LON/00AM/LAM/2005/0022

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON APPLICATION UNDER SECTION 24 OF THE LANDLORD AND TENANT ACT 1987 & 20C OF THE LANDLORD & TENANT ACT 1985

Applicant:	**Leaseholders of Kings Wharf**
Represented by:	**Mr O John**
Respondents:	**Lemon Land (Kings Wharf) Ltd**
Represented by:	**Mr P Flintoff – Director, Lemon Land (Kings Wharf) Ltd** **Mr J Thornton MICE MCI – Hurford Salvi Carr**
Re:	**Kings Wharf, 301 Kingsland Road, London E8 4DL**
Hearing date:	**14 December 2005**
Appearances:	**Mr O John - 414; Ms Lloyd – G10; Mr L Mill – 213** **Mr J Curtis – 212; Mr W Osmert – 401; Mr R Lusardi - 215** **Mr S James & Ms McKendrick – 302; Mr J Edgeley – 207** **Mr M Postman – 315; Mr Rendall**

For the Applicant

Mr P Flintoff – Director, Lemon Land (Kings Wharf) Ltd
Mr J Thornton MICE MCI – Hurford Salvi Carr

For the Respondent

Members of the Residential Property Tribunal Service:
Mr R T Brown FARLA(Ind)
Mr D N Huckle FRICS
Mr A D Ring

LON/00AM/LAM/2005/0022

London Rent Assessment Panel

Leasehold Valuation Tribunal

Determination of an application under Section 24 of the Landlord and Tenant Act 1987 for the appointment of a Manager of Residential Premises

Applicant: Leaseholders of Kings Wharf

Respondent: Lemon Land (Kings Wharf) Ltd

Premises: Kings Wharf, 301 Kingsland Road, London E8 4DL

1. Background and Application

1.1 The application dated the 10th September 2005 is made under Section 24 of the Landlord and Tenant Act 1987 ('The Act') and follows the service of notice under Section 22 on the 12th July 2005.

1.2 The Application is for the appointment of Mr Duncan Rendall FIRPM of Rendall and Rittner Property Managers to be appointed in place of the current Managers, Messrs Hurford Salvi Carr on account of the Landlord's alleged breaches of obligations under the leases and the Managing Agent's alleged breaches of the RICS Service Charge Residential Management Code (Section 87 of the Leasehold Reform, Housing and Urban Development Act 1993) (the 'Code').

1.3 The application is made by 30 leaseholders who hold 32 long leasehold interests.

1.4 The premises comprise a mixed use development of 57 flats (of which the Freeholder retains 1) and 14 commercial units.

1.5 The Tribunal issued directions on 5th October 2005.

2. The Hearing

2.1 A Hearing was held at 10 Alfred Place London on 14th December 2005

2.2 The Applicants were represented by Mr O John, lessee of flat 414. During the Hearing some 11 of the Applicants were present for some or all of the time.

2.3 The Respondent, Lemon Land (Kings Wharf) Limited was represented by Mr P Flintoff, director of the landlord company, and the landlord's Managing Agent Messrs Hurford Salvi Carr by Mr J Thornton MICE MCI .

2.4 Mr. John explained that following the service of the notice under section 22 of the 'Act' a response had been received from the Respondent's Agent together with the offer of a meeting. The explanation did not resolve the outstanding issues and the offer of a meeting was not acceptable as previous meetings had not proved fruitful.

2.5 Mr John explained that the Applicants considered that there were four major breaches of the code by the Respondent's Managing Agents Messrs Hurford Salvi Carr in the following paragraphs of the 'code':

4.1 (compliance with the law),
4.10 (accurate clear and concise communication),
11.1 (compliance with the lease) and
11.4. (annual audit of accounts).

There were four major issues outstanding as follows:

(1) Is the building properly insured?

(2) Are the service charges being properly apportioned and accounted for?

(3) If there is another incident of harassment how will it be handled?

(4) How will B1 tenants be using their premises in future?

2.6 As to issue (1) (insurance) Mr John stated that lessees were concerned that the building was not properly covered for insurance purposes because of the use of part of the commercial premises was in contravention of current planning consent and the fire alarm system was not being properly maintained.

Mr John explained that the fire alarm system did not appear to operate correctly and in particular the alarm bells although wired to the mains did not ring in some flats. Mr Thornton explained that the system was wired in 'loops' and interruption of one part of the loop would result in failure of the alarms in other flats.

Mr Thornton produced a report from Fire Maintenance Limited which explained that the probable cause was one or more lessees disconnecting the alarm bell within their flats. A quote had been obtained to rewire the circuits to ensure that if one bell was faulty it would not affect the others. A circular had been sent to leaseholders advising them not to disconnect alarm bells in individual flats.

Mr Flintoff and Mr Thornton explained that their insurers were aware of the actual and proposed uses of the commercial parts and the reason for the fire alarms not sounding.

The LVT directed that the Respondents contact their insurers with a request that they produce a letter setting out the position on cover. This letter was produced to the Applicants and the Tribunal at the Hearing and indicated that despite the matters raised above insurance cover was in place.

