaker would otherwise be carried out by him or other staff at Kemsley and a charge for that management function would be made. In this context Mr Alty said that his own role at Thorndon Hall had reduced. He now attends site once or twice a year. He prepares the annual draft budgets and discusses works and priorities with directors, organises the collection of on account contributions from the lessees, arranges for annual accounts to be audited and deals with balancing charges that may arise. He explained that he prepares a special account for 77 Thorndon Hall to reflect the fact that the provisions for the contributions to service charges for that property do not fit in with the norm for the development. Mr Alty said that he also investigates and gives advice on strategic issues that may arise from time to time and as requested by the directors.

38. Mr Buckingham did not challenge the nature of the role carried out by the current caretaker; the evidence of Mr Alty accorded with his understanding of that role. The gist of Mr Buckingham's challenge is set out in paragraphs 52-54 of the Respondents' statement of case [26]. In essence he asserts that the sum of £31,437.26 is excessive and above the 'norm' for an unskilled labour post. No evidence as to what might be the 'norm' was provided. Mr Buckingham valued the package enjoyed by the caretaker at £40,000 per year. This obviously includes a quantification of the value of the rent free accommodation provided. Mr Buckingham suggested that the package should be no more than £30,000 per year. Mr Buckingham did not have any complaints about the quality of the caretaking service provided.

39. Mr Buckingham also challenged the apportionment of the expenditure. In his statement of case he asserted that the cost was apportioned between Schedule Two and Schedule Four in the accounts. This does not appear to be correct. The year-end accounts are at [11]. The whole expenditure is allocated to Schedule 2 and the Respondents' agreed contribution of 0.8648% is correctly calculated to be £271.87.

40. We have to construe the lease. The lease, like any other instrument, falls to be construed in accordance with laid down principles. These may be conveniently summarised as follows:

The approach to construction

41. In *Campbell v Daejan Properties Limited* [2012] EWCA Civ 1503, a case concerning the construction of a residential lease, the leading judgment was given by Jackson LJ. He said that in construing a written instrument the governing principle is that the parties mean what they say in their document. The Court is to give effect to the express terms of the contract and must resist the temptation to re-draft or to improve upon the terms used. If by mischance the contract does not say what both parties intended, the normal remedy for the aggrieved party is an action for rectification.

42. Jackson LJ said that there was an exception to this governing principle. If, for example, there is an obvious or clerical error or grammatical mistake, the court will correct it as a matter of construction. Jackson LJ said that although the courts have, in recent years, slightly broadened the scope of this exception, it is still confined within clear limits.

43. Jackson LJ then cited and discussed the recent authorities including, *East v Pantiles (Plant Hire) Limited* [1982] 2 EGLR 111; *KPMG v Network Rail Infrastructure Limited* [2007] EWCA Civ 363; *Chartbrook v Persimmon Homes Limited* [2009] UKHL 38; and *Pink Floyd Music Limited v EMI Records Limited* [2010] EWCA Civ 1429. Drawing these together Jackson LJ said the approach the Court should adopt was as set out by Lord Hoffman in *Chartbrook* and Lord Neuberger in *Pink Floyd* as follows:

Lord Hoffman - *Chartbrook*

> *"14. There is no dispute that the principles on which a contract (or any other instrument or utterance) should be interpreted are those summarised by the House of Lords in* Investors Compensation Scheme Ltd v West Bromwich Building Society *[1998] 1 All ER 98, [1998] 1 BCLC 493, [1998] 1 WLR 896, 912-913. They are well known and need not be repeated. It is agreed that the question is what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. The House emphasised that "we do not easily accept that people have made linguistic mistakes, particularly in formal documents" (similar statements will be found in* Bank of Credit and Commerce International SA v Ali *[2001] UKHL 8, [2002] 1 AC 251, 269, [2001] 1 All ER 961;* Kirin-Amgen Inc v Hoechst Marion Roussel Ltd *[2004] UKHL 46, [2005] 1 All ER 667, [2005] RPC 169, 186 and* Jumbo King Ltd v Faithful Properties Ltd *(1999) 2 HKCFAR 279, 296) but said that in some cases the context and background drove a court to the conclusion that "something must have gone wrong with the language". In such a case, the law did not require a court to attribute to the parties an intention which a reasonable person would not have understood them to have had."*
>
> *"25. What is clear from these cases is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant. In my opinion, both of these requirements are satisfied."*

Lord Neuberger – *Pink Floyd*

> *"To the same effect, Chadwick LJ said in* City Alliance Ltd v Oxford Forecasting Services Ltd *[2001] 1 All ER Comm 233, para 13 (in a passage cited with approval in* Lediaev v Vallen *[2009] EWCA Civ 156, para 68) that the court cannot "introduce words that the parties have not used" into a contract unless:*
>
> > *"satisfied (i) that the words actually used produce a result which is so commercially nonsensical that the parties could not have intended it, and (ii) that they did intend some other commercial purpose which can be identified with confidence."*

