RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL FOR THE EASTERN RENT ASSESSMENT PANEL

Case Number CAM/26UG/LSC/2004/0046

Landlord and Tenant Act 1985 (as amended) ("the Act")

Heritage Close, 19 – 33, High Street, St Albans, Herts AL3 4EB

Parties:

Mr. L J Westwood
Christine Hammond
Anne Strong and Jane Bandcroft
On behalf of the Heritage Close Residents Association **Applicants**

Lanchester Investments Limited **Respondents**

Appearances:

Ms. Christine Hammond
And Mr L J Westwood **For the Applicants**

Mr E F Shapiro BSc(Est Man) FRICS IRRV FCIArb
Mr E Samet **For the Respondent**

Tribunal members:

Mr A A Dutton Chair
Ms M Krisko BSc(Est Man)BA FRICS
Mr B Tyers

Hearing date: **25th January 2005**

Decision date: **3rd February 2005**

A. BACKGROUND

1. This application was made by Mr L J Westwood on behalf of the Heritage Close Residents' Association ("the Applicants") under section 27A and section 20C of the Landlord and Tenant Act 1985 (as amended) ("the Act"). The association is a body recognised by the Landlord, Lanchester Investments Limited ("the Respondent")

2. The application challenged service charges for the year 2004 in relation to major works carried out to the premises at Heritage Close, St. Albans ("the Premises"), alleged that the provisions of section 20 of the Act had not been complied with and further challenged the method of apportionment of the service charge between the residential and commercial properties at the Premises.

3. The Premises comprise a mix of residential and commercial units. There are 12 maisonettes and there were originally 16 commercial units but the layout of these commercial units has changed, although not resulting in any great change to the floor area ratio between the residential and commercial units. There is a car parking area in the basement, which is not demised to the residential units by the lease but is used by some residential unit holders on a separate basis.

4. The residential units occupied by the Applicants members are held under leases of 99 years commencing 1st January 1975 at an initial rent of £30 per annum rising by fixed sums every 33 years to £120.

5. As a result of concessions made by the Respondent in its statement of case dated 18th November 2004 the only issue that fell to be considered by us was the question of apportionment of the service charges between the residential and commercial units for the period 1st October 2004 onwards, the parties agreeing that all accounts up to and including the year ending September 2004 would fall to be apportioned under the existing arrangements, that is to say 90.26% to the commercial units and 9.74% for the residential units.

B PRE- HEARING APPLICATION by Applicants

6. The Applicants' had sought an adjournment of the hearing the day before complaining about the late delivery of the Respondent's statements and in particular the introduction of comparable rental values of commercial units in St. Albans. This had been refused. On the day they made an application for an order preventing the Respondents from relying on witness statements of Mr Eric Frank Shapiro the expert and advocate for the Respondents and Mr Ephraim Samet a director of the Managing Agents, Keneth Peters Asset Management Limited. Having considered the submissions made by Miss Hammond on behalf of the Applicants and Mr Shapiro on behalf of the Respondent we ordered that the statements should be admitted. We will set out brief reasons for this later in this document.

C EVIDENCE

7. The Applicants' case can be simply stated. The terms of the lease, which we will refer to in more detail in the decision element of this document, provided for the service charges to be apportioned between the occupiers of the Premises on the basis of the rateable value for a unit and compared to the total rateable value for all units, both residential and commercial in the Premises. It was conceded by the Applicants that the old rateable value system no longer applied to the residential units. Their case was, however, that a new arrangement, based on percentages, which were themselves based on the rateable values for all units on the Premises in 1991, had been in place since then and there was no need to change, nor indeed did the Respondent have the power to make any change.

8. For the Respondent, Mr Shapiro submitted that the lease as drafted did not contemplate that the apportionment of the service charge would be "fossilised". His view was that the lease was flawed in this regard as his opinion was that the rateable value apportionment was an inappropriate method of dealing with service charges in a mixed residential/ commercial development. He opined that if the draftsman had meant the rateable value to be constant the lease would have said so. In fact the lease contemplated that the rating system might disappear and put forward alternatives. The

first might apply, if for example a unit had been destroyed by fire, the second, where the rating system had been "changed or abrogated". His case was that the apportionment, relying on outdated rateable values for the residential units compared with uplifted rateable values for the commercial premises, was now "inoperable or manifestly inequitable". Accordingly the Respondent Landlord was entitled to introduce another "just and equitable method" to apportion the service charges between the residential and commercial properties.