2.7 As to issue 2 (accounting and apportionment) Mr John stated that the Applicants were not satisfied with the standard of accounting and administration generally. In particular the Applicants considered that the insurance premium should be included as part of the service charge and not demanded separately. The Applicants were further confused by the non appearance of the insurance premium in the budget for the year.

Mr Thornton explained that the insurance premium was not part of the service charge but a separate item within the lease and it was necessary to ensure cover was maintained by demanding the recoverable part of the premium as soon as it was due.

Mr John produced further examples which he maintained demonstrated poor accounting and administration:

(a) Mr. Mill of Flat 213 had never owned a parking space and yet had been invoiced for one on a number of occasions despite advising the Agents.

(b) Insurance had not been invoiced for 18 months.

(c) Late production of accounts in contravention of the RICS code.

(d) Water charges not being included in the accounts.

In response Mr Thornton:

(a) Agreed that Mr. Mills should not have been invoiced for a parking space, apologised for the continuing failure to address this error and confirmed steps would be taken to rectify this error.
(b) Advised that the accounts identified the insurance payment and had been signed off as correct by the Auditors.
(c) Admitted this point and explained that in any new development where individual units were sold on different dates the first year's accounts were always difficult to produce within the time limits set by the code. If the accounts for 2003 had not been distributed this was an oversight and they would be distributed with the 2005 accounts.
(d) Pointed out that the lease is silent on the recovery of water charges. There is only one water meter for the whole building and agreement had been reached for the water to be recharged to lessees in accordance with Schedule 3 part 1 of the lease.

2.8 As to Issue 3 (Harassment) Mr John explained that following a serious incident of harassment of one of the residential lessees by

one of the commercial tenants it became apparent that Hurford Salvi Carr did not have a procedure in place for dealing with harassment.

Mr Thornton responded that at the time of the incident they did not have such a procedure in place; however the company had now adopted the ARMA guidelines on dealing with incidents of harassment. Both he and Mr Flintoff had spoken to the commercial tenants concerned and the matter was ongoing.

2.9 As to issue (4) (future use of B1 units). Mr John contended that the continued use of the B1 units in breach of both covenant and planning regulations was an ongoing concern.

Mr Flintoff provided a detailed verbal explanation of the issues in connection with the use of the B1 units and confirmed that action was being taken through the landlord's solicitors. This was, he emphasised, a matter for the landlord, and lay outside the Managing Agent's responsibilities.

3. Section 20(c) Application

3.1 The Applicants sought an order from the LVT under Section 20(c) of the Landlord and Tenant Act 1985 limiting the Respondent from recovering the costs of the Hearing through the service charge account. The Tribunal directed that a written submission on costs be provided to the Tribunal and that the Applicants should have one opportunity to respond in writing before making a decision.

4. The Inspection

4.1 The Tribunal did not inspect the premises.

5. Findings of Fact

5.1 A letter was produced to the Tribunal from the Respondent's insurance brokers confirming that cover was in place and that they were aware of the various planning issues.

5.2 Although there was some lack of clarity in the accounts they had been audited by a firm of appropriately qualified accountants.

5.3 Following the incident of harassment the Respondent's agents had put in place appropriate procedures to deal with future incidents.

5.4 The Respondents admitted there were planning issues with the B1 units which the landlord was trying to resolve through its solicitors and with the relevant authorities. These issues lay outside the Managing Agent's responsibilities.

6. Application of the law

6.1 **S24 of the Landlord and Tenant Act 1987 - Appointment of manager by the court**.

(1) A leasehold valuation tribunal may, on an application for an order under this section, by order (whether interlocutory or final) appoint a manager to carry out in relation to any premises to which this Part applies—
(a) such functions in connection with the management of the premises, or
(b) such functions of a receiver,
or both, as the court thinks fit.
(2) A leasehold valuation tribunal may only make an order under this section in the following circumstances, namely—
(a) where the court is satisfied—
(i) that any relevant person either is in breach of any obligation owed by him to the tenant under his tenancy and relating to the management of the premises in question or any part of them or (in the case of an obligation dependent on notice) would be in breach of any such obligation but for the fact that it has not been reasonably practicable for the tenant to give him the appropriate notice, and
(iii) that it is just and convenient to make the order in all the circumstances of the case; or
(ab) where the court is satisfied—
(i) that unreasonable service charges have been made, or are proposed or likely to be made, and
(ii) that it is just and convenient to make the order in all the circumstances of the case;
(aba) where the tribunal is satisfied—

(i) that unreasonable variable administration charges have been made, or are proposed or likely to be made, and

(ii) that it is just and convenient to make the order in all the circumstances of the case;

(ac) where the court is satisfied—

(i) that any relevant person has failed to comply with any relevant provision of a code of practice approved by the Secretary of State under section 87 of the Leasehold Reform, Housing and Urban Development Act 1993 (codes of management practice); and

(ii) that it is just and convenient to make the order in all the circumstances of the case;

(b) where the court is satisfied that other circumstances exist which make it just and convenient for the order to be made.