44. We are satisfied on the evidence, which was not really challenged, that the role undertaken by the caretaker is not that of an unskilled labourer. He may carry out some relatively menial tasks but his role has grown and developed and he undertakes a wider range of tasks as described by Mr Alty in his evidence which we have summarised above. The question arises whether that wider role falls within the provisions of the lease as properly construed. The material words are:

> *"3. The costs of employing a Porter in connection with the management of the Development and of providing accommodation for him and his family"*

45. Thorndon Hall is a prestigious and sophisticated listed development comprising a number of buildings set in substantial grounds. It requires a good degree of management. Contractors attending site to quote or estimate for works and to carry out works will need to be met and to some extent supervised. They may need to ask about the availability of water or electrical power or need clarification of what it is they have to do and no doubt on occasions, discuss options. It seems to us drawing on our experience that there is a need for a person familiar with the development to be on site most working days to undertake this role and to include it within other duties. This appears to us to be reflected by the terms of the lease. The lease does not use the expression 'caretaker' but the expression 'Porter in connection with the management of the Development'. We find that the role of the caretaker explained to us by Mr Alty falls well within what would reasonably have been in the minds of the parties when the lease was entered into in 1988.

46. The directors of the Management Company have expanded on the role of the caretaker employed by them when it was found he was capable of taking on additional responsibilities and we cannot find that it was unreasonable of them to have done so. There was a role to be performed. If not undertaken by the current caretaker they would be required to make alternative provision, either by the employment of a further person or procuring such services from a managing agent, such as Kemsley.

47. We turn next the costs incurred in 2010. Mr Buckingham quantifies the caretaker's package at about £40,000 per year which he says is above the norm. We are not persuaded that this is a fair approach. It plainly includes a value attributable to the free accommodation provided to the caretaker. The

market rents of flats within Thorndon Hall will reflect that it is a prestigious development. The caretaker does not live there through his choice but because he is required to do so for the better performance of his duties. Whilst we accept that looking at the package it is right to take into account that accommodation is provided free of charge and that must reflect in a reasonable salary, we do not accept that the whole of market rental of the flat actually provided should be taken into account.

48. As we have said Mr Alty took us carefully through the component parts of the expenditure of £31,437 for the year 2010. These may be summarised as follows:

Salary and NI costs	£28,440
Telephone	£ 825
Travel/expenses	£ 172
Advertisement	£ 2,000
	£31,437

In the absence of any evidence from either of the parties as to what the 'norm' might be for a resident caretaker providing a like level of duties in the Essex area the members of the tribunal called upon their collective and accumulated experience of such expenditure. We are satisfied that the amount actual amount expended was within the range that can be properly regarded as reasonable. We thus find that the sum of £31,437 was reasonably incurred and is reasonable in amount.

Garden

49. The Garden expenditure in 2010 was £19,188.65. It might be better termed 'Grounds Maintenance' since it includes the costs associated with the formal gardens, terraces, grounds of the estate and woodland (about 16 acres) drive ways, car parks, garage blocks, ornamental pond and external lighting. The contribution charged to the Respondents at 0.8648% is £165.94.

50. In their statement of case the Respondents stated they did not understand how this sum was arrived at and required a breakdown. A schedule of the costs is at [153]. Mr Alty took us through the details. A gardener is employed for 3 days per week at a cost which he equates to about £11.35 per hour. Included in the total expenditure are a number of expenses, such as tree felling, installation of sensors and lighting repairs. Mr Buckingham stated that he was not challenging these items; his challenge was limited to the sums paid to the gardener, although he was not challenging the quality of her work which he said was good. Mr Buckingham had calculated that the cost of employing the gardener was nearer to £15 per hour which he considered excessive. He submitted that the cost should be no more than £12 per hour.

51. On its inspection the tribunal noted that the gardens and grounds were kept in high order, and indeed the gardener was at work at the time. We can

thus understand why Mr Buckingham did not wish to challenge the quality of the work carried out by the gardener.

52. As to the costs we find that they were reasonably incurred and are reasonable in amount.

Audit Fees

53. The cost of the audit in 2010 was £3,214.38. The Respondents' share amounts to £27.80.

54. The service charge regime is set out in clause 5 of the lease. There is a provision for a year end certificate in these terms:

> *"(vi) The Certificate of the Management Company or if appointed the Auditor for the time being of the Management Company as to the amount due under this clause ... "*

Paragraph 6 of the Fourth Schedule (which sets out expenses incurred to which the lessee is to contribute) is in these terms:

> *"6. The fees and disbursements paid to any Managing Agents appointed by the Management Company in respect of the management and to any Auditor for the purposes of this Lease."*

55. The Respondents wished to see the supporting invoices and to be satisfied that the costs related solely to the service charge account and were not connected with the corporate or statutory accounts which the Management Company is obliged to prepare.

