SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Case No. CHI/46UD/LIS/2005/0023

REASONS

Application : Sections 27A and 20C of the Landlord and Tenant Act 1985 as amended ("the 1985 Act")

Applicant/Leaseholders : Mr R Newman and Mr P Newman, Apartment 9; Mr & Mrs K Ferguson and Mr A Ferguson, Apartment 10; Mr & Mrs A Duff, Apartment 11; Mrs K R Hall, Apartment 23; Mr & Mrs S Walker, Apartment 24; Mr & Mrs J R Staley, Apartment 25; and Mr R Crozier, Apartment 29

Respondent/Landlords : M J Gleeson Group plc ("Gleesons") and Charter Court Management Company Limited

Estate : Charter Court, Gigant Street, Salisbury, Wiltshire, SP1 2LH

Apartments : The residential Apartments 9, 10, 11, 23, 24, 25, and 29 in the Estate

Date of Application : 3 June 2005

Date of Directions Hearing : 20 July 2005

Date of Full Hearing : 30 November 2005

Venue : City Hall Meeting Room, Malthouse Lane, Salisbury, SP2 7TU

Appearances for Applicant/ Leaseholders : Mr and Mrs G Lewis, 14 Charter Court; Mrs K R Hall; Mr T Elliott, 6 Charter Court; Mrs P Moore, 12 Charter Court; Mrs J Stone, 17 Charter Court; Dr J R Brooks, 27 Charter Court; and other residents of the Estate, some of whom stayed for only part of the hearing

Appearances for Respondent/ Landlord : Miss S Hannis, Client Services Director, Mr C Lucas, Technical Services Director, and Mr M Monkhouse, Service Charge Accountant, all of Mainstay Residential Limited ("Mainstay")

Members of the Leasehold Valuation Tribunal : Mr P R Boardman MA LLB (Chairman), Mr M R Horton FRICS, and Mr C G Thompson

Date of Tribunal's Reasons : December 2005

Introduction

1. This Application by the Applicant/Leaseholders is under :
    a. section 27A(1) of the 1985 Act for the Tribunal to determine the payability of service charges for the years 2003 and 2004
    b. section 20C of the 1985 Act for an order that the costs incurred by the Respondent/Landlords are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant/Leaseholders ("the section 20C application")

2. The Applicant/Leaseholders have also made an application for payment of their costs of the proceedings

3. Mainstay have also made an application for payment of their costs of the proceedings

4. On the 20 July 2005 the Tribunal held a pre-trial review hearing

5. The substantive hearing of the application took place on the 30 November 2005

6. The definition of "service charge" for the purposes of the 1985 Act has been extended by paragraph 7 of Schedule 9 to the Commonhold and Leasehold Reform Act 2002 ("CLARA 2002") to mean an amount payable not only for services, repairs, maintenance, or insurance or the landlord's costs of management, but also now for improvements. The Tribunal's jurisdiction to consider the payability of a service charge applies whether or not any payment has been made (section 27A(2) of the 1985 Act)

7. Section 18(1) of the 1985 Act provides as follows :

    18 Meaning of "service charge" and "relevant costs".
    (1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent—
    (a) which is payable, directly or indirectly, for services, repairs, maintenance[, improvements] or insurance or the landlord's costs of management, and
    (b) the whole or part of which varies or may vary according to the relevant costs.

8. By virtue of the Commonhold and Leasehold Reform Act 2002 (Commencement No 2 and Savings) (England) Order 2003, section 151 of the 2002 Act, which substituted a new section 20 for the previous section 20 of the 1985 Act, has no effect where qualifying works were carried out before the 31 October 2003

9. The material parts of the previous section 20 of the 1985 Act are as follows :

    (1) Where relevant costs incurred on the carrying out of any qualifying works exceed the limit specified in subsection (3), the excess shall not be taken into account in

determining the amount of a service charge unless the relevant requirements have been either

(a) complied with, or

(b) dispensed with by the court in accordance with subsection (9)

(2) In subsection (1) "qualifying works", in relation to a service charge, means works (whether on a building or on any other premises) to the cost of which the tenant by whom the service charge is payable may be required under the terms of his lease to contribute by the payment of such a charge

(3) The limit is whichever is the greater of –

(a) £50..... multiplied by the number of dwellings let to the tenants concerned, or

(b) £1000.....

10. Paragraph 10 of Schedule 12 to CLARA 2002 provides as follows :

10 Costs

(1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).

(2) The circumstances are where--
(a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or
(b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

(3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed--
(a) £500, or
(b) such other amount as may be specified in procedure regulations.

(4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.

11. The material parts of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003 ("the 2003 Fees Regulations") are :

Reg. 9

(1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by

him in respect of the proceedings.

(2) A tribunal shall not require a party to make such reimbursement if, at the time the tribunal is considering whether or not to do so, the tribunal is satisfied that the party is in receipt of any of the benefits, the allowance or a certificate mentioned in regulation 8(1).