6.2 **S20C of the Landlord and Tenant Act 1985 - Limitation of service charges: costs of proceedings**.

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court or leasehold valuation tribunal, or the Lands Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;

(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;

(c) in the case of proceedings before the Lands Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.".

7. Reasons for the Decision

7.1 In arriving at their decision the Tribunal considered the evidence presented and applied the tests set out in Section 24(2) of 'The Act'.

7.2 **Insurance.** The Tribunal accept the explanation of the Respondent supported by the letter from the landlord's insurance brokers. They were satisfied that the insurance brokers were being kept informed of the position in respect of the use of the commercial parts and of the fire alarms.

The Tribunal were further satisfied with the Respondent's arrangements for invoicing the insurance at the time of renewal. However whilst this item is not a service charge as defined by the lease it is a service charge within the definition of Section 18 of the Landlord and Tenant Act 1985 and therefore falls to be included within any set of accounts prepared. There is no requirement within the lease for the premium to be invoiced together with the service charge or be included in any budget issued to lessees.

7.3 **Service Charge apportionment and accounting.** The 'code' is specific as to 'must' and 'should'. A clause stating 'must' is a requirement whereas a clause stating 'should' is best practice. Specifically the Applicants alleged breaches of the code;

para 4.1, (compliance with the law) This is a 'must' clause and the Tribunal were presented with no evidence of breach of statutory obligation.
It is acknowledged, by the Respondents, that the accounts were late in production however regulations introducing Section 152 of the Commonhold and Leasehold Reform Act 2002 have not been issued. The relevant legislation is therefore Section 21 of the Landlord and Tenant Act 1985 as amended by Schedule 2 of the Landlord and Tenant Act 1987. These provisions only generate time limits where a formal request is made. No evidence of a formal request was produced in evidence.

para 4.10, (accurate clear and concise communication). This is a 'should' clause and whilst the Tribunal did find evidence of poor communication they did not consider it to be sufficiently serious to warrant the appointment of a new manager.

para 11.1 (compliance with the lease). This is a 'should 'clause'. The Tribunal did not find the actions of the Agent to be in breach of the lease.

para 11.4. (annual audit of accounts). This is a 'should' clause' The Tribunal, although noting the late production of accounts, did not find breach of the code. The Tribunal accept the Respondent's explanation of the delay.

The Tribunal considers it is impractical to account separately for the car parking spaces and notes the Landlord's commitment to produce the accounts for 2003 and 2005 without further delay.

The Tribunal is satisfied that the method for apportioning the water charges is the most practical within the limitations of the lease and the fact that only one meter serves the entire building. The Respondent has undertaken recheck that the amounts paid and apportionments for collection are correct.

7.4 **Harassment.** The Respondent's Managing Agent has put in place appropriate procedures following the guidelines of ARMA

7.5 **B1 use in future.** The Respondent was fully aware of the problems relating to the use of the commercial premise and action is being taken to resolve these issues. In any event the Tribunal accept that this is not a matter which relates to the performance of the Managing Agent.

7.6 **General.** The Tribunal consider, on the evidence presented, that many of the problems which gave rise to this application could have been avoided had there been better communication by the Managing Agent with the lessees. A point acknowledged, during the Hearing, by both Mr. Thornton and Mr. Flintoff. However these shortcomings, whilst unsatisfactory, are not sufficient to justify the appointment of a replacement manager

7.7 **Respondent's costs.** The Tribunal acknowledge the correspondence from both parties in respect of the submission on Section 20(c) costs. The Tribunal however disregard attempts by the Applicants re-open issues beyond the submission on costs.

The Respondent's schedule of costs is set out below:

(1) Legal costs	£2000.00 plus VAT
(2) Managing Agent's attendance at LVT	£ 750.00 plus VAT
(3) Mr P Flintoff director	£1000.00 no VAT

In deciding whether or not to limit the amount of the Respondent's costs recoverable through the service charge the Tribunal considered the following;

(a) There had been minor breaches of the RICS code by the Respondent.
(b) There was poor communication by the Managing Agent to the Applicants.
(c) The Applicants had failed to respond to the Managing Agents correspondence of the 9th August 2005 in response to the Section 22 Notice and subsequently refused to attend a meeting offered by the Managing Agent in their letter of the 30th September 2005.

7.8 In the light of their decision below the Tribunal do not intend to reconvene to interview the Applicant's proposed Manager, Mr Rendall.

8. The Tribunal's Determination

8.1 The Tribunal determine that it is not just and convenient to appoint a Manager in this case.

8.2 The Tribunal determine that the amount of the costs proposed by the Respondent is reasonable.

8.3 The Tribunal determine the Respondents may recover only 50% (£1875.00) of those costs incurred in these proceedings through the service charge on account of the matters raised at 7.6 (a)-(c).

Robert T Brown FRICS
Chairman

Dated. 8/2/06.....