

Others: Mr & Mrs Sherman
Mrs P Boniss
Mr R Hibbitt
Miss M Baxter
Mr R Hewlett (Former Leaseholder)

The Application

1. On the 4th March 2005 the Applicant applied to the Tribunal under section 27A of the Landlord and Tenant Act 1985 as amended by the Commonhold and Leasehold Reform Act 2002 for a determination as to the reasonableness of the costs incurred by way of service charge during the financial years 1st April 1999 to 31st March 2005 and for the costs to be incurred for the year 1st April 2005 to 31st March 2006.
3. In addition the Applicant made an application pursuant to section 20(c) of the Landlord and Tenant Act 1985, for an order that the Landlord's costs in connection with these proceedings should not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenants of the property.

The Law

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

Section 18

- (1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent-
 - (a) which is payable directly or indirectly for services, repairs, maintenance, improvement or insurance or the landlord's costs of management, and
 - (b) the whole or part of which varies or may vary according to the relevant costs
- (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the land lord or a superior landlord in connection with the matters of which the service charge is payable.
- (3) for this purpose
 - (a) costs includes overheads and
 - (b) costs are relevant costs in relation to a service charge whether they are incurred or to be incurred in the period for which the service charge is payable or in an earlier period

Section 19

- (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period-
 - (a) only to the extent that they are reasonably incurred; and

- (b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard; and the amount payable shall be limited accordingly.
- (2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

- 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.

5. Landlord and Tenant Act 1985 as amended by the Housing Act 1996 and Commonhold and Leasehold Reform Act 2002. The notice required under this legislation was served in the present case after the 31st October 2003 and therefore the amendments introduced by s 151 of the Commonhold and Leasehold Reform Act 2002 to s20 and 20ZA of the Landlord and Tenant Act 1985 and the Service Charges (Consultation Requirements) (England) Regulations 2003 apply.

Section 20

- (1) Where relevant costs incurred on the carrying out of any qualifying works exceed the limit specified of £1000 or £50 per flat, whichever is the greater, the excess shall not be taken into account in determining the amount of the service charge unless the relevant requirements have been either
 - (a) complied with or
 - (b) dispensed with by the court
 and the amount payable shall be limited accordingly.

- (2) ...“qualifying works”...means works ...to the costs of which the tenant by whom the service charge is payable may be required under the terms of the lease to contribute by the payment of a service charge.
- (4) The relevant requirements in relation to such of the tenants concerned as are not represented by a recognised tenants’ association are-
 - (a) At least two of the estimates of the works shall be obtained one of them from a person wholly unconnected with the landlord
 - (b) A notice accompanied by a copy of the estimates shall be given to each of those tenants concerned ...
 - (c) The notice shall describe the works to be carried out and invite observations on them and on the estimates ...
 - (d) The date stated in the notice shall not be earlier than one month after the date on which the notice was given...
 - (e) The landlord shall have regard to any observations received in pursuance of the notice ...

Description of the Building and Property

6. The Building comprises three, two and three storey, blocks of purpose built flats (the Building) and there are 30 flats in all. The Building was built in 1976 and is constructed of brick under pitched and flat roofs. The Property is a first floor flat.

Inspection

7. The Tribunal inspected the Property in the presence of the Applicant’s Representative and Representatives of the Respondent on 19th September 2005 prior to the Hearing.
8. Externally the Building appeared to be in good condition and well maintained. The grounds were well kept and the garages and driveways appeared to be in a satisfactory condition. Internally the common hall and stairs were clean and in good condition.

The Lease

9. The Applicant holds a sub tenancy (the Lease) of the Property and the Applicant’s Representative resides in the Applicant’s flat. A copy of the sub lease, referred to in the Lease itself as an underlease, was provided. The Respondent, a company wholly owned by the tenants, is the immediate landlord. According to the Articles of Association, each tenant holds an equal number of shares in the Respondent Company and only the tenants may be shareholders. The shareholder tenants elect the directors of the company from among their number. The Respondent holds a tenancy of the whole building for a term of 99 years from the 1st July 1976. The tenancy was originally granted to Harewood Gardens (Netherton) Management Company Limited and was later assigned to the Respondent who now holds the reversion. A copy of the head lease was provided. The Respondent or its predecessor has granted sub leases to the tenants pursuant to the terms of the head lease.
10. The Lease, which is between the Respondent’s predecessor Harewood Gardens (Netherton) Management Company Limited and the first tenant of the Property, is for a term of 99 years from the 1st July 1976 (less three days) at a peppercorn rent.