56. Mr Alty explained that the sum of £3,214.38 was the balance after allowing for prepayments and accruals. A breakdown is at [202]. The supporting invoices issued by Bird Luckin follow at [203 and 204]. The first makes reference to 'preparation of the company's accounts ... Preparation and submission of the income tax return for 2009/10' The second makes reference to preparation of the limited company's accounts and service charge accounts for the year ended 31 December 2010 plus an additional charge of £500 for splitting the accounts into two. Evidently this was necessary as a consequence of the 2011 Decision which separated out service charge expenditure governed by the terms of the lease and corporate income and expenditure governed by the articles of association. Mr Alty accepted that both invoices included for some corporate work and some service charge accounts work. His broad brush approach was that the costs should be apportioned 66% to 75% for the service charge accounts work.

57. Mr Buckingham submitted that he should pay nothing. He did not see that the auditors provided any level of service as regards the service charge account.

58. We find that the lease properly construed contemplates that auditors might be engaged to provide a service in connection with the service charge accounts. We find that the Management Company took advice from the auditors before it issued the service charge certificates. We also find that it incurred fees in connection with the exercise to separate out service charge costs and corporate costs arising from the 2011 Decision.

59. Doing the best we can with the limited evidence before us we can but draw on our accumulated experience and expertise in these matters. We find that it was reasonable to incur auditor's fees and that for 2010 a reasonable amount is £2,100.00. The share of that to be borne by the Respondents amounts to £18.16.

Management Fees

60. The fees incurred for the year 2010 amounted to £12,250. The Respondents' share amounts to £105.94.

61. Mr Alty confirmed that there was a management contract in place for 2010 which provided for a fee of £12,250 which had been negotiated between himself and the directors of the Management Company. We have already summarised in paragraph 37 above the management services provided by Kemsley and the day to day management undertaken by the caretaker.

62. The development comprises about 83 residential units so that the unit fee for the management services provided by Mr Alty through Kemsley equates to about £147.60 per year.

63. Mr Buckingham was highly critical of the level and quality of service provided by Kemsley. He suggested he should be required to contribute to 50% of the sum incurred. He said the service he received was less than acceptable.

64. Clearly Mr Buckingham is at odds with the Management Company on a number of fronts. Most of these relate to or are connected with the service charges and the accounts. These are dealt with by Kemsley on behalf of the Management Company. Mr Buckingham becomes frustrated when matters are not ordered to his liking or how he perceives they should be and this often manifests itself in confrontation with Kemsley and/or the exchange of sharp correspondence with Kemsley. We can therefore well understand why Mr Buckingham does not consider that Kemsley provides him with a quality service. We must however bear in mind that Kemsley is the agent of the Management Company, not of Mr Buckingham and its principal duties are owed to the Management Company. There was no evidence before us that the Management Company did not regard the agreed fee as being reasonable in amount.

65. We do not pretend that the services provided by Kemsley were wholly without fault. Some errors were made and some correspondence might have been answered sooner. However, given the somewhat limited

management role placed with Kemsley we find that a unit fee just short of £150 for a year is within the range that can properly be regarded as reasonable for a development of the size and type as that of Thorndon Hall. Kemsley has not always got things right and on some issues it might have given clearer guidance to the directors of the Management Company. Nevertheless we were not persuaded that the annual fee of £12,250 was unreasonable in amount. Where Kemsley were writing to Mr Buckingham on instructions setting out the policy or decision of the directors, the fact that Mr Buckingham did not agree what was being put to him does not mean that Kemsley was not providing the management services required of them by the Management Company.

66. Accordingly we find that no adjustment should be made for the management fees for 2010.

Reserves or Sinking Fund

67. Mr Buckingham submitted that the lease provides for a sinking fund but not a reserve fund. What paragraph 2 of the Fourth Schedule actually provides for is [245]:

> *"2. Such sum (to be fixed annually) as shall be estimated by the Management Company (whose decision shall be final) to provide a sinking fund for any part of the Reserved Parts that the Management Company decides as necessary"*

The Reserved Parts are defined on [224] as follows:

> *"the gardens lawns woods access roads car spaces lobby halls terraces basement areas staircases passages and lifts and all parts of the Blocks or of the Development which are used in common by the owners lessees or occupiers of any two or more of the Flats or Cottages or by their visitors and the main structural parts of the Blocks Cottages and the Garages including the roof main walls parapets foundations and exterior parts thereof (but not the glass of the windows of the Flats Cottages and Garages nor the interior faces of such of the walls which bound the Flats Cottages and Garages and the floor finishes of the Flats Cottages and Garages) and all cisterns tanks drains sewers pipes wires ducts and conduits in under or upon the Development not used solely for the purpose of a single Flat or Cottage or Garage and the boundary walls and fences surrounding the Development"*

68. Mr Alty explained that the directors of the Management Company have made provision for 3 separate sinking funds, generally called Reserves as follows:

Blocks:	To cover costs of major works redecorations and stonework repairs;

Cottages: To cover costs of major works and redecorations to the cottages; and

Estate: To cover costs of major works to repair or maintain the roadways, grounds, external lighting, resurfacing etc.