Documents

12. The documents before the Tribunal are :
    a. the Application and supporting papers at pages 1 to 73 of the Tribunal's bundle
    b. the Applicant/Leaseholders' bundle, and any references in these reasons to an "Annexe" are references to an Annexe in that bundle
    c. the Respondent/Landlords' bundle, and any references to an "Appendix" are references to an Appendix in that bundle
    d. the Applicant/Leaseholders' response bundle

Inspection

13. The Tribunal inspected the exterior of the Estate on the 30 November 2005. A helpful drawing of the Estate was in Annexe A in the Applicant/Leaseholders' bundle

14. The Estate comprised a number of modern brick-built buildings and 2 garage barn areas. There were 5 studios above the northernmost car barn, apparently accessed by black-painted metal staircases. There were retractable parking posts, some yellow and some silver/grey, in the parking spaces. Apartment 29 had its own entrance onto Gigant Street. Apartments 9 and 23 had their own entrances under an archway leading onto Gigant Street. Apartments 10, 11, 24, and 25 shared a common entrance under the same archway, and were accessible by stairs within. Apartments 10 and 24 had individual entrances onto a first-floor landing. Apartments 11 and 25 had individual entrances onto a second-floor landing. At the western end of the southernmost car barn was a small, open, paved area, which Mr Lewis identified as being the bin store referred to in the documents before the Tribunal

15. The Estate appeared to be well maintained.

Preliminary and procedural matters

16. At the pre-trial review on the 20 July 2005 the Tribunal had ruled that the Tribunal had no jurisdiction to determine the reasonableness of service charges payable by the owners of the freehold properties forming part of the Estate

17. At the hearing on the 30 November 2005, the Tribunal referred to the applications by the owners of leases of the studios to join in the proceedings, and to the lease of the studio at 2 Charter Court in the Applicant/Leaseholders' bundle, which had not been before the Tribunal on the 20 July 2005

18. The Tribunal noted that paragraph 2 of Part III of the Fourth Schedule to the studio lease prohibited the tenant from using the studio "otherwise than as amenity storage ancillary to a Residential Unit on the Estate only or such other use as the Planning Authority may approve and not to use the [studio] for any other purpose whatsoever"

19. Mr Lewis confirmed that one studio was used, with planning permission to do so, as an office, and each of the others as an additional storage space as an adjunct to one of the residential units. They each had facilities such as a wash basin and toilet

20. After hearing submissions from both parties, the Tribunal found that its jurisdiction under section 27A of the 1985 Act :
    a. was governed by the definition of "service charge" in section 18 of the 1985 Act
    b. was accordingly limited to service charges payable by tenants of "dwellings", which the Tribunal found to mean premises used as a residence
    c. did not extend to service charges payable in respect of the studios, because they were not used as residences
    d. was limited to the service charges payable in respect of the 7 Apartments accordingly

21. The service charges for the Estate were divided into 4 "sectors", as explained in the helpful note attached to the Applicant/Leaseholders' application at page 8 of the Tribunal's bundle. The service charges payable in respect of Apartments 9, 10, 11, 23, 24, 25, were sector 1 and sector 2 service charges. Those for Apartment 29 were sector 1 and 3 service charges. Sector 4 service charges related to the studios, and were accordingly not within the Tribunal's jurisdiction in the light of the Tribunal's finding in that respect

22. Mr Lewis said that each owner had a share in Charter Court Management Company Limited, but none were directors. The only director was an employee of Gleesons. None of the Applicant/Leaseholders had had power over what was done by Charter Court Management Company Limited. Charter Court Management Company Limited had no income other than through the service charges paid by the owners of the units at Charter Court

23. So far as Mainstay was concerned, the parties agreed that Mainstay was not a party to the Applicant/Leaseholders' leases, and was accordingly not a party in the Tribunal proceedings, but was attending the hearing on behalf of the Respondent/Landlords

24. Mr Lewis submitted that there was a conflict of interest in that the owners of units at Charter Court were shareholders in Charter Court Management Company Limited, but had no power or control; they had not been consulted about the appointment of Mainstay; Mainstay were now representing Charter Court Management Company Limited at the hearing, and were applying for an order for their costs of attending the hearing

25. The Tribunal considered the matter, and found that there was no conflict in Mainstay representing Charter Court Management Company Limited at the hearing, but indicated that Mr Lewis's submissions would be considered when the question of Mainstay's costs were dealt with at the end of the hearing

The Leases

26. The parties agreed at the beginning of the hearing that the Apartments were held on Leases in similar terms to the Leases of Apartments 23 and 29 in the Applicant/Leaseholders' bundle

27. For the purposes of these proceedings the material parts of the Leases were as follows :

Clause 6

The Tenant covenants with [Gleesons] and as a separate covenant with [Charter Court Management Company Limited]

6.1 *to pay the Estate Charge and Building Service Charge in the manner set out in the Fifth and Sixth Schedules*

Clause 7

7.1 *[Charter Court Management Company Limited] covenants with the Tenant that subject to the payment of the Estate Charge and the Building Service Charge it will provide and perform the Estate Services and the Building Services……*