11. The relevant terms of the Lease are:

Clause 3 of the Lease states that:

(i) In this Underlease the expression "the maintenance Contribution means a sum equivalent to the total of one eighth of aggregate annual maintenance provision for the whole of the eight flats being in block A of the building and one thirtieth of the aggregate maintenance provision for the whole of the remainder of the building except Blocks B and C thereof computed in each case in accordance with provisions of the Third Schedule hereto

(ii) The Tenant hereby covenants with the Lessor that the Tenant will in respect of each calendar year within the term hereby granted pay the Maintenance Contribution to the Lessor on the Thirty First of March in each year...

Clause 4 states that:

The Lessor shall apply the sums received by it in respect of the annual maintenance provision for the purposes specified in Clause 5

Clause 5 sets out a number of provisions as to what the maintenance charge may be expended on including:

(i) To pay remuneration to the Surveyor ...not to be more than one tenth of the aggregate annual maintenance provision

(ii) ...in every third year ...to wash and paint... all the outside wood iron cement stucco work of the building usually painted or treated... ALSO... to keep the interior and exterior walls and ceilings and floors of the building (other than those included in this or any other demise) and the roof structure foundations and main drains thereof in good and substantial repair and condition...

(iii) ...to keep the entrance hall staircases and passages in the building and used in common...in good and substantial repair ...and in every seventh year ...to wash and paint ...

(v) ...to make provision for the payment of legal costs incurred by the Lessor...(b) in making such applications and representations and taking such action as the Lessor shall reasonably think necessary in respect of any notice or order ...served under any statute...

(vii) To keep the building ...insured against loss or damage by fire lightning storm tempest flood escape of water explosion impact aircraft or anything dropped therefrom riot or civil commotion and such other risks as the Lessor shall think fit to the full value thereof including two years loss of rent...

(viii) To effect insurance against such liability to third parties and occupiers liability and such other risks and in such amount as the Lessor shall reasonably think fit.

Third Schedule states:

The annual maintenance provision in respect of any calendar year shall consist of:-

- a) the aggregate expenditure incurred by the Lessor in the year for the purposes mentioned in Clause 5 of this Underlease as reduced by any unexpended reserve already made pursuant to sub-paragraph b) hereof in respect of any expenditure and*
- b) an appropriate amount as a reserve for or towards those of the matters mentioned in Clause 5 aforesaid as are likely to give rise to expenditure by the lessor after such calendar year being matters likely to arise either only once during the then unexpired term of this Underlease or at intervals of more than one year during such unexpired term including(without prejudice to the generality of the foregoing) such matters as the painting of the exterior of the building the repairs of the structure thereof the repair of drains and the overhaul or modernisation of any plant or machinery...*

Documentation

12. The documents provided by the parties as being of particular relevance for the determination of the Tribunal included the following:
- Copy of the Respondent's Lease
 - Copy of the Applicant's Lease
 - Application Form
 - Copies of Service Charge Accounts and Invoices
 - Copies of the documentation for the Section 20 Procedure

Terminology

13. The annual "Maintenance Charge" under Schedule 3 of the Lease comprises the aggregate expenditure incurred by the Lessor in the year (Annual Expenditure) and an appropriate amount as a reserve (Reserve) for matters likely to arise at intervals of more than one year. In this Statement of reasons the term "Service Charge" (as used in the Landlord and Tenant Act 1985 as amended) refers to the "Maintenance Charge" in the Lease and the term "Reserve" referred to in the Lease includes the term "sinking fund".

Preliminary Matters

14. The Tribunal had received a statement, which had been sent to the parties, from a previous leaseholder at the Building seeking to support the Applicant's case. The statement referred to the theft of service charge funds by a Director of the Respondent prior to the years in question and although the Applicant's Representative took the view that the Respondent's poor management in the past precipitated the theft nevertheless the statement itself did not further the Applicant's case and was not to be adduced as evidence.

Legal Issues

15. The Applicant's Representative had submitted the following legal points in written representations and confirmed them to be in issue at the Hearing:
1. That the Service Charge should be payable in arrears on the 31st March each year
 2. That the reserve fund should be for specified works and transparently budgeted and that where monies paid on account towards the Service Charge were found to be in excess of the actual Annual Expenditure they should be returned to the respective tenants and not arbitrarily allocated to the Reserve fund and the allocation ratified by a resolution of the Respondent.