9. Initially that suggested alternative method was based on floor area which according to Mr Samet's written evidence resulted in a new basis of apportionment at 65.14% to the commercial premises and 34.86% to the residential properties. Not unnaturally perhaps this had sparked the application to the Tribunal, as the previous percentage split in operation from 1991 to 2004 was as referred to above, namely 90.26% to the commercial premises and 9.74% to the residential units. This initial change was not pursued by the Respondent on the advice of Mr Shapiro.

10. Mr Shapiro suggested two alternative methods. The first was to agree a fixed proportion for some elements of the service charge with the residential lessees, with other expenditure being apportioned each year by the managing agent. This was the preferred route. The alternative was for the managing agent to apportion all expenditure each year in a fair and judicial way. Neither option was pursued in any further detail before us at the hearing as it was agreed that the first hurdle the Respondent's needed to overcome was whether or not the present apportionment arrangement should change. In that regard Mr Shapiro relied on the Respondent's statement of case and his submissions to us at the hearing. He also referred to certain rating cases but did not have the authorities to hand nor did he know the full title of the cases. We were subsequently provided with copies of the reports of British Gas Corp. v Universities Superannuation Scheme Ltd (1986)1 EGLR120 and Basingstoke and Deane Borough Council v The Host Group Ltd 1987 EGLR147.

11. Mr Shapiro submitted that the present system was manifestly inequitable and had remained in place as a result of inertia on the part of the previous Landlord, who sold their interest in the Premises to the Respondents in 2002. He told us that he had no idea whether the sums paid by the lessees had any relationship to the actual cost of running their units and that could not be fair or reasonable. To highlight this perceived inequality he took us through the service charge account for the year ending September 2002 substituting his view as to the appropriate distribution of the costs for the percentage split previously applied of 90.26/9.74. In his opinion it showed that the lessees should be paying around £1000 per unit, per annum excluding insurance, compared to somewhere between £400 and £500, excluding insurance. He was however candidly prepared to accept that these figures may not be correct.

12. Miss Hammond reiterated that so far as the Applicants were concerned they had agreed an arrangement in 1991 and that was what they should pay.

D DECISION

13 We deal firstly with the application to exclude the Respondent's witness statements. We decided that they should be allowed. The statement of Mr Shapiro, apart from raising some valuation points which he put forward as examples only and did not seek to rely on in his submission to us, merely spoke to the statement of case on behalf of the Respondent which had been with the Applicants for some weeks. Mr Samet's witness statement merely set out the history and support of Mr Shapiro, whilst conceding that the floor area apportionment was inappropriate. We did not believe that the Applicants were prejudiced. It should be noted that the Applicants had not filed any witness statements. We turn now to the substance of the application before us.

14. The relevant sections of the lease state as follows:

Fourth schedule

(1) To pay to the Landlord from time to time in manner hereinafter provided the proportion properly attributable to the Demised Unit (meaning thereby that proportion which the rateable value of the Demised Unit bears

to the aggregate Rateable Value of the Demised Unit and the other Lettable Units in the Centre) of the total outgoings and expenditure (the aggregate amount of which outgoings and expenditure is in this Lease referred to as "the Service Cost") paid incurred or borne by the Landlord in discharging the obligations executing the works and providing the services amenities and facilities specified in the Third Schedule hereto or all or any of them respectively the amount of the Service Cost and the proportion thereof aforesaid to be determined and notified in writing in manner hereinafter provided by the Landlord's Surveyor PROVIDED NEVERTHELESS:-

(a) That if at any time there shall not in respect of the Demised Unit or in respect of the other Lettable Units in the Centre be in force any determination of rateable value by the relevant rating authority then either

(i) the yearly gross rent (not being merely a nominal or concessionary rent) for the time being payable to the Landlord in respect of the Demised Unit or the other Lettable Units respectively or

(ii) in the case of any other Lettable Unit in respect of which no yearly gross rent or only a nominal or concessionary yearly gross rent is payable to the Landlord such yearly sum as in the opinion of the Landlord's Surveyor represents the then current market rent of that other Lettable Unit shall for the purpose of provisionally apportionment be treated as the rateable value thereof until the actual rateable value thereof has been determined and assessed when any necessary adjustment or correction shall be made

(b) That if the system or method of rating buildings and premises in operation at the commencement of the term hereby granted shall hereafter be changed or abrogated so as to render the apportionment of and contribution to the Service Cost according to rateable value inoperable or manifestly inequitable then such apportionment and the proportion of the Service Cost to be attributed to and paid in respect of the Demised Unit shall

be calculated by some other just and equitable method to be conclusively determined by the Landlord's Surveyor

Sub paragraph 1(a) of the 4th schedule to the lease in our finding is intended for a temporary situation only. The example given by Mr Shapiro of a unit being damaged by fire is as good as any. In our finding this subsection does not assist us in reaching a decision in this case.

