RESIDENTIAL PROPERTY TRIBUNAL SERVICE

SOUTHERN RENT ASSESSMENT PANEL AND LEASEHOLD VALUATION TRIBUNAL

Section 27A and 20ZA of the Landlord & Tenant Act 1985

Case Number: **CH1/15UB/LIS/2004/0035**

Re: **Villa 62**
Millendreath Village
Looe
Cornwall

Between: **Mr T E Cardwell**
(and others)

Applicant

Hill Properties Ltd
c/o Chancery St James plc

Respondent

Before: **Mr A L Strowger, M.A. (Cantab), (Chairman)**
Mr R Batho, MA BSc LLB FRICS

Representation: **Mr J Sharples, Counsel, for the Applicants**
Mr T Dutton, Counsel, for the Respondent

Date of Hearing: **27 September 2006**

HEARING

1. The Application made under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") asks the Tribunal "*to determine whether the tenants are liable for capital expenditure on a private property that is owned by a third party not connected with our landlords or their agent but does provide a service. To determine if found liable the reasonableness of the amount to be paid on the outstanding amount and future years' contribution if any. To determine the amount held within the capital expenditure that can be contributed as running costs for the period shown. To determine if the works carried out were to a legal and satisfactory standard.*"

2. The Tribunal has previously determined as a preliminary issue that it has jurisdiction to consider the application, having found that the costs claimed are "relevant" costs falling within the meaning of "service charge" as defined by section 18 of the 1985 Act. The Tribunal set out its reasons for reaching that finding in its determination of 31 January 2005.

3. The Tribunal made a further Directions Order on 26 June 2006.

Background

4. The full background to the application is set out in the Tribunal's determination of 31 January 2005 but for the sake of clarity and to avoid unnecessary cross-referencing a brief synopsis is set out below.

5. The Applicants are 96 of the lessees at Millendreath Holiday Village ("Millendreath"). It is a matter of agreement between the parties that there are altogether 176 bungalows and villas at Millendreath which are let on 99 year leases granted by a Mr D C and Mrs J W West ("the Wests"). The lessees covenanted under clause 2 (I) of the leases "to contribute a rateable or due proportion of costs charges and expenses of repairing maintaining rebuilding and cleaning all sewers drains pipes etc..."... The Tribunal refers collectively to it all as "the Sewerage Plant".

6. Mr T E Cardwell, the original Applicant, is the secretary of the Millendreath Residents Association and represents the Applicants. The Respondent, Hill Properties Limited ("HPL") are the successors in title to the freehold reversion of the lessees, having purchased part of Millendreath from the Wests. HPL, in acquiring the reversion, entered into a covenant in clause 2 of the fourth schedule of the transfer to reimburse the Wests 67.4% of "the costs of operating, maintaining, renewing or repairing the entire sewerage disposal system..." situated on retained land and used by the lessees and others. Chancery St James is the agent of the Respondent.

7. Mr I S Walker acquired the land on which the Sewerage Plant is situated, being the remainder of the Wests' title at Millendreath. Mr I S Walker's brother, Mr J Walker appears throughout to have acted as his agent.

8. The substantative hearing of the application was adjourned by agreement between the parties in January 2005 until after the hearing of the High Court action by Mr I S Walker against the Respondent, and the Court's determination of the proper amount of the costs of works on the Sewerage Plant in respect of which the Respondent's 67.4% contribution should be calculated. The same costs form the subject matter of the present application to the Tribunal.

9. Mr Cardwell attended part of the hearing in the High Court but as an observer only. Neither he nor any of the other lessees was party to the action. The approved judgement of His Honour Judge Chambers QC in the High Court action is dated 15 September 2005.

Preliminary matters

10. The Tribunal agreed that the Application be amended to include the consideration of the service charge demands made on 24 June 2004 and 15 March 2006.

11. Counsel for the Applicants, Mr Sharples, sought to amend the Applicants' statement of case in three respects. The Respondent's Counsel, Mr Dutton, opposed this on the basis that the skeleton argument raising these points had only been submitted the day before the hearing and the Respondent, not having had sufficient time to consider the points, would be prejudiced by the lateness. After hearing both Counsel, the Tribunal considered each point.

12. Firstly with regard to the claim for interest, in the Tribunal's view a late challenge to it would not prejudice the Respondent; accordingly the Tribunal allowed the Applicant's statement of case to be amended to challenge the claim for interest as a service charge.