1. Payment of the Service Charge in arrears on 31st March Applicant's Case

16. In support of his case that the Service Charge should be payable in arrears on the 31st March each year the Applicant's Representative submitted correspondence dated 17th September 2003 from Anthony Essien, the Principal Legal Adviser at "Lease", The Leasehold Advisory Service. The letter states that the Lease "makes no provision for the payment of sums in advance save for the contribution towards a "reserve"" and that the Applicant is "required on the 31st March in every year to pay the Maintenance Contribution."

Respondent's Case

17. In respect of the Service Charge being payable in arrears on the 31st March each year the Respondent's Representative commented in written representations that for many years the Service Charge had been required to be paid in advance by the 1st April of each year. The Respondent's Representative contended that by always demanding the Service Charges to be payable in advance by all tenants the Lease had in effect been varied and the Service Charge had become properly payable in this way. Some tenants had been permitted to pay by quarterly instalments but these also were in advance against the Service Charge in the forthcoming year. If this was an incorrect interpretation of the lease it could not be seen how the requirements of the lease to maintain the Building could be carried out, as the Respondent did not have any funds itself from which it could draw to pay for work and then reclaim from the tenants. It was noted that the due dates and financial year dates specified in the Applicant's Lease are stated to be 31st March. However in some leases the 1st April is specified. They said they had always required an advance payment to be made on the 1st April. If the Tribunal determined that this was not the correct interpretation then the Respondent would have to issue two demands, one for the 31st March and another for the 1st April depending on the individual leases.

Tribunal's Determination

18. The Tribunal found that the Lease only permitted the cost of the Annual Expenditure to be demanded in arrears but authorised a Reserve to be demanded in advance for works that may arise at intervals of more than one year. The Tribunal is only concerned with the Lease before it, which in this case is that of the Tenant. The Lease states that the Tenant is liable to pay the Service Charge on the 31st March of each

year. Therefore the Annual Expenditure is to be paid in arrears on the 31st March of each year together with an appropriate sum for the Reserve.

19. The Tribunal appreciated the difficulty of meeting the costs of the Annual Expenditure when the Lease did not make provision for Service Charge payments to be made on account. The Respondent could not demand a Service Charge on account although individual tenants might voluntarily make payments on account. To enable the Respondent to demand such payments it would be necessary for the underleases to be varied by agreement executed by a Deed of Variation or by application to the Tribunal if agreement could not be reached. Neither an informal agreement between a landlord and tenant nor a unilateral demand by the landlord over time to pay a service charge on a particular basis can vary a lease. The Lease also could not be varied by a resolution of the Respondent in General Meeting. Only a Deed of Variation can vary the Lease.

2. Reserve should be for specified works and excess Annual Expenditure should not be allocated to the Reserve by resolution of the Respondent

Applicant's Case

20. With regard to the submission that the Reserve should be for specified works and transparently budgeted the Applicant's Representative submitted dictionary definitions of a "sinking fund" which stated that the fund is "money set aside at intervals for payment of a particular liability at a fixed future date" A letter from Greenwood's Solicitors dated 1st September 2005 was also produced which sought to deal with concerns expressed by the Applicant in relation to the Reserve. An appointment was made for the Applicant's Representative to meet with the solicitor dealing with the matter but the solicitor had cancelled this. The Applicant's Representative also submitted in the written representations that the amount set aside for the 3 and 7 year decoration cycle is arbitrary and the Respondent has read the clause referring to a reserve being set aside for works required in "intervals of more than a year" as applying to Annual Expenditure.
21. The Applicant's Representative submitted that where monies paid on account towards the Service Charge were found to be in excess of the actual costs they should be returned to the respective tenants and not allocated to the Reserve fund.
22. The Applicant also submitted that the practice of allocating to the Reserve money paid on account that is in excess of the actual costs must be authorised by the Lease and could not be ratified by a resolution of the Respondent. He commented that the "dual responsibilities of residents as shareholders and tenants may cause a conflict of interest...the Company [Respondent] has a responsibility to enact the Lease not to invite proposals which may seek to alter it."