The Fifth Schedule
Part I The Estate Services

1. *To repair and maintain to a reasonable standard and where necessary renew those parts of the roadway footpaths accessways forecourts boundary walls and fences parking bays and the structures enclosing or associated with the parking spaces and all other areas at the Estate which fall within the Estate Communal Area*
2. *To provide lighting to the Estate Communal Areas……*
3. *To keep any planted or landscaped area within the Estate Communal Areas in good order or condition*
4. *To maintain the Service Installations*
5. *The costs of obtaining public liability insurance in respect of the Estate Communal Areas*

Part II Estate Management Costs

1. *The costs and expenses incurred by [Charter Court Management Company Limited] in the provision of the Estate Services*
2. ……
3. ……
4. ……
5. *The costs of employing any surveyor accountant agent solicitor and*

contractors or other person in connection with the management of the Estate the preparation and auditing of the accounts of [Charter Court Management Company Limited] and the collection of Estate Charges from owners of other parts of the Estate

6. *Any expense incurred by [Charter Court Management Company Limited] in relation to or incidental to the administration of [Charter Court Management Company Limited]'s affairs*
7. *……*
8. *All other costs and expenses which [Charter Court Management Company Limited] may reasonably incur in the best interests of the Estate*

The Sixth Schedule
Part I Building Services

1. *To maintain and repair and where necessary renew:*
   - *1.1 the main structure of the Building……*
   - *1.2 …… Service Installations……*
   - *1.3 the Common Parts*
2. *To keep the Common Parts reasonably well lit……*
3. *To keep the Common Parts clean and tidy……*
4. *…… to decorate the Common Parts and those parts of the exterior of the Building which are usually painted or decorated*
5. *To clean the exterior of the windows……*

Part II The Building Costs

1. *The costs and expenses incurred by [Charter Court Management Company Limited] in the provision of Building Services*
2. *……*
3. *……*
4. *The amount of any contribution towards the expense of making repairing maintaining rebuilding or renewing any Service Installations ways pavements party walls or fences or other conveniences which are used by the Building in common with other parts of the Estate or other adjoining or neighbouring property which [Charter Court Management Company Limited] is called upon to make*
5. *……*
6. *……*
7. *……*
8. *All other expenses (if any) incurred by [Charter Court Management Company Limited] or its agents in or about the maintenance and proper and convenient management and running of the Building*

Items in dispute in the 2003 Service Charge demands

Electricity – £215.54 Appendix 3A page 1

28. Mr Lewis agreed the figure of £215.54, but said that £114.79 had been paid by the Residents' Association on the 6 July 2004, as confirmed by the invoice in the Applicant/Leaseholders' response bundle

29. Mr Monkhouse said that £54.07 had been credited in this respect in the 2004 service charge demands, as confirmed at Appendix 3B page 1

30. Mrs Lewis said that units at Charter Court had changed hands, and credits should be attributed to the service charge year in which the original charge arose, not to a subsequent year

31. The Tribunal indicated that if the correct amount of credit had been given, albeit in a different service charge year, then that was really a matter for adjustment between buyers and sellers of units, and did not affect the overall amount or the payability of the service charge as such

32. Having considered the matter at length, Mr and Mrs Lewis confirmed that this item was no longer in dispute

Gardening - £1010 Appendix 3A page 1

33. Mr Lewis agreed the figure of £1010, but said that the Residents' Association had paid £320 plus £50 court fee to the gardener, Mr Dunsford, in July 2004, to settle his court proceedings against Mainstay, as confirmed in Annexe C

34. Miss Hannis said that strictly speaking the £320 had been paid by the Residents' Association, not by individual owners. However, the sum of £320 had in any event been credited in the 2005 service charge figures, as confirmed at Appendix 3C page 1

35. Miss Stone asked how the credit was going to take effect if Mainstay were no longer agents for the Respondent/Landlords

36. The Tribunal indicated that this was not within the Tribunal's jurisdiction, but, in the event of disagreement, would be a matter for proceedings in the County Court

37. Mr Monkhouse said that the £50 court fee paid by the Residents' Association could not be credited against the £1010 because it was additional to the £1010, and had not been charged in the service charge account at all. It would have to be added to the service charge before the payment by the Residents' Association could be credited with the same figure

Bin store - £870 Appendix 3A page 1

38. Mr Lewis said that the bin store referred to was an improvement. It was the paved area at the western end of the south car barn area which the Tribunal had seen during the inspection earlier that morning. It was not part of the original development. The Applicant/Leaseholders agreed that it had been required, but there had been no consultation with them about the cost. There was no provision in the Leases for the Respondent/Landlords to include the cost of improvements in the service charge

39. Mr Lucas said that there had been a bin store already, and this item was for the cost of relocation to a better position. It could be included in the service charge as a cost under paragraph 8 of Part II of the Fifth Schedule to the Leases

40. Miss Hannis said that it could not be right to suggest that the installation of anything new would always be an improvement, since otherwise it would not even be possible to add, for example, a door bell, if none had been there before. It was a question of whether the cost impacted on the value of the Estate. Miss Hannis cited the case of **Gibson v Chesterton** as authority, but did not

have a copy for the Tribunal or the Applicant/Leaseholders, and did not have the case reference

41. Mr Elliott said that he had been involved in the negotiations about the bin store with Gleesons and Mainstay in 2002 and 2003. There had been virtually no bin store in the south car barn area. The residents had complained. A completely new bin store area had been built. Mr Elliott had seen estimates of about £400 to £500, but the costs had never been circulated.