He said that expenditure drawn from the reserve funds in 2010 was as follows:

Blocks: General repairs £15,160; Stonework £24,534;
Cottages: General repairs £7,164;
Estate: Works £4,501.

Mr Alty told us, and it was not challenged, that the strategy for the sinking funds is considered by the directors each year as part of the budget setting exercise. Adjustments are made as required and forward projections of expenditure prepared and reviewed in the light of planned projects. Some projects are cyclical, for example redecorations are 5 yearly whereas others, such as major lift repairs or replacement will be less frequent.

69. There was some semantic discussion at the hearing as whether there is or is not a technical difference between a sinking fund and a reserve fund and whether the expression 'sinking fund' is a term of art. Mr Buckingham submitted that the Management Company does not operate a sinking fund but a reserve fund. Mr Buckingham did not produce any authority to support his proposition but contended that a sinking fund was usually referable to a specific item of plant or equipment with a finite life span and annual provision was made to build up a fund to purchase a replacement when required.

70. In some circumstances the expression 'sinking fund' might, in context, be used as a term of art along the lines suggested by Mr Buckingham. We have to construe the lease as written in accordance with the principles we have set out above. In so doing we find that the parties to the lease intended the Management Company should have a wide discretion as to the purpose and application of funds to be set aside. We find that 'sinking fund' was not used as a term of art in the subject lease. It was used in the sense that it was a fund (or funds) to be set aside for any part of the Reserved Parts for expenditure at a later date. We are reinforced in this view by the wide definition of Reserved Parts which is not limited to items such as plant and equipment. We are therefore satisfied that the 3 sinking funds or reserve funds set up and operated by the Management Company fall well within the scope of paragraph 2 of the Fourth Schedule to the lease.

71. The amount of the reserves attributable to the Respondents for 2010 amount to £193.72. We find this sum to be reasonable in amount. Mr Buckingham submitted that he should not be required to contribute to the sinking funds anymore due to historic mismanagement, which he did not elaborate upon. We reject that submission as unfounded.

72. Mr Buckingham also raised a point that some of the reserves have been used to bridge what appears to be a temporary cash flow issue. It appears this may have arisen as a consequence of the splitting of the corporate expenditure and service charge expenditure following on from the 2011 Decision. Mr Alty sought to assure us that funds have not been misused or unlawfully spent but have been accounted for in a different way on a temporary basis. Such an issue is outside the scope of our jurisdiction on a section 27A application. In any event it does not directly impact on the reasonableness of service charge expenditure for 2010. We do however observe that generally it is preferable to separate out reserve funds or sinking funds from a general day to day management fund and to ensure that sinking funds or reserve funds are only drawn down to fund approved projects for which the funds were set aside.

Summary

73. The first final demand for 2010 given to the Respondents claimed the sum of £868.52 for the year. Later a revised demand was given to them claiming £896.32, an increase of £27.80. At the hearing on 31 May 2013, the Claimants abandoned the later claim and were content for the tribunal to determine the application on the basis of the claim of £868.52.

74. In the light of the above we have made modest adjustments to the service charges payable by the Respondents for 2010. We have also made some adjustments to reflect section 20B of the Act, which we shall explain shortly.

    In consequence the service charges payable by the Respondents to the Applicant for the year 2010 is the amount of £776.06 as shown on Appendix 1 to this Decision.

The budgets for 2011 and 2012

75. The only contentious items in these budgets which Mr Buckingham wished to pursue were the amounts allocated for Caretaker Salary. The budget sums were £28,000 and £29,200 respectively.

76. Mr Alty took us carefully through the usual process adopted by the directors for budget setting. In essence he reviews each head of expenditure against historic cost and adds or subtracts from that data depending on what he believes the directors' policy to be for the ensuing year. He then discusses his draft budget with the chairman who prepares spread sheets which he then shares with the directors for comment/discussion. A draft budget is then circulated to members/lessees for discussion at a general meeting usually held in January each year. The directors then set the budget having regard to observations made at the general meeting.

77. The gist of Mr Buckingham's objection to the two budget items was that in his view the caretaker is paid too much. He did not wish to add to the submissions he had made in relation to the 2010 head of expenditure on this topic.