13. Secondly the Tribunal considered whether to allow the statement of case of the Applicants to be amended to challenge the inclusion of the operating costs of the Sewerage Plant as a service change. In his skeleton argument Counsel maintains that whilst HPL are required to reimburse 67.4% of the operating costs of the sewerage plant to Mr Walker, these do not fall within the service charge provisions of the lessees' covenant.

14. The Tribunal accepts it is the case that in the leases no such specific covenant is imposed on the lessees with regard to operating costs. However there was no evidence that in the 30 years from the granting of the leases by the Wests to the transfer of part of their reversion to HPL that the claims for payment of the appropriate proportion of operating costs had ever been challenged. It would also appear to be the case that the lessees continued to make payments even after the transfer of the site of the sewerage plant to Mr Walker. The lessees have had the benefit of the use of the sewerage plant and have historically paid a contribution towards its operating costs. There has been ample opportunity to raise the issue before but neither any of the lessees nor their legal advisors had previously sought to do so. The Tribunal considers that it is too late for such an issue to be raised at this stage; it does not give the Respondent the opportunity of properly dealing with it. Accordingly the Tribunal does not allow the statement of case to be amended in this regard.

15. Thirdly the Tribunal considered the limitation point, raised in section 4 in the skeleton argument of Mr Sharples, Counsel for the Applicants. Under section 20B of the 1985 Act as set out in Under sub-section (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*....."

16. The costs that might fall within this category were not particularised by Mr Sharples, but the Tribunal considered that it was too late to raise this issue and did not give the Respondent the opportunity of dealing with it. There had been ample opportunity to raise the issue before. Therefore the Tribunal did not allow the statement of case to be amended to raise the issue of limitation under section 20B.

17. HPL claims it is in an invidious position in that it has no control over Plant – however this problem is of its own making and directly results from it entering into the transfer and accepting the burden of its terms that do not take into account the provisions of the 1985 Act.

Section 27A (4) (c)

18. The Tribunal considered the bar contained in section 27A of the 1985 Act to making an application to a LVT. It states that no application may be made under subsection (1) or (3) in respect of a matter which inter alia under (4) (c) "*has been the subject of a determination by a court*". The Tribunal notes that when the present application was lodged with the Tribunal office there had been no such determination. It pre-dated the determination of the High Court action but the hearing of the application was then delayed, pending the outcome of that action, on the parties' application

19. The Tribunal takes the commonsense view that the making of an application for the purposes of section 27A (4) is perfected and completed only when considered by the Tribunal – the mere procedural step of lodging an application with the Tribunal office is not sufficient to prevent the bar of sub-section (4) applying if, at the time the application is considered by the Tribunal, there has been a determination by a court.

20. The Tribunal considered submissions by both Counsel on the application of section 27A (4)(c) to this case. The Tribunal concluded that it was not necessary for the Applicant to have been a party to the High Court action for the section 27A (4) (c) bar to apply. It applies in so far as the subject matter of the application to the LVT is the same as that on which the court (in this case the High Court) has made a determination.

21. In reaching this conclusion the Tribunal takes into account the fact that Parliament chose to include the words "to which the tenant is a party" in sub-section (b), which refers to a post dispute arbitral agreement, but that such wording is absent from (c). The Tribunal is a creature of statute and section 27A (4) (c) is determinative on this issue rather than the common law of res judicata. The object of the legislation is to prevent a matter determined by a court being re-litigated before a tribunal.

22. Mr Sharples pleads Article 6 of the European Convention on Human Rights as incorporated in the Human Rights Act 1998 (the right to a fair trial). However the Tribunal finds no merit in the Art. 6 point: the hearing of the application by the Tribunal was adjourned at the request of the parties pending the outcome of the High Court action. The Applicants could have applied to have been

joined in the High Court action (CPR 9.2(b)) and been heard. It was their choice not to do so.

23. Furthermore the Tribunal finds it inconsistent that the Applicants should have agreed to adjourn pending the outcome of the High Court action but should now wish to re-litigate before this Tribunal those parts of the Judge's decision that they find unpalatable. It is not for the Applicant to cherry pick the Judge's decisions, accepting some and rejecting others.