Respondent's Case

23. The Respondent's Representative stated orally and in written representations that following the embezzlement of funds it was necessary to build up a Reserve and this was agreed at the Extraordinary General Meeting on 24th May 2000. Also at the Annual General Meeting on 29th November 2000 "Residents fully endorsed the

company and accountant's recommendations for continuous investment in the necessary reserve funding." In addition at the Annual General Meeting on 28th November 2001 a resolution was passed to operate a sinking fund towards the funding of large items of expenditure and to deposit surplus company funds in it.

24. The Respondent's Representative stated that specific funds had been budgeted as follows however the accountants had not appropriated these to the Reserve in the accounts:
1999/2000 no contribution to Reserve
2000/2001 contributions of £1160 were budgeted
2001/2002 contributions of £3850 were budgeted
2002/2003 contributions of £ 2000 were budgeted
2003/2004 contributions of £2000 were budgeted
25. The Respondent's Representative stated that in none of the above were contributions allocated to specific items within the Reserve notwithstanding requests to the accountants to do so and the requirements of the underleases. The Respondent's Representative accepted that the accounting for the Reserve should have been much clearer in the past and, since recently having taken over as company secretary, he had changed the presentation of the accounts and the Reserve was now identified much more clearly in the Service Charge Account for the current year. The matter would have been dealt with sooner but the accountants had shown a marked reluctance to present the Reserve as a separate item and to identify specific funds for particular purposes such as the 3 and 7-year decoration cycle.
26. The Respondent's Representative stated that where there had been a surplus the General Meeting had approved that it should be allocated to the Reserve and referred to minutes of General Meetings. He said it was necessary for the Respondent to act through the General Meeting in order to fulfil its obligations under the Lease. The operation and management of the Respondent were therefore proper items in the Service Charge.

Tribunal's Findings on the Legal Issues

27. A contribution to a reserve fund should be based upon a proper forecast of identified specific future items of expenditure. The Tribunal found that the Respondent had budgeted for specific contributions each year however the accounts were not clear in identifying specific future items of expenditure based upon a forecast. It also appeared that additional surplus funds were appropriated to the Reserve by way of Resolution of the Respondent in General Meeting rather than on the basis referred to being entered in the Service Charge account. The Tribunal found that this appropriation in effect established a separate reserve for major works on the Building held by the Respondent on the authority of the General Meeting. The reasonableness of the contributions budgeted for the Reserve is considered later in this statement of Reasons.
28. The Tribunal found that a clear distinction must be made between the operation of the underleases and the role of tenants as tenants on the one hand and the operation of the immediate landlord company and the role of tenants as shareholders on the other. The Tribunal agreed with the view expressed by the Applicant's Representative that a conflict of interest could arise. It was noted that the Articles of Association did not

preclude the Respondent from engaging in activities beyond the management of the Building. Therefore monies held by the Respondent need not necessarily be exclusively for the maintenance of the Building and synonymous with the Maintenance Contribution as defined in the Lease. Resolutions in General Meeting of the Respondent therefore could not vary the Lease nor could they determine how the Reserve under the Lease should be raised or maintained. The operation and financial arrangements of the Respondent must be kept separate from the operation of the Lease. There will be occasions where the Respondent may carry out work on the Building other than pursuant to the Service Charge e.g. the installation of the security door entry system. Where this occurs the work must be funded through the Respondent's own funds not the Service Charge i.e. by the tenants as shareholders not as tenants. It was noted that Clause 16 of the Articles of Association permit the Respondent to raise funds from its members i.e. shareholders.

Reasonableness of Service Charges

Applicant's Case

29. The Applicant's Representative stated that he did not challenge the reasonableness of specific amounts other than the Reserve, but raised the following matters as being issue:
 - a) That the Reserve is unreasonable
 - b) That Notices served in relation to the resurfacing of the access road and the door entry system did not comply with s20 Landlord and Tenant Act 1985
 - c) That a loan made by one of the director's of the Respondent to overcome the cash flow problem following an embezzlement of funds should not have been reimbursed but be compensation for the mismanagement and breach of trust of the Board of the Respondent.
 - d) That items such as Directors' Personal Liability Insurance were not chargeable to the Service Charge under the Lease.
30. For the year ending 31st March 2000 the Applicant's Representative made no comment as to the charges and no Reserve was charged in that year, in fact a loss accrued.
31. In respect of all the years following, the Applicant's Representative commented that a surplus was made over and above the budgeted Reserve and submitted that this should have been returned to the tenants. The resolutions of the General Meeting should not have been used to appropriate the surplus to the Reserve.
32. The Applicant's Representative said that the access road resurfacing work had cost more than £1,500 and therefore section 20 of the Landlord and Tenant Act 1985 applied. He questioned whether the provisions of the section had been properly complied with in that the Notice that was issued did not invite tenants to submit names of contractors from whom a quotation might be obtained.