78. Given the historic costs and given our findings that the 2010 expenditure of £31,437 was reasonable in amount we find that budget sums of £28,000 and £29,200 for 2011 and 2012 were reasonable in amount. Inevitably budget setting is not an exact science and we are satisfied that the sums set were well within the range open to the directors to determine. We find that it cannot properly be said that the directors' decisions were perverse or so unrealistic as to warrant interference from us.

79. At the hearing on 31 May 2013 Mr Alty for the Management Company conceded that the demands given to the Respondents for the two interim payments in 2011 were not compliant with section 21B of the Act and thus the Respondents were entitled to withhold payment pursuant to section 21B(3). Evidently final accounts have been prepared and the contribution payable by the Respondents has been ascertained as £933.21 [13]. It was not clear to us if and when a final demand has been made for that sum. If a demand has been made that sum will be payable unless any challenge to it is agreed or determined. For completeness we note that on the schedule included in Mr Demachkie's supplemental statement of case dated 21 February 2013, there is reference in paragraph 4 to a Revised Interim Demand for 2011 but no reference to a final demand for that year.

Cash Account

80. Having made the determinations above it falls to settle the cash account as between the parties.

81. Toward the end of the day of the hearing on 31 January 2013 an issue emerged as to what compliant demands may been given to the Respondents in respect of the years 2010, 2011 and 2012 and the proper treatment of a sum of £929 paid by the Respondents in May 2011 which they assert was a payment on account of their general service charge liability and which the Applicant asserts was the payment of a costs obligation.

82. In agreement with the parties these matters were to be determined by the tribunal on the basis of written submissions and without an oral hearing pursuant to Rule 13. Appropriate directions were duly issued. Subsequently, by letters dated 25 February and 12 March 2013 the Respondents exercised their right and requested an oral hearing. This was duly set for 10:00 Friday 31 May 2013; the delay being due to diary congestion of some of those involved.

83. We have received the further written materials from the parties as follows:

Applicant	
21 February 2013	Supplemental Statement of Case
Respondents	
8 February 2013	Supplemental submissions/evidence
25 February 2013	Letter/further submissions
12 March 2013	Follow-up letter

16 April 2013	Letter further submissions and with two authorities attached

The hearing on 31 May 2013

84. At the hearing on 31 May 2013 the Management Company was represented by Mr Alty of Kemsley LLP and Mr R K Sepkes, a director of the Applicant. The Respondents were represented by Mr Buckingham.

85. The Respondents' supplemental submissions/evidence dated 8 February 2013 contained a good deal of material relating to matters dealt with and concluded at the hearing on 31 January 2013. Mr Buckingham was informed that the tribunal would not look at or consider that material and that it would focus only on the material concerning the two matters set out in the Directions dated 31 January 2013. Mr Buckingham did not object to this course.

86. It will be convenient to deal with the £929 payment first.

The payment of the £929

87. In 2008 there was a tribunal hearing in Ref No CAM/22UD/LSC/2008/0036 on an application brought by the Management Company against the current Respondents. None of the members of the current tribunal were members of the 2008 tribunal. The 2008 application was dismissed. The Respondents made an application under section 20C of the Act. The Decision of the 2008 tribunal is dated 1 September 2008 and is at [AS50]. The Decision was critical of the conduct of both parties and in effect an order on the 20C application was made in these terms:

> *"It is therefore just and equitable that 25% of the costs of the Hearing today are borne by the Respondents* ***as part of their future Service Charge****. If this sum cannot be agreed this can be determined by a future Tribunal Hearing."* (Emphasis added)

The Respondents sought permission to appeal this decision and the 2008 tribunal refused permission [AS63].

The Respondents repeated an application for permission to appeal to the Lands Tribunal. It was common ground that permission was refused by the President in these terms:

> *"There is no possibility of the applicants successfully contending that the LVT exercised its discretion unlawfully. Its decision is clear and reasoned and one to which it was undoubtedly open to it to come. The justification for what it decided is manifest."*

88. Evidently negotiations then took place between the Management Company's solicitors, Tolhurst Fisher LLP, and the Respondents as to the quantum of the sum to be paid by the Respondents.

At [AS62] is a letter from Tolhurst Fisher LLP to the Respondents dated 6 April 2009:

> *"We confirm that our client has instructed us that it is prepared to accept a contribution from you to costs in respect of the LVT proceedings of £929.00."*

At [AS60] is a letter from Kemsley LLP to the Respondents dated 11 May 2009:

> *"Please find attached our Application for Payment in the sum of £929.00 as per copy letter (see attached) sent to you by Tolhurst Fisher solicitors on 6 April 2009."*

The attached application stated, so far as material:

> *"11 May 2009 Contribution towards costs of LVT proceedings £929.00"*

At [AS58] there is a letter from the Respondents to the Management Company dated 10 March 2011:

> *"Dear Sirs*
> ***LVT/County Court Costs***
> *We enclose:*
> 1. *Cheque in the sum of £929.00 payable to Thorndon Hall Management Company Limited in respect of LVT costs award of 1 September 2008.*
>
> 2. *Cheque in the sum of £885.36 payable to Tolhurst Fisher LLP in respect of their costs in relation to the county court hearing of 9 March 2011 on behalf of Thorndon Hall Management Company Limited.*
> *Yours faithfully"*

It was common ground that the cheque for £929 was duly presented to and paid by the bank.