42. Miss Hannis said that Mr Elliott had nominated the contractors and obtained estimates, as confirmed at 1H. Miss Hannis did not have the estimates, but had had no recollection of the figures being £400 to £500 as now suggested by Mr Elliott. The contractors had been Odds & Sodds, who had been nominated by Mr Elliott, as confirmed by the e-mail to Mr Elliott at Appendix 1J. There had been consultation with the residents, as confirmed by the letter and survey at Appendix 1F and 1G

43. Mr Lewis said that the fact that the residents had nominated contractors did not absolve the Respondent/Landlords from consulting on the costs before the work was done

44. Miss Hannis agreed that there had not been consultation with the residents on the final figures, but the residents had been involved, and in any event the costs were reasonable

Parking posts – £1200.85 Appendix 3A page 1

45. Mr Lewis said that this item was the cost of 6 yellow parking posts, 2 in the south car barn, and 4 in the north car barn. Again, this item was an improvement, which could not be included in the service charge, and there had been no consultation about the cost, which was extortionate for 6 posts. In addition, the cost exceeded the limit of £1000 under the previous section 20 of the 1985 Act

46. Miss Hannis submitted that the limit under section 20 was not £1000, but £1450, namely 29 x £50, because the owners of all 29 units on the Estate had to contribute to this item of service charge, not just the 7 Applicant/Leaseholders. The residents had been consulted about this item at the same time as the consultation about the bin store. Quotations had been obtained from more than one contractor nominated by the residents, although no quotations were before the Tribunal. Mainstay had engaged the same contractors as had been engaged by Shaftesbury Housing Association in relation to their parking posts at the southern end of the Estate. The cost was not extortionate

Garage wall repair – £120 Appendix 3A page 2

47. Mrs Moore said that there had been accidental damage which had affected her property. She had contacted Mainstay, but with no response. The Residents' Association had arranged for the work to be done while an insurance claim was being made

48. Mr Lewis said that the £120 was for emergency work, after which the insurance company carried out the full repair. There was no dispute about the figure of £120, only about whether it should have been included in the insurance claim. The Residents' Association had paid an excess of £100

49. Miss Hannis said that the Residents' Association were dealing with the insurance claim direct. Mainstay were not aware that an excess of £100 had been paid, and there was no evidence in that respect, but in any event that would still leave £20 payable

50. Mr Elliott said that he had reported the damage to Mainstay who had instructed Odds & Sodds to carry out emergency work, as confirmed by the invoice dated the 19 November 2003 in

Appendix 3D. The insurance assessor came, but would not deal with the claim until the £100 excess was paid. Mr Elliott gave the assessor Mr Elliott's personal cheque for £100. The invoice was in the Residents' Association's accounts for 2004

51. Mrs Lewis confirmed that the £100 excess was in the Residents' Association's 2004 accounts as having been paid

52. Mr Lewis said that Mainstay should have dealt with the insurance claim, but did not do so

53. Miss Hannis said that it had been agreed at a meeting attended by the Residents' Association , Gleesons, and herself, that the Residents' Association would deal with the insurance claim direct with the insurance company. However, in answer to a question from the Tribunal, Miss Hannis accepted that Mainstay should probably have given the £120 emergency repair invoice to the Residents' Association to enable it to be included in the insurance claim

Sinking fund – £3900

54. Mr Lewis said there was no dispute about the principle of including a sinking fund figure in the service charge, or about the figure itself. However, it appeared that Mainstay had used the funds for ordinary services. In addition, the £3900 had been demanded as part of the budgeted expenditure for 2003, but was not included in the final account for 2003, as confirmed by page 8 of the accounts at 3K. Properties had been bought and sold on the basis of the £3900 demanded

55. Miss Hannis said that no service charges had been paid, so there had been no contribution to reserves, but a surplus of £3760 had been carried forward on the assumption that all demands had been paid

56. The Tribunal indicated that the Tribunal's jurisdiction in this application was limited to the question whether the sum was payable, and that the question whether the funds had been misused would be a question for the county court, and that the question of the financial basis on which properties had been bought and sold was a matter of adjustment between the buyers and sellers

Cleaning – £415.35 Appendix 3A page 2

57. Mrs Lewis said that cleaning invoices had been miscoded, and attributed to incorrect sectors. An example was the invoice at page 2 of Appendix 3D, where the first item of £70 related to a studio, according to the manuscript note "sector 4 s/c" at the foot, whereas the invoice referred to "cleaning of stairwell, hoovering, washing down paintwork and woodwork etc, polishing throughout". The studios were accessed via the black-painted metal stairways which the Tribunal had seen on inspection, and the wording of the invoice could not properly apply to a studio accordingly. Another example was the invoice copied in the Applicant/Leaseholders' response bundle, where the same comments applied. That invoice was dated Saturday the 8 February 2003. There was another invoice for £100 for the following day, a Sunday, which was an example of questionable accounting. However, in answer to a question from the Tribunal, Mrs Lewis accepted that none of those invoices formed part of the £415.35