33. The Applicant's Representative said that the door entry system had cost more than £1,500 and therefore section 20 of the Landlord and Tenant Act 1985 applied. He stated that provisions of the section had not been properly complied with in the Notice that was issued.
34. The Applicant's Representative stated that, following the embezzlement of funds by a previous company secretary; a loan was made by one of the directors of the respondent to overcome the cash flow problem that followed. The Representative submitted that this should have been a gift by way of compensation for the mismanagement and breach of trust of the Board of the Respondent because if the Lease had been complied with the embezzlement would not have occurred. He was also concerned that the same management practices that had enabled the embezzlement to take place were continuing.

Respondent's Case

35. The Respondent's Representative made the following comments in written representations and orally at the Hearing.

Year ending 31st March 2000

36. In the year ending 31st March 2000, £1,878 including bank charges, together with the loss that had accrued from the year ending 31st March 1999 of £3,064, made a total loss of £4,942.

Year ending 31st March 2001

37. In the year ending 31st March 2001 the contributions made by the tenants amounted to £25,597, which covered the Annual Expenditure of £17,354 and the accrued loss of £4,942 and left a balance of £3,301. In addition there was a sum of £90 for called up share capital giving a surplus of £3,391. This was not returned to the tenants as it was intended to refurbish the rainwater goods and resurface the driveway, which was anticipated to cost £4,400 and it was agreed at the 2000 Annual General Meeting that investment in the Reserve should continue. The accountants did not show the budgeted Reserve of £1,160 as a separate amount nor did they allocate a specific sum for the intended works. No Management fees were paid for this year as a management company had not been appointed.

Year ending 31st March 2002

38. In the year ending 31st March 2002 a surplus of £5,919 is shown but again the accountants failed to appropriate the budget contribution of £3,850 to a specific Reserve or allocate sums for the intended works but showed the whole surplus as shareholders' funds.

Year ending 31st March 2003

39. In the year ending 2003 a surplus of £9352 had accrued. The budgeted contribution of £2,000 was not shown by the accountants to be appropriated to the Reserve in the Service Charge account nor was there any reference to the £4,400 being set aside for

the access road re-surfacing. The Notices to comply with section 20 of the Landlord and Tenant Act 1985 were issued on 15th August 2003 in relation to the access road re-surfacing although the work was not carried out until the following year. The copies of the Notices were produced and it was submitted that they complied with the statutory provisions at that time. A sum of about £1,400 for managing agent's fees was omitted from the account in error and would have reduced the surplus.

Year ending 31st March 2004

40. In the year ending 31st March 2004 a loss of £4,411 is shown in the accounts. The Budgeted contribution of £2,000 was not shown by the accountants to be appropriated to the Reserve in the Service Charge account. There was also no mention in the Service Charge account of the budgeted contributions to the Reserve and the surplus funds that were appropriated to the Reserve in anticipation of the access road re-surfacing and which were carried over from the 2002/2003 accounts. The loss of £4,411 for 2004 was covered by the sums carried over from the 2002/2003 accounts.
41. The 2004 accounts show the costs for the installation of a security door entry system however this was carried out by the Respondent as evidenced by the minutes of the 2002 Annual General Meeting and was not a Service Charge item and therefore s 20 of the Landlord and Tenant Act 1985 did not apply.
42. The Tribunal noted that the Management fee was well in excess of the 10% permitted under Clause 5(i) of the Lease. The Respondent's Representative pointed out that the sum of £8,856 included £1,400 from the previous year and replied that it had not been possible to obtain the services of a management company for a lesser figure. The Tribunal questioned the Respondent's Managing Agent as to the manner of charging and the level of fees. She stated that she did not make a charge per flat but charged according to time but she would not indicate what hourly rate she had applied. She had assessed a fee on the basis that the block would require on average half a day a week to administer.