89. The gist of Mr Buckingham's case was that the 2008 tribunal had no power to make an award of costs against the Respondents and it was clear from the 2008 Decision that the sum to be paid was some form of additional service charge, over and above the routine service charges payable pursuant to the lease. In support of this submission Mr Buckingham relied solely upon the words in the 2008 Decision:

> *"borne by the Respondents* ***as part of their future Service Charge."***

90. Mr Buckingham submitted that the Management Company ought to have included this sum in his 2008 final service charge demand. It did not do so.

The 2011 application determined the service charge payable by the Respondents for the years 2004 to 2009 inclusive. The amount payable for 2008 was determined to be £808.06 and comprised routine service charges only. He said the Applicant did not seek to include the £929 debit. He said that when the cheque for £929 was banked in March 2011 it should have been credited to the Respondents' service charge cash account as if it were a payment generally on account of current service charge liabilities and not allocated to payment of the costs which had been agreed at £929, despite the fact that the covering letter expressly stated it was tendered *"in respect of LVT costs award of 1 September 2008."*

91. Mr Alty submitted that the parties proceeded on the basis that on a section 20C application the order was that no costs were to be passed through the service charge account and that the Respondents were to make a contribution of 25% of the Management Company's costs. The quantum of that contribution had been mutually agreed to be £929.00. That sum was tendered by the Respondents on that basis and accepted by the Management Company on that basis. Mr Alty explained that the costs incurred by the Management Company had been paid from its accumulated reserves from its ground rent income and the contribution was paid into the Applicant's general account. Neither debit nor credit went through the service charge account. He also said that the sum was not a service charge payable in accordance with the regime set out in the lease and it had never been treated as such. He thus submitted that the payment should not be credited to the Respondents' service charge cash account as if it were a sum paid generally on account.

92. We prefer the analysis made by the Management Company and the submissions of Mr Alty. The sum paid cannot have been paid as if it were a service charge within the regime set out in then lease. It has to be treated as something outside of that regime. The sum of £929 was not debited to the service charge account as between the Management Company and the Respondents. It was credited to that account in error. It is plain to us that the sum was tendered as being a contribution payable in respect of the 2008 tribunal decision and it was accepted on that basis. We find that it not now open to the Respondents to properly assert that the character of the payment should be treated in quite a different way and totally different to the basis on which it was tendered. Where a debtor owes several sums to a creditor the debtor is entitled to allocate a payment to such debt as he may choose. In the present case the Respondents chose to allocate the payment of £929 as being a contribution to costs which they had agreed to pay. Having made that allocation it is not now open to the Respondents to say that they wish to allocate the payment in a different way.
We find that the Management Company is entitled to correct its error and to remove (or contra) the credit of £929 in the service charge cash account.

The 2010 and 2011 final payments

93. Mr Buckingham submitted that the lease should be correctly and strictly construed. He drew particular attention to the words:

which appear just below clause 5(ii)(b) and which govern and apply to clauses 5((ii)(b)(i)-(viii) [235].

He said that the word *"ALWAYS"* was of particular significance and he quoted a dictionary definition of that word which included 'at all times'. He said that with that in mind the provisions of sub-clause (iv), properly construed, is that it is an imperative the budget for a year is prepared before, and a valid demand for the interim payments must be made before, 1 February which is the specified date for payment of the first of the two interim payments. He submitted that if the Management Company failed to do that it was precluded from seeking both of the two interim payments and the year-end balancing charge. As to the latter his submission was that if there are no interim payments to take into account there is nothing to 'balance' the year-end final amount against, with the consequence that there is no year-end final sum payable.

It was common ground that the Management Company had not made compliant demands for the 2010 and 2011 interim payments. Mr Buckingham said the consequence was that no service charges at all were payable by the Respondent for either of those two years.

94. Mr Alty made rival submissions. He said that the service charge regime, properly construed gave the Management Company the right to make a demand for two interim payments in each year, 1 February and 1 August but did not impose an obligation on it to do so. He drew attention to the words in the lease:

> *"... the contributions ...for each calendar year shall be estimated ... as soon as practicable after the 1st of January of each year..."*

He submitted there was no obligation that the estimate must be made by 1 February in each year and sometimes there were genuine practical reasons which preclude that. Mr Alty submitted that if the estimate was not prepared by 1 February and if the demand for the interim payments went out after 1 February, the legal effect was that the first interim payment was payable on demand and in practical terms that would be, 7 days or so to give the lessee the opportunity to draw a cheque, which is exactly the effect as a final year-end balance is payable on demand. Of course provided the estimate was prepared and sent out prior to 31 July the interim payment due on 1 August would be payable in the normal way.