24. The Tribunal would also observe that after the adjournment of the hearing of the LVT application pending the outcome of the High Court action, the Applicants had the opportunity of seeking to amend their application to the LVT to make Mr Walker a second Respondent. Instead the Applicants sat on their heels – content to await the outcome of that claim.

25. The Tribunal's attention was not drawn to any documentary evidence that was not before the Judge. The Judge heard oral evidence from Mr O'Brien, Mr John Walker, Mr De Leiros and from both experts. The Tribunal received oral evidence only from Mr Cardwell and Mr Ward for the Applicants, and from Mr De Leiros and their expert, Mr Barber, for the Respondent. The Tribunal has neither heard nor seen new evidence which might justify its re-considering any part of the judgement. There is no basis on which the Tribunal can hear afresh any matter that formed part of the judgement in the High Court action, being the determination by a court for the purposes of section 27A (4) (c).

26. To the extent that the Judge made a decision on a matter that is part of the Application to the LVT, the Tribunal finds that it is barred from considering it by section 27A (4)(c). On the issue of reasonableness of the service charges claimed, both in amount and the reasonableness of incurring them, the Judge was specifically asked to rule on these matters and did so by way of a postscript to his judgement. The Judge spelt out, for the avoidance of doubt, that the figures he had ruled as being recoverable were both reasonable in amount and reasonably incurred. The Tribunal therefore finds that it is barred from considering section 19 (1) (a) - the extent to which the service charges claimed were reasonably incurred by virtue of the Judge's ruling - and his findings as to the amounts that should be paid.

Reasonableness of the standard of works and services

27. Is there anything left for the LVT to consider? The Tribunal door is not entirely closed to the Applicants. There is the other limb to the Application, namely under section 19 (1) (b) – whether the services or works are of a reasonable standard. The Judge in the High Court made no determination as to the standard of the works and so the application to the Tribunal on this matter is not barred by virtue of s.27A (4) (c). Perhaps surprisingly, however, this was not an issue that featured in the reports of the experts, either in their individual reports or in their joint report, and it was not an argument that was developed by Counsel. Therefore the difficulty faced by the Tribunal in considering the reasonableness of the standard of the work is the lack of evidence.

28. The Tribunal noted at its site inspection in June that the site was very untidy, and did not give a good impression of a high standard of workmanship, but was not in a position to assess the efficiency of the Sewerage Plant. At the Hearing, the Valuer Member asked Mr Barber about the standard of workmanship, and whether the plant had been properly installed. Mr Barber's reply was that it was "not a job he would have been proud of". He had not done a detailed assessment of the installation but his general impression had been that it was "tatty", and he had noted that the sea outfall was broken. In answer to the further question as to whether the Sewerage Plant delivered the required effluent quality, Mr Barber said that it had been doing so before the trial, and that it therefore met the required standard.

29. Mr Barber gave no evidence that the work had not been done to a reasonable standard and it would appear to have met the requirements of the Environment Agency. In the absence of any evidence that the work has not been done to a reasonable standard, the Tribunal has no alternative but to find that the work was carried out to a sufficiently reasonable standard to allow the recovery of the monies found by the Judge to be payable.

Consultation requirements and the application for dispensation

30. The Commonhold and Leasehold Reform Act 2002 (the 2002 Act) substituted a new section 20 into the Landlord and Tenant Act 1985, and inserted a new section 20ZA, with effect from 31 October 2003. [See Commonhold and Leasehold Reform Act 2002 (Commencement Order No. 2 and Savings) (England) Order 2003, art. 3(1).] The Service Charges (Consultation Requirements) (England) Regulations 2003 (SI 2003/1987) came into effect on the same date.

31. Under section 20ZA (1) the Tribunal now has power to dispense with the more extensive consultation requirements of the new sections and the more detailed regulations. However, this additional power of the Tribunal only came into force on 31 October 2003. The old section 20 continues to apply, inter alia, in respect of qualifying works that are begun before that date. It is common ground between the parties that the Respondent did not comply with any consultation requirements. It is also common ground that the works (and services) that are the subject of the present application were completed before 31 October 2003.