Year ending 31st March 2005

43. The Service Charge account shows a surplus of £1,773 and contributions for Annual Expenditure and to the Reserve are shown separately.
44. The Tribunal noted the legal fees to Greenwood's solicitors of £2,412. The Respondent's Representative said that there had been some lengthy correspondence much of it generated in response to the Applicant's communications. The Respondent's Representative commented that advice had been sought, as he believed the Respondent was entitled to do under the Lease by virtue of Clause 5(v). However the advice that had been given, such as it was, had lacked clarity and he conceded that some the items raised in the course of the Application might have been settled if the advice had been clearer.

Issues for all accounting years

45. With regard to the loan by one of the directors following the embezzlement, the Respondent's Representative referred to a list of itemised costs of Annual Expenditure

included in the evidence provided. The director had paid for these items and had been later reimbursed by the Respondent. No charge or interest was made for the loan and if the director had not provided the money the respondent would have had to obtain a bank loan, which would have incurred interest and would have appeared as an item on the Service Charge account.

46. The Tribunal asked whether the auditors had raised any issues as to the presentation of the accounts, particularly with regard to the Reserve. The Respondent's Representative stated that since he had been the Company Secretary he had raised the matter of how the Reserve should be shown but had only recently been able to persuade the accountants to show it as a separate item.
47. The Tribunal asked the Respondent's Representative whether he thought it appropriate that the insurance cover under the lease should include an indemnity for directors' liability at a cost of £299.25 and why the insurance cover included cover for loss of rent in the sum of £400,522 when the tenants were only liable for a peppercorn rent. The Respondent's Representative replied that as the directors were unpaid, members would not take office unless they were covered by insurance for the work they did. With regard to the loss of rent it was believed that this covered the cost to the tenants of having to rent alternative accommodation if the Building became uninhabitable due to flood or fire.
48. The Tribunal asked the Respondent's Representative whether he thought items such as the Company Secretary's expenses should be included in the Service Charge when they were costs of the Respondent incurred as a company rather than incurred in maintaining the Building under the Lease. The Respondent's Representative replied that the Respondent's role under the Lease was to maintain and manage the Building and costs of the Respondent were necessarily incurred in carrying out that role.

Tribunal's Determination on the Reasonableness of the Service Charge

Issue a) Reasonableness of the Reserve

49. The Tribunal found at paragraph 28 of these Reasons that the Respondent had budgeted for a Reserve although, as was conceded by the Respondent's Representative, this had not been properly entered in the Service Charge account. In addition the Respondent, as authorised in General Meeting, had set aside surplus funds for major works on the Building from payments on account of service charges. The surplus funds that were appropriated were in effect being held in a separate reserve account of the Respondent rather than as a part of the Service Charge Reserve. The complexity of these arrangements is due to the failure of the Respondent to keep the Service Charge account separate from the company accounts of the Respondent. However it appears from the correspondence and accounts produced that the Respondent has not been well served by its professional advisors and the failure referred to seems to have been compounded by the lack of clarity in the advice given by those advisers.
50. The Tribunal determine that, notwithstanding the lack of clarity in identifying specific future items of expenditure based upon a forecast, the amounts budgeted to be set aside, as set out in paragraph 25 of these Reasons, were reasonable. It is noted that the

resurfacing of the access road required additional funds, which in this case were provided by monies that had been appropriated to the Respondent's reserve. If these funds had been obtained by way of an additional item on the Service Charge account the Tribunal would have found them to be reasonable.

51. Neither the demanding of a service charge in advance nor the appropriation to the Respondent of surplus funds paid to meet service charges on account are authorised by the Lease. These can only be levied voluntarily. If it is desired to require that payment of service charges be made in advance the underleases must be varied. The basing of a contribution to the Reserve on a proper forecast of identified specific future items of expenditure should reduce the need both to request additional funds for major works in the year they are undertaken and to establish additional reserve funds through the Respondent.

Issue b) Compliance with section 20 Procedure

52. The Tribunal determine that the section 20 procedures had been properly complied with in accordance with the law as it was at the time of service of the notice. The point submitted by the Applicant's Representative was an amendment under the Commonhold and Leasehold Reform Act 2002 that did not come into force until 31st October 2003.
53. The Tribunal determine that the installation of the door entry system was carried out by the Respondent as evidenced by the minutes of the 2002 Annual General Meeting and was not a Service Charge item and therefore s 20 of the Landlord and Tenant Act 1985 did not apply.