Mr Alty submitted that there is no provision in the lease to the effect that time is of the essence for sending out the estimate and making a demand for the two interim payments.

95. We accept that the lease must be properly construed. It is a working document and the parties must be clear as to how it operates and both

parties are entitled to expect that the other will comply with obligations imposed upon them by the terms of the lease. That said we find the incredibly strict and draconian construction contended for by Mr Buckingham is simply not tenable or workable. His approach is a stretch too far. It cannot have been the intention of the parties to the lease when it was granted back in 1988 that the Management Company had the one opportunity to serve a compliant demand before 1 February in each year and that if it failed to do so it would not be entitled to recover any service charges at all for the whole of that year but still have the obligation to insure the development and provide the services set out in the lease. If, for example, due to a technical defect in the demand for the interim payments, or a delay in the postal system the demands were delivered late to all lessees, the Management Company would have no income at all for the whole of the year. The construction contended for by Mr Buckingham is simply wrong and it makes no commercial sense at all and we reject it.

96. For the sake of good order we should record that it was common ground that a sample demand is at [AS41] and that on instruction from the Management Company the usual practice has been that it would be accompanied by a copy of the estimate for the year and a covering letter from Kemsley specifying the amount of the interim payments to be made on 1 February and 1 August and also giving the lessee the opportunity to make payment by way of 10 instalments provided payment was effected by bankers standing order.

The section 20B point

97. It will be clear from this Decision that there is a long standing poor relationship between the parties especially as to service charges and accounting matters, about which Mr Buckingham corresponds regularly and at length. For internal reasons which were not entirely clear to us the decision was taken by the Management Company or its advisers to defer sending to the Respondents a demand for the interim payments for 2010. This may have been connected with some efforts to try and get agreement on some accounting issues. The result was that in 2010 no demand, or at no least compliant demand, was sent to the Respondents. It was common ground that the final demand for 2010 was not given to the Respondents until 20 September 2011.

98. It was conceded by the Management Company that section 20B was engaged which precluded it from recovering expenditure incurred prior to 21 March 2010. The effect of this on the sums payable for 2010 was set out in some detail in paragraphs 7- 9 of the Management Company's supplemental statement of case dated 21 February 2013. The points made and the quantum of the consequent reductions as calculated by the Management Company were not challenged by the Respondents in their statement of case in answer dated 25 February 2013.

99. At the hearing Mr Buckingham did not challenge the reductions as regards Caretaker Salary, Garden and Management Fees but he took objection to paragraph 9(b) where it was explained that adjustments to a number of

utilities and other small expenditures were de minimis and that it was disproportionate to undertake the detailed exercise to quantify them. Mr Buckingham submitted that the exercise should be undertaken. Mr Alty said that the Management Company was taken by surprise and did not have the relevant materials to hand. We find that Mr Buckingham had failed to put the Applicant on notice of this issue and we concluded that it was unjust and disproportionate to allow him to do so at the hearing. Similarly, Mr Buckingham complained that no adjustment had been made to the sum allocated to the Reserve Fund but no prior notice of this point had been given. For the same reason we held that Mr Buckingham should not be allowed to pursue it. Looking at it from a practical point of view the amount of a contribution to the reserve fund would be 'incurred' when it was transferred to the reserve fund. There was no evidence before us as to the date on which sums were transferred from the general account to the reserve fund. Given that the first interim payments were not due until 1 February and that evidently some lessees take the opportunity to pay by 10 instalments we infer that the general account would be built up over some months and that transfers to the reserve fund are more likely than not to be made towards the end of a year when there were sufficient surplus funds available. We conclude that it was thus unlikely that any transfers to reserve fund would have been made by 21 March 2010.

Costs and fees

100. There were no applications for costs, section 20C orders or for the reimbursement of fees.

Concluding comments

101. To summarise, we have determined the amount of service charges payable by the Respondents for the year 2010. We have also determined that the absence of compliant demands for interim payments for 2011 does not preclude the Management Company from giving a demand for the actual service charges payable for that year and that such demand is payable on demand, that is say, within a few days of receipt.

    We have not determined the amount of the actual service charges payable for the years 2011 and 2012. Given that over the years successive tribunals have given to the parties clear guidance on the proper construction of the lease and the reasonable approach to service charges to be adopted we very much hope that the parties will now take a pragmatic view and reconcile any differences they may have.