32. Counsel for the Respondent, Mr Dutton sought to persuade the Tribunal that section 27A gave the Tribunal concurrent jurisdiction with the County Court. He argued that a problem of jurisdiction came about as a result of the piecemeal way in which the new provisions were introduced. The Tribunal would not disagree that the piecemeal implementation was unfortunate but cannot accept his novel proposition that section 27A impliedly gave the Tribunal concurrent jurisdiction to exercise the power of dispensation given to the County Court under section 20 (9). He could cite no case or text to support his case, and there is no reason to imply any such power in section 27A, however desirable such a power may be from the Respondent's point of view.

33. Whilst the transitional position may be anomalous, the Tribunal finds no basis for reading into section 27A any implied powers for the Tribunal to dispense with the consultation requirements in this case. The Tribunal would also note the view of the authors of Leasehold Valuation Tribunals – A Practical Guide, as set out at paragraph 9.40 (headed 'Transitional position'). They say that the old regime, under the un-amended version of the 1985 Act, section 20 will continue to be relevant for some time and the new consultation regime does not apply where the qualifying works are commenced before 31 October 2003; the footnote refers to the relevant commencement order. The old regime includes the exclusive power given to the County Court to dispense with the consultation requirements.

34. Therefore the Tribunal finds that it has no power under section 20ZA (1) to dispense with the consultation requirements. It is the Tribunal's considered view that only the County Court has power in the present case to dispense under the old section 20 (9)

The capping provisions

35. The position is therefore that the old provisions as to consultation apply. This means that it is for the Respondent to apply to the County Court to exercise its power under section 20 (9) to dispense with all or any of the relevant consultation requirements, if satisfied that the landlord acted reasonably, as Counsel indicated that it would if his argument were rejected by the Tribunal. In the absence of such dispensation it is for this Tribunal to apply the statutory cap on the service charges that the High Court has found to be reasonable and reasonably incurred in respect of the carrying out of any qualifying works.

36. The capping provisions are set out in the old section 20 (3). Under the Service Charge (Estimates and Consultation) Order 1988 (SI 1988/1285) the relevant statutory limit on the amount of service charge recoverable in any service charge year where the consultation requirements have not been complied with is £50 multiplied by the number of units, or £1,000, whichever is the greater. The cap applies to qualifying works but not to services. In the present case, with 176 units, the capping level to be applied to qualifying works is £8,800.

37. The Tribunal has considered which items found by the Judge to be recoverable should be regarded as 'qualifying works'. Counsel for the Applicants argues that the payments to Mr Williams are in respect of 'works' (which would mean they would be subject to the cap).

38. The Tribunal has considered the form of contract between Mr Williams and Mr Walker, a sample of which, dated 12th March 2002, may be found at page 229 of the Respondent's disclosure bundle 1. Under the terms of this contract Mr Stephen Williams undertakes "to check, maintain and repair (to Mr John Walker's satisfaction) the sewerage apparatus in Millendreath Valley; he agrees to be on call 24 hours a day if required; and if unable to repair or deal

with a specific problem, he undertakes to report it immediately to Mr John Walker ...."

39. Mr Williams' invoices (e.g. Respondent's disclosure bundle 2, pages 33 – 38, headed 'general maintenance'), refer to "work carried out as per contract – maintenance to tank and pumps). Mr Barber, the Respondent's expert, refers at paragraph 3.5.11 of his report (Hearing Bundle page 411) to the Williams contract as a 'labour only' contract.

40. In its expert opinion the Tribunal considers that the contract was one of services, not qualifying works. Whilst it might have been envisaged that Mr Williams would carry out (unspecified) running repairs which might include minor works, the prime purpose was to be on call to carry out servicing. There is no evidence that Mr Williams carried out other than minor works: he was the maintenance man. He was paid a retainer to be on call to keep the Sewerage Plant running. The Tribunal therefore finds that as the essential nature of the contract with Mr Williams was for services rather than for qualifying works, the statutory cap does not apply to his charges.

41. The Tribunal has applied the cap to the other items on the Scott schedule that on the findings of the Judge are qualifying works. The Tribunal has set this out in the attached schedule, applying the £8,800 per service charge year cap determined above. With regard to the non Scott Schedule items, the Tribunal has also included the sums awarded in respect of overflow pipework and interstage pipework, but it has disallowed the sum of £7,200 awarded in respect of fencing as it is not satisfied that this is a cost, charge or expense relating to the sewers, drains pipes or other conveniences.

42. The judgement of the High Court was that, although the Claimant was not registered for VAT, it would be reasonable for him to recover the payments of VAT which he had had to make in respect of sums falling within the covenant. Although no submissions on the subject were made, the Tribunal concludes that it would be reasonable to apply the same principle as between the parties to this application.