Issue c) Director's Loan to the Respondent

54. The Tribunal determine that as no charge or interest was made for the loan it did not affect the Service Charge account and the issue of reasonableness did not arise.

Issue d) items chargeable to the Service Charge under the Lease

55. The Tribunal found at paragraph 29 of these Reasons that a clear distinction must be made between the management of the underleases and the management of the Respondent as the immediate landlord company. The accounts as drawn up and presented to the Tribunal were in effect the Respondent's company accounts rather than the Service Charge accounts for the Lease. The Income and Expenditure Account is headed "Stoneleigh Court Company Limited" and is treated as being synonymous with the Service Charge account under the Lease. The Tribunal is only concerned with the reasonableness and payability of the items on the Service Charge account. Therefore the Tribunal determine that certain items referred to on the Detailed Income and Expenditure Accounts provided were not payable under the Lease. It would appear that the Account should be divided into two accounts: one relating to income and expenditure for the company and another relating to service charge income and expenditure under the underleases. The tenants will be responsible for both sets of expenditure but the company will incur one which will be payable by the tenants as shareholders under Article 16 of the Articles of Association and the other will be incurred under the underleases and will be payable by the tenants as tenant.

56. The Tribunal determined that the following items were not chargeable to the Service Charge under the Lease:

Year ending 31st March 2000

Company secretary expenses	£3,239
Printing, postage and stationery	£82
Legal and professional fees	£3525
Bookkeeping and secretarial expenses	£1,669
Accountancy	£588
Bank charges	£499

Insurance of £2,280 to the extent that cover is obtained for £400,522 loss of rent

Year ending 31st March 2001

Company secretary expenses	£3,324
Printing, postage and stationery	£9
Legal and professional fees	£38
Bookkeeping and secretarial expenses	£1,504
Accountancy	£352
Bank charges	£187

Insurance of £2,971 to the extent that cover is obtained for £400,522 loss of rent

Year ending 31st March 2002

Company secretary expenses	£2,201
Insurance relating to Directors' personal liability	£299.25
Legal and professional fees	£385
Bookkeeping and secretarial expenses	£1,504
Accountancy	£353
Bank charges	£141

Insurance of £3437.75 to the extent that cover is obtained for £450,366 loss of rent

Year ending 31st March 2003

Company secretary expenses	£1,660
Insurance relating to Directors' personal liability	£299.25
Printing, postage and stationery	£178
Bookkeeping and secretarial expenses	£2,048
Accountancy	£352
Bank charges	£150

Insurance of £4,220.75 to the extent cover is obtained for £450,366 loss of rent

Year ending 31st March 2004

Insurance relating to Directors' personal liability	£299.25
Printing, postage and stationery	£6
Telephone	£10
Legal and professional fees	£2,305
Accountancy	£746
Bank charges	£182
Management Fee	£6,418.52

Insurance of £5,055.75 to the extent that cover is obtained for £450,366 loss of rent

Year ending 31st March 2005

Insurance relating to Directors' personal liability	£299.25
Accountancy	£2,288
Telephone, postage, stationery etc	£1057
Bank charges	£136
General	£49
Management Fee	£4,513.37

Insurance of £5,740.75 to the extent that cover is obtained for £450,366 loss of rent

The Tribunal determined that the insurance premium for each year should be disallowed to the extent that it is not reasonable to obtain cover for loss of rental in the sums stated when the ground rent is a peppercorn

57. There is no provision for the charging of printing, postage, stationery, bookkeeping, secretarial and accountancy in the Lease. The company secretary's fees and the professional fees were not for the purposes specified in Clause 5 of the Lease.
58. The Tribunal determined that the following items were chargeable as being reasonable and payable by the Applicant in accordance with the Lease and Service Charge account:

Year ending 31st March 2000

Rates	£4,019
Light and heat	£345
Cleaning	£2,554
Repairs and maintenance of property	£4930
Professional fees:	
Bruce Edwards -Consulting engineers	£ 172
BNA in relation to the garage cracking	£100
Gardening expenses	£2,238
Sundry expenses	£125

Year ending 31st March 2001

Water Rates	£3,800
Light and heat	£414
Cleaning	£2,843
Repairs and maintenance of property	£553
Gardening expenses	£1,298
Sundry expenses	£61

Year ending 31st March 2002

Rates	£4,454
Light and heat	£422
Cleaning	£2,585
Repairs and maintenance of property	£2,885
Gardening expenses	£1,630
Sundry expenses	£45