102. During the course of the hearings the tribunal made clear that the disputes, between the parties, sometimes over quite modest sums or on the footing of quite unreasonable, unmeritorious or specious arguments were being litigated and determined at the public expense. In times of austerity this was inappropriate, disproportionate and simply wrong. The parties were warned that any future applications to a tribunal which sought to raise matters already determined in principle or which raised petty issues or arguments over petty sums were likely to be treated as an abuse of the tribunal's process and would be dealt with as such.

103. At the request of Mr Buckingham we record that he stated he was willing to sit down with representatives of the Management Company and to discuss matters. We are happy to do so. From exchanges that were between the parties during the course of the hearings we observe that if the Respondents are able to make the bold gesture to vary their lease so that it accords with all the other leases and the service charges are shared out as originally intended, the Management Company may be able to make an equally bold gesture to reciprocate

John Hewitt
Chairman
7 June 2013

The Schedule

Relevant Legislation

Landlord and Tenant Act 1985

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, improvements 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 for 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 or later 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 provisions 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.

Note: Reasonableness: The application of the test:

The application of the test was helpfully explained by HHJ Karen Walden-Smith in *Havering LBC v Macdonald* [2012] UKUT 154 LC (17 May 2012) and may be summarised as follows:

1. It is by virtue of the provisions of section 27A of the Landlord and Tenant Act 1987 (inserted by the Commonhold and Leasehold Reform Act 2002) that an application may be made to the LVT for a determination whether a service charge is payable and, if it is, as to the amount which is payable.

2. As is consistent with other decisions as to what is meant by "reasonableness", in determining the reasonableness of a service charge the LVT has to take into account all relevant circumstances as they exist at the date of the hearing in a broad, common sense way giving weight as the LVT thinks right to the various factors in the situation in order to determine whether a charge is reasonable. The test is "whether the service charge that was made was a reasonable one; not whether there were other possible ways of charging that might have been thought better or more reasonable. There may be several different ways of dealing with a particular problem or matter. All of them may be perfectly reasonable. Each may have its own advantages and disadvantages. Some people may favour one set of advantages and disadvantages, others another. The LVT may have its own view. If the choice had been left to the LVT it might not have chosen what the management company chose but that does not necessarily make what the management company chose unreasonable" per His Honour Judge Mole QC in *Regent Management v Jones* [2010] UKUT 369 (LC).

3. Once a tenant establishes a prima facie case by identifying the item of expenditure complained of and the general nature (but not the evidence) of the case it will be for the landlord to establish the reasonableness of the charge. There is no presumption for or against the reasonableness of the standard or of the costs as regards service charges and the decision will be made on all the evidence made available: see *Yorkbrook Investments Ltd v Batten* (1986) 19 HLR 25

(as applied in *Schilling v Canary Riverside Development PTD Limited* LRX/26/2005 and *Regent Management Limited* (supra).

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,
   (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement, to which the Tenant is a party,
   (c) has been the subject of determination by a court, or
   (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the Tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been

incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Appendix 1 **77 Thorndon Hall** **2010 Service Charges Payable**

Expense	2010 Total Claimed	77 Share 0.8648%	S20B Adjusted	LVT Determination
Caretaker Salary	£ 31,437.26	£ 271.87	£ 237.10	£ 237.10
Electricity	£ 818.54	£ 7.08		£ 7.08
Audit	£ 3,214.38	£ 27.80		£ 18.16
Garden	£ 19,188.65	£ 165.94	£ 144.36	£ 144.36
Insurance	£ 3,985.66	£ 34.47		£ 34.47
Refuse	£ 1,226.36	£ 10.61		£ 10.61
Post Point	£ 500.00	£ 4.32		£ 4.32
TV	£ 6,810.75	£ 58.90		£ 58.90
Sundries	£ 134.63	£ 1.16		£ 1.16
Water	£ 828.80	£ 7.17		£ 7.17
Ground Rent	£ 260.00	£ 2.25		£ 2.25
Pest Control	£ 590.00	£ 5.10		£ 5.10
Management Fees	£ 12,250.00	£ 105.94	£ 79.46	£ 79.46
Reserves	£ 22,400.00	£ 193.72		£ 193.72
Total	**£ 103,645.03**	**£ 896.33**		**£ 803.86**
Deduction to adjust to first demand				-£ 27.80
Net Sum Payable				**£ 776.06**

Appendix 2 **77 Thorndon Hall** **Cash Account**

Balance payable as at 31.12.2009 determined by LVT		£ 43.67
First interim 2010		£ -
Second interim 2010		£ -
Final 2010 as detemined by LVT and now payable		£ 776.06
First interim 2011		£ -
Second interim 2011		£ -
Final 2011 payable - no details of final demand provided		
[redacted]		£ 497.52
[redacted]		£ 497.52
[redacted]		£ -
First interim 2013 - no details provided		£ -
		£ 1,814.77