15. We must therefore look carefully at the wording of sub paragraph (b). It is quite clear that the system of domestic rates have been "abrogated". They were abolished some time ago. This is common ground. It appears that in 1991 from a document before us included in the Respondents Statement of case, figures representing the rateable values for the residential units and the commercial units had been established to the satisfaction of the Landlord and the lessees. These figures had been used by the parties at that time to give the percentage split of 90.26% to the commercial properties and 9.74% for the residential units. This had been applied from 1991 until the Respondent sought to change the apportionment in 2004. The lease allows the Landlord's surveyor to calculate the proportions and apportionments by some "other just and equitable method" which is presumably what he did in 1991. The question we therefore need to consider is whether or not this apportionment arrangement is "inoperable" or "manifestly inequitable". The question of "Inoperable" is straight forward. Is the present apportionment capable of being implemented or operated? The answer in our finding is that clearly it is. Percentage splits are easily operated and are not uncommon when dealing with apportionments of service charges under domestic leases. We appreciate that it may give rise to "a swings and roundabout" exercise as conceded by Miss Hammond but in our experience this is not uncommon. It is not unusual to find lessees of flats in a block being required to contribute to services of which they get no benefit, for example lifts. The problem in this case is the mix of residential and commercial premises but that does not of itself mean that a percentage split for the apportionment of service charges is "inoperable".

16. Is the present system "manifestly inequitable" i.e. plainly unfair or unjust? The figures we referred to above for the rateable values for both residential and commercial property in 1991, presumably took into account the opening up of the residential letting market following the introduction of the Housing Act 1988. It also contained the then up to date commercial rateable values. It was these values that had been used by the Landlord to fix the service charge apportionment by reference to percentages.

17. We were told that there had been no significant changes in the relationship between the residential properties and the commercial units since that time. In fact there may have been a slight increase in the floor areas of the commercial units following the repositioning of the stairs to the residential units. We were told that some elements of the service charges were of reduced benefit to the lessees, these appeared to be the costs of maintenance of the car parking, the management fees, in that the commercial units required more management time and the staffing costs, on the same basis as the management time. This "swings and roundabout approach" was not a cause of concern to the lessees.

18. We now refer to the authorities mentioned by Mr Shapiro (see paragraph 8 above). No real indication was given at the hearing as to the assistance that these cases would give to us and no detailed submission was put to us as the relevant parts of the judgment which would assist. We have considered them both. The British Gas case relates to the construction of a rent review clause in a commercial lease and the underlying purpose of same. The second case cited relates to the rent review of a ground rent for public house and the terms upon which such rent review would operate. We cannot see that these cases help us in making our decision in this matter. The terms of the lease are clear. The Landlord, for whom the lease was prepared and against whom the terms must be construed provided for the abolition of rateable values. The successor to the original Landlord, relying on the terms of the lease reached an agreement as to an acceptable method of recalculating the apportionments in 1991. Nothing seems to have materially changed since then.

19. We do not find that the apportionments agreed in 1991 between the then Landlord and the Applicants are "inoperable" or "manifestly inequitable". No compelling evidence was adduced at the hearing to show that this was the case. The best that Mr Shapiro could do was to substitute his assessment of the relative apportionment of individual items which indicated that the figure could be nearer £1000 than the apparent sum of between £400 and £500 currently being paid. It would be wrong to say that these were figures plucked out of the air for we are aware of Mr Shapiro's expertise but there was no hard evidence that the percentages he substituted were any closer the actual cost/benefit to the lessee than the established percentage.

20. We therefore find that there is no basis to alter the established apportionment of service charges for the Premises from the percentage split that has been in operation since 1991, namely 90.26% for the commercial units and 9.74 % for the residential properties.

21. We cannot help but feel that this wish to change the apportionments may be partly driven by the fact that some commercial units are empty and not contributing to the annual costs, which the Landlord is presumably covering.

22. On the question of costs Mr Shapiro conceded that if we were against the Landlord on this matter the costs could not be added as a service charge. We agree that this is the right approach and therefore order that the provisions of section 20C of the Act shall apply and that the costs of these proceedings are not recoverable by the Landlord under the service charge regime. Further for the avoidance of doubt we confirm that the costs of the major works which should have been the subject of a notice complying with section 20 of the Act are disallowed in so far as they exceed the sums payable under the Service Charge (Estimates and Consultation) Order 1988, which in this case is £1000.

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Chairman

7th February 2005

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Date