58. Mr Lewis said that the £415.35 related only to the common parts comprising the entrance and access to the 4 Apartments 10, 11, 24, and 25. The Residents' Association had now employed direct a lady who charged £8 an hour and cleaned every 6 weeks. Her charges came to £70 a year, compared with the £415.35 charged by the Respondent/Landlords. The residents did not now do any cleaning themselves, although they had temporarily done so initially to assess how much cleaning was necessary

59. Mr Lucas said that the date of the invoice did not necessarily indicate the date of the work referred to in the invoice, particularly if an invoice for cleaning was dated a Saturday or Sunday. The present arrangements for cleaning in 2005 had no bearing on the reasonableness of the cleaning in 2003. The residents would not have been happy with cleaning every 6 weeks, which would have been inadequate. Gleesons' instructions to Mainstay were that the marketing information before the sale of the units on the Estate included a commitment to fortnightly cleaning at least. Mr Lucas would be surprised if the Residents' Association's figure of £8 an hour included employer's liability insurance. The costs included in the service charge had been reasonable for the service provided

60. Mr Lewis said that the Residents' Association's insurance policy included employment of contractors

61. Mrs Hall said that her Apartment was number 23, so she did not use the common parts to access her Apartment, but she did access her electricity meter at the foot of the common parts stairwell, and it always looked immaculate under the current cleaning arrangements

62. Miss Hannis said that the document sent to the residents with Mainstay's letter dated April 2003 at Appendix 3O confirmed that the cost of cleaning the common parts in 2002 had been £70 a month, but that that figure would be reviewed frequently. There had been no response from any of the residents. The invoices listed at Appendix 3A page 2 were not all for £70. Most were for £50. There clearly were some coding issues, because the invoice dated the 22 February 2003 for £45 related to a studio, not to an Apartment, but this did not prejudice the Applicant/Leaseholders because the correct invoice was for £50, so the Applicant/Leaseholders had in fact benefited by £5

63. In answer to a question from the Tribunal, Mr Lewis accepted that the £415.35 did not include any invoices for cleaning between May and October 2003, and only one after October, and that the miscoding by Mainstay might well have resulted in a benefit to the Applicant/Leaseholders

Items in dispute in the 2004 Service Charge demands

Meeting room –£87 Appendix 3B page 1

64. Mrs Lewis said that the meeting had taken place in 2003, but the cost had been incorrectly included in the 2004 service charge. Properties had been bought and sold on the basis of the 2003 service charge demands without that figure

65. The Tribunal indicated that the question of the financial basis on which properties had been bought and sold was a matter of adjustment between the buyers and sellers, and did not as such affect the issue of payability before the Tribunal

66. Mr Lewis said that the Residents' Association had hired the same room during the same year for £30. The hiring by the Residents' Association had been for about 2 hours on a Sunday afternoon, and had included tea and coffee. In any event, Mainstay were not entitled to charge for the hire of a room for residents' meetings in addition to their management fees, which included making site visits for inspections and residents' meetings, and there was no provision in their management agreement enabling them to charge extra for the hire of a room, as confirmed by Appendix 4 Schedule 1 Part I item 8, and Schedule 3

67. Miss Hannis said that the purpose of Schedule 3 was only to set out the basic annual fee. Schedule 1 Part I item 8 made it clear that additional charges could be made, such as for additional meetings at an hourly charge. The Fifth Schedule Part II paragraph 8 of the Leases

entitled the Respondent/Landlords to charge the cost of the room hire in the service charge. The room hire in 2003 had been from about 7.00 pm to about 10.30 pm

68. Mr Lucas said that there had been an extra charge for the hire of a room in a pub for a residents' meeting in 2002, which had been paid in the 2002 service charge, so there was a precedent

Management fees – £1725.25 (£1560.44, £151.93, and £12.88) Appendix 3B pages 1 and 2

69. Miss Hannis confirmed that Mainstay had withdrawn the proposed enhanced management fee referred to in Mainstay's letter to the Tribunal dated the 23 September 2005 at page 68 of the Tribunal's bundle. It had not been charged in the service charge, and Mr Lewis confirmed that it was no longer in issue before the Tribunal accordingly

70. So far as the £1725.25 was concerned, Mr Lewis said that Mainstay had provided no services in 2004, and accordingly could not charge a fee for that year. The figures charged represented about half the annual fee, whereas they had carried out no management activity after December 2003, an example of which was the difficulty with the garage wall repairs. The Residents' Association had met Mr Andrew West of Gleesons on the 19 December 2003 and he had assured the Residents' Association that Mainstay would be removed as managing agents with effect from the end of 2003 because of the complaints by residents. The Residents' Association confirmed their understanding that that was the case in their letter dated the 26 March 2004 in Annexe D. The letter was written to Darren Jones, the Area Managing Director of Gleesons, who was also the only director of Charter Court Management Company Limited. At the time the letter was written, the residents were managing the Estate themselves. Mr Lucas had written to the Tribunal on the 4 August 2005 confirming that Mainstay had been appointed only up to the 31 December 2003 (page 53 of the Tribunal's bundle)