Total sum payable

43. Exercising its powers under section 27A of the 1985 Act the Tribunal finds that the total sum payable by the lessees to the Respondent for the years in question is £105,047.67 plus 67.4% of such further sum as the Respondent has paid out in VAT on the allowed items. Excluding any such sum in respect of VAT, this is equivalent to £596.86 per unit.

Interest

44. Interest on the judgement debt of £137,120.54 was set at £12,594.14. Mr Dutton argues that this should be recoverable from the Applicants, relying on the basis of indemnity. The service charge clause 2 (l) refers to contributing and paying "a rateable or due proportion of the costs charges and expenses of making repairing maintaining rebuilding and cleaning all pipes or other

services .....and to keep the Lessor indemnified against such proportion of such costs and expenses as aforesaid". The Courts have always construed service charge clauses restrictively and the Tribunal does not find that interest on a judgement can be construed as a cost of the provision of the service provided. Accordingly this item is not recoverable from the lessees.

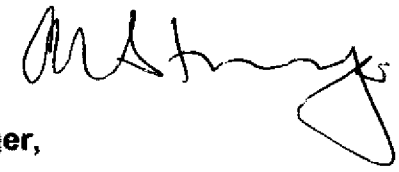
Application under section 20C

45. The Respondent points out that it incurred costs in the High Court action of the order of £100,000 and has not sought to recover any of such costs from the Applicants. The Tribunal notes that the Respondent would not be entitled to recover such costs as part of the service charge in any event, as there is no provision for such recovery in the service charge clause.

46. The Applicants have applied for an order under section 20C that all or any of the costs of the of the landlord in connection with the proceedings before the LVT shall not be regarded as relevant costs to be taken into account in determining the amount of any service charges by the tenants/lessees. Again, the Tribunal can find no provision in the lease which would allow such recovery. In all the particular circumstances of this case the Tribunal finds it appropriate and equitable to make such an order.

Order

47. Exercising its power under section 20C of the 1985 Act, the Tribunal orders that all or any of the costs in connection with the proceedings before the LVT shall not be regarded as relevant costs in determining the amount of any service charges by the tenants/lessees.

Signed:  **Dated: 5 December 2006**

A L Strowger,
Chairman

The Schedule

	Item	Claimed in Scott schedule	Non Scott Schedule items	Allowed by Judge (plus VAT where relevant)	Tribunal's findings as to cap	Allowed by Tribunal
1	Williams	£21,227.50		£21,227.50	No cap	£21,227.50
2	Works and parts	£28,294.69		£15,000.00	Cap	£8,800.00
3	electricity	£8,934.00		£6,443.42	No cap	£6,443.42
4	Meetings - Aguafirst	£200.00		0		0
5	Meetings EA	£200.00		0		0
6	Travel	£600.00		0		0
7	Williams	£9,333.32		£9,333.32	No cap	£9,333.32
8	VWM	£82,500.00		£17,000.00	No cap	£17,000.00
9	Bailiffs	£12,509.75		0		0
10	Water/Env	£704,389.00		£275,756.84	Cap	£8,800.00
11	B17 (electricity)	£4,500.00		£1,610.85	No cap	£1,610.85
12	Williams	£18,664.00		£18,664.00	No cap	£18,664.00
13	Williams	£17,500.02		£17,500.02	No cap	£17,500.02
14	Magistrates	0		0		0
15	Aguafirst	£60,222.50		£38,000.00	Cap	£8,800.00
16	R & A Cleaning	£390.00		£458.25	As allowed	£458.25
17	Env.Agency	£4,160.70		£3,698.00	As allowed	£3,698.00
19	Williams	£17,500.02		£17,500.02	No cap	£17,500.02
20	Aguafirst	£100,500.00		£80,000.00	Cap	£8,800.00
21	electricity	£9,000.00		£3,221.71	As allowed	£3,221.71
32	Overflow pipework		£500.00	£500.00	As allowed	£500.00
38	Interstage pipework		£3,500.00	£3,500.00	As allowed	£3,500.00
		£1,100,625.50		£528,934.09		£155,857.09
	Respondent's liability @ 67.4%					£105,047.67
	Leaseholder liability per unit					£596.86