Year ending 31st March 2003

Water Rates	£3,581
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Light and heat	£375
Cleaning	£2,820
Repairs and maintenance of property	£1,067
Gardening expenses	£1,280

Year ending 31st March 2004

Rates	£4,325
Light and heat	£532
Cleaning	£2,496
Repairs and maintenance of property	£10,872
Gardening expenses	£1,052
Sundry expenses	£42
Management Fee @ 10% of £24,374.75	£2437.48

Year ending 31st March 2005

Water and sewerage	£4,010
Electricity	£669
Cleaning	£2,605
Gardening	£1,586
Repairs and maintenance of property	£766
Managing Agent @ 10% of £15,376.25	£1,537.63

59. The Lease only makes provision for the management charges of a Surveyor to be included and these are limited to 10% of the Annual Expenditure. The Legal and professional fees in relation to the Application are potentially chargeable under Clause 5 (v) of the Lease but are subject to an application under s 20C referred to below.
60. The Tribunal read the insurance policy document relating to the provision for loss of rental and it appears to refer to cover being given for non-payment of rent by the tenants including loss of rent, in the sum of £400,522 in the 1999-2000 policy, rising to £450,366 in the 2004-5 policy. As the ground rent is a peppercorn, insurance for loss of rent is not required and any portion of the premium relating to such cover is not recoverable as service charge. The Tribunal requires the Respondents to obtain a revised premium from the Insurers for a policy that does not include loss of rent cover and adjust the Service Charge accordingly.

Application under Section 20C of the Landlord and Tenant Act 1985

61. The Respondent applied for an order under Section 20(c) of the Landlord and Tenant Act 1985 that the Landlord's costs in connection with these proceedings should not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant of the property.

The Applicant's Case

62. The Applicant's Representative stated that he had been raising the issues referred to the Tribunal for number of years and felt that he was the only person who had stood up and been counted. The Lease had not been complied with and if he had not challenged matters nothing would have been done. He had not received any of the documentation that had been presented to the Tribunal prior to his application. How

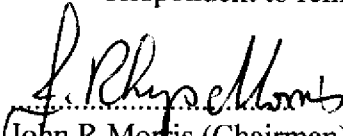
the costs would be paid if they were not met by the service charge was not his concern.

Respondents' Case

63. The Respondent's Representative stated that they were entitled to obtain professional advice and to charge the costs of the Application to the Service Charge under clause 5(v) of the Lease. However it was felt that the Applicant should bear the cost of Application as the issues raised were being dealt with and the Application was unnecessary. The respondent's representative said that he had done his best to deal with matters properly and had sought professional advice but this could have been clearer and given better guidance.

Determination of Application under Section 20C of the Landlord and Tenant Act 1985

64. The Tribunal found that Clause 5 (v) of Lease entitled the Respondent to charge the costs of the Application to the Service Charge subject to a determination under s20C.
65. Although the Tribunal had found in favour of the Respondent in respect of compliance with the s20 procedure and the loan to the director nevertheless the important legal issues raised have been found in favour of the Applicant. Accordingly the Tribunal found that the Annual Expenditure must be demanded in arrears and determined that a number of items that had been included on the Service Charge account should have been charged to the Respondent's company accounts. It may be argued that the tenants pay both accounts either as shareholders or tenants nevertheless different considerations pertain to each type of account and care must be taken in keeping them separate. Notwithstanding the determination that the amount allocated to the Reserve was reasonable nevertheless if the Reserve had been better managed and the account clearly shown the Application may not have been necessary. It was also found that the Management charge was not in accordance with the Lease.
66. The Tribunal appreciate the difficulties the respondent faces in that the Lease seems to have been drafted for a different type of landlord than the Respondent and a variation might be considered. It is also appreciated that the present company secretary is seeking to solve the legacy of problems he has inherited. However the Tribunal determine that the Respondent's costs in connection with these proceedings should not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant and the Tribunal by virtue of paragraph 9 Leasehold Valuation Tribunals (Fees) (England) Regulation 2003 requires the Respondent to reimburse the Applicant's fees.


John R Morris (Chairman)

Caution: For the purpose of reaching a decision the Committee inspected the subject property. Such inspection is not a structural survey. Any comments about the condition of the property in this Statement of Reasons must not be relied upon as a guide to the structural condition of the property.