71. Miss Hannis said that Mr Lucas had not been part of the ongoing discussions about the continuing management at the time he wrote the letter dated the 4 August 2005. The purpose of that letter had been to ensure that Mainstay were involved in the Tribunal proceedings, not to comment on the date when Mainstay ceased management. Mainstay had not ceased management on the 31 December 2003. Mr Lucas's role in Mainstay was to structure budgets and liaise with developers, whereas Miss Hannis headed the service charge team who took over service charge issues once Mainstay were instructed

72. In answer to questions from the Tribunal, Mr Lucas said that he had not been aware of the ongoing discussions with Gleesons when he had written the letter dated the 4 August 2005, but had been aware from discussions with colleagues that Mainstay's management involvement had been extremely limited. He could not recall which of his colleagues had told him the 31 December date. It had not been Gleesons who had told him

73. Miss Hannis said that Mainstay's management contract had a 3-year duration from the 26 October 2001 (Appendix 4 page 4 paragraph 3). In December 2003, Gleesons asked Mainstay to cease management before the end of the 3-year period. In item 4 of Gleesons' letter dated the 1 December 2003 (Appendix 2A) they confirmed that Mainstay had acted in accordance with their management contract. Nevertheless, Mainstay felt that their position was untenable, because the residents had refused to pay any service charges, and Gleesons had asked Mainstay to cease any collection procedures. Throughout 2003 Mainstay had been seeking instructions from Gleesons how to proceed with management in those circumstances, with Mainstay having no funds, which had resulted in the Residents' Association paying the electricity and gardener's bills. Management by Mainstay ceased on the 1 July 2004, in accordance with Gleesons letter to Mr

Elliott of that date (Appendix 2E). However, Mainstay were still involved in trying to extricate themselves. It was difficult to mange without funds. Clause 7.1 of the Leases provided for services to be provided by Charter Court Management Company Limited only if service charges were paid. All the residents were in default, which made it impossible to manage. However, Mainstay paid the insurance premium out of Mainstay's own funds. Mainstay's letter to Gleesons dated the 23 April 2004 (Appendix 2B) confirmed that Mainstay were willing to cease management but only when sums owing to Mainstay had been paid, so that Mainstay could hand over management in good order. Mainstay's letter to Gleesons dated the 28 May 2004 (Appendix 2C), in respect of which Miss Hannis waived the privilege involved in the heading "without prejudice", offered to terminate on the terms set out in Mainstay's e-mail to Gleesons dated the 23 January 2004 (Appendix 1S at pages 3 and 4), but those terms had still not been complied with. Mainstay had still carried out a site inspection in March 2004, despite having no funds, as confirmed in the letter dated the 26 March 2004 from the Residents' Association to Gleesons (Annexe D)

74. In answer to questions from the Tribunal, Miss Hannis said that the management activity carried out by Mainstay in 2004 had included insurance of the Estate, including taking instructions how to pay; site inspections, although Miss Hannis could not give the dates of any inspections other than the one in March 2004, other than to refer to the contractual obligation to inspect every 6 weeks; drawing up and providing financial information; and telling contractors who were owed money why no payments were being made, including defending the gardener's court proceedings until the residents themselves made payment. Mainstay's management activities were limited because of lack of funds. Nevertheless, Mainstay were entitled to their management fees at the full rate, despite not carrying out their full management services. Gleesons had not paid Mainstay's fees, because the residents did not agree terms

75. Mrs Lewis said that in relation to insurance, Mainstay had written to Gleesons on the 23 February 2004 seeking instructions about the insurance premium owed on the 1 August 2003 (Appendix 1S). Mrs Lewis had no information about payment, but was sure that the premium was eventually paid, but any activity by Mainstay in 2004 was in protecting Mainstay's own position, and was not activity in managing the Estate

76. Mr Lewis said that the reason why the parties had been at loggerheads was because of the poor service and inefficiency by Mainstay in 2002, as set out in Annexe B

77. Mrs Hall said that the residents had been shocked at the size of the increase in service charge demands in 2003 compared with those for 2002, particularly in the light of having such poor management

78. Mr Elliott said that Gleesons letter to Mr Elliott dated the 1 July 2004 (Appendix 2E) agreed to pay Mainstay's management fees from the 1 January to the date of handover (paragraph 2), and not to charge the residents (paragraph 3). The Residents' Association understood that Mainstay would have nothing more to do with the Estate. The Residents' Association agreed to manage the site instead. The Residents' Association did not agree to pay the disputed service charge, but on the 9 September 2004 made an offer of settlement of the 2003 service charge items (Annexe C). The Residents' Association had still not received any response to that letter, despite Gleesons saying in a letter dated the 23 September 2004 (in the Applicant/Leaseholders' response bundle) that they had passed it on to Mainstay

79. Dr Brooks said that there was no evidence of Mainstay carrying out site inspections every 6 weeks in 2004

80. Miss Hannis agreed that she had no evidence, and that inspections had not been as frequent, but referred again to the inspection in March 2004 which had been witnessed by the residents

81. In answer to questions from the Tribunal Miss Hannis was unable to estimate how much of a reduction in service there had been in the first 6 months of 2004, nor to estimate how much of the activities actually carried out by Mainstay in that period had been to do with their attempted extraction from involvement with the site

82. Mr Lucas said that the main thing which did not continue was liaison with the residents

Items in dispute in the 2005 Service Charge demands

Interest on unpaid management fees for 2003 and 2004 – £ 288.96 (£32.51, £204.18, £30.70, £19.88, and £1.69) Appendix 3C page 1

83. Mr Lewis said that there was no provision in the Leases for payment of interest through the service charge or otherwise

84. Miss Hannis said that as they were no longer managing the Estate, they were claiming interest from one company to another under the Late Payment of Commercial Debts Act 1998 at 12.75%. Miss Hannis produced an article about the Act, but did not have a copy of the Act itself. Interest was a cost incurred for the provision of Estate Services for the purposes of the Fifth Schedule of the Leases

85. Mr Lewis submitted that if interest was payable at all, then it was payable only by Charter Court Management Company Limited, and was not payable by way of service charge under the Leases

Section 20C application

86. Miss Hannis said that the Respondent/Landlords' costs of the proceedings before the Tribunal were payable under paragraph 8 of Part II of the Fifth Schedule to the Leases

87. Mr Lewis said that the Residents' Association had offered to settle the 2003 service charges in their letter dated the 9 September 2004, but had received no response despite 8 reminders

88. Miss Hannis said that she had not seen the offer letter dated the 9 September 2004, despite the terms of Gleesons' letter dated the 23 September 2004, but that in any event it would not have been appropriate for Mainstay to respond to the settlement offer. Mainstay would not have advised Gleesons to accept the offer because the expenditure had been properly incurred

Costs application by Applicant/Leaseholders

89. The Tribunal indicated that the Tribunal's power to award costs was limited to the powers set out in paragraph 10 of Schedule 12 to CLARA 2002, and in regulation 9 of the 2003 Fees Regulations

90. Mr Lewis said that in relation to paragraph 10 of Schedule 12 to CLARA 2002, the Applicant/Leaseholders were complaining about the Respondent/Landlords behaviour before the Tribunal proceedings, not during those proceedings. In addition to the points made already about the settlement offer by the Residents' Association dated the 9 September 2004, and the 8 reminders, Pye Smith had written to Gleesons on the Residents' Association's behalf warning that an application would have to be made to the Tribunal if no reply was received

91. Miss Hannis submitted that paragraph 10 of Schedule 12 to CLARA 2002 applied only to

behaviour by a party "in connection with the proceedings", and that that meant behaviour after the proceedings had begun, and not behaviour before they had begun

92. Both Mr Lewis and Miss Hannis indicated that they had no comment about regulation 9 of the 2003 Fees Regulations

Costs application by Mainstay

93. The Tribunal indicated that, the Tribunal had no jurisdiction to make an order for costs in favour of Mainstay. Mainstay were a party neither to the Lease, nor to the Tribunal proceedings

The Tribunal's findings

Items in dispute in the 2003 Service Charge demands

Electricity – £215.54

94. In accordance with Mr Lewis's concession at the hearing, the Tribunal finds that this item is payable by way of service charge, and that the fact that the credit of £54.07 was credited in a subsequent year and might have affected adjustments between buyers and sellers of units on the Estate does not affect the payability of the £215.54 by way of service charge

Gardening - £1010

95. The Tribunal finds that :

    a. in accordance with Mr Lewis's agreement with the figure of £1010 at the hearing, the Tribunal finds that this item is payable by way of service charge

    b. again, the fact that the credit of £320 was credited in a subsequent year and might have affected adjustments between buyers and sellers of units on the Estate does not affect the payability of this item by way of service charge

    c. the sum of £50 costs paid by the Residents' Association to the gardener has not itself been included in the service charge, and cannot therefore affect the payability of the £1010 by way of service charge

Bin store - £870

96. The Tribunal finds that :

    a. the construction of the bin store was a brand new construction in a location where there was no bin store before

    b. its construction was therefore an addition and an improvement to the Estate, rather than a matter of maintenance or repair

    c. the Respondent/Landlords can include in the service charge the costs of additions or improvements only if the Leases so allow, and only to the extent that the costs are reasonable

    d. the only provisions in the Leases to which the Tribunal has been referred in this respect are those in Part II of the Fifth Schedule

    e. however, Part II of the Fifth Schedule merely sets out "Estate Management Costs", and does not seek to define or augment the list of "Estate Services" set out in Part I of the Fifth Schedule

f. paragraph 1 of Part I of the Fifth Schedule refers only to an obligation to "repair and maintain.....and where necessary renew.....", which does not include additions or improvements to the Estate

g. the Leases do not therefore allow the cost of construction of the bin store to be included in the service charge

97. The Tribunal has also considered the evidence on behalf of the Respondent/Landlords that the residents requested the construction of the bin store

98. In that respect, the Tribunal finds that :

a. there is evidence before the Tribunal of initial consultation by the Respondent/Landlords and of nominations of contractors by Mr Elliott

b. however, there is no evidence before the Tribunal of any consultation by the Respondent/Landlords about prices

c. the figure of £870 far exceeds the initial estimates of about £400 to £500 referred to by Mr Elliott

d. there is no evidence before the Tribunal of a concluded agreement between the Respondent/Landlords and the Applicant/Leaseholders about the construction of the bin store

e. in any event, any such agreement would have been a separate contract outside the terms of the Leases, and accordingly enforceable, if at all, otherwise than through the service charge provisions in the Leases

99. Having considered all the circumstances, the Tribunal finds that this item is not payable by way of service charge

Parking posts – £1200.85

100. The Tribunal finds that this item is not payable by way of service charge for the same reasons as already set out in relation to the bin store

Garage wall repair – £120

101. The Tribunal finds that :

a. the Tribunal accepts the evidence of Mrs Moore, Mr Elliott and Mrs Lewis that the repair work was carried in 2 stages; that the first, emergency, stage was organised by Mainstay; that the £120 was for that first stage; that the insurance excess of £100 was paid by Mr Elliott; and that the second stage works were organised by the residents who successfully claimed the cost from the insurance company

b. it is unreasonable for the cost of £120 to have been included in the service charge rather than being passed to the residents to include in their insurance claim

c. this item is therefore not payable by way of service charge

Sinking fund – £3900

102. The Tribunal finds that there is no issue about payability as such before the Tribunal, and the Tribunal finds that this item is payable by way of service charge

103. The Tribunal finds that the question of how the fund was used after payment, and whether

adjustments between buyers and sellers of units on the Estate have been affected, does not affect the payability of this item by way of service charge

Cleaning – £415.35

104. The Tribunal finds that :

a. the Residents' Association now pays £8 an hour every 6 weeks, and the residents regard that as adequate

b. that level of cleaning would, nevertheless, not have complied with the Respondent/Landlords obligations under the Leases, or with the pre-sale marketing literature for the Estate, which specified fortnightly cleaning at least

c. from the Tribunal's own expertise and experience in these matters, 2 hours cleaning every fortnight would be a reasonable level of cleaning in all the circumstances, for the lobby, staircases and 2 landings involved, at a rate of about £12 an hour, and that a monthly figure of about £50 would therefore be reasonable

d. the figure of £415.35 includes some miscoded invoices

e. nevertheless, the amount specifically charged under this item is not unreasonable as an overall charge for cleaning for the period referred to

f. in all the circumstances, this item is therefore payable by way of service charge

Items in dispute in the 2004 Service Charge demands

Meeting room – £87

105. The Tribunal finds that :

a. the fact that the charge was incurred in 2003 but not included in a service charge until 2004 and that it might have affected adjustments between buyers and sellers of units on the Estate, does not affect the payability of this item by way of service charge

b. the submissions by Miss Hannis about the principle of the Respondent/Landlords being entitled to charge this fee in addition to Mainstay's management fees are persuasive, and the Tribunal accepts them

c. the Tribunal accepts Mr Lewis's evidence that the residents hired the same room in the same year for about two hours for £30, which the Tribunal finds to be at a rate of £15 an hour

d. the Tribunal also accepts the evidence of Miss Hannis that the hiring referred to in the charge of £87 was from about 7.00 pm to 10.30 pm, namely about three and a half hours, which the Tribunal finds to be at a rate of £24 an hour

e. there is no evidence or explanation for the difference in rates

f. in all the circumstances, a reasonable rate was £15 an hour, and a reasonable charge for three and a half hours was therefore about £55

g. the sum of £55 this item is therefore payable by way of service charge in respect of this item

Management fees – £1725.25 (£1560.44, £151.93, and £12.88)

106. The Tribunal notes that Mainstay have withdrawn their proposal to charge an enhanced management fee, and that this is therefore not an issue before the Tribunal

107. In respect of the fees totalling £1725.25, the Tribunal finds that :

a. the Respondent/Landlords are entitled to include in the service charge payable by the Applicant/Leaseholders fees charged by Mainstay under Mainstay's management agreement with the Respondent/Landlords only to the extent that those fees are allowed to be so charged under the Leases, and only to the extent that they are reasonable

b. the only items of work carried out in 2004 by Mainstay of which specific evidence is before the Tribunal are the items referred to in the evidence of Miss Hannis in that respect

c. of those items :

- there is persuasive evidence only of one site inspection, namely in March, and Miss Hannis's suggestion that there must have been others because of the contract to inspect ever 6 weeks is unsupported by any evidence that any others did in fact take place
- only the payment of the insurance premium and the site inspection in March were connected with the management of the Estate on behalf of the Respondent/Landlords
- the other items were connected with Mainstay's attempts to withdraw from management of the estate and with Mainstay's attempts to deal with situations which were arising because of the fact that they were not managing the Estate in the meantime

d. the payment of the insurance premium and the site inspection in March were not items which by themselves entitled the Respondent/Landlords to include in the service charge any fees for the appointment of a managing agent

e. the other items were not connected with the management of the Estate, and were not items which entitled the Respondent/Landlords to include in the service charge any fees for the appointment of a managing agent

108. Having considered all the circumstances, the Tribunal finds that this item is not payable by way of service charge

Items in dispute in the 2005 Service Charge demands

Interest on Mainstay's fees

109. The Tribunal finds that :

a. the Respondent/Landlords are entitled to include in the service charge payable by the Applicant/Leaseholders interest on fees charged by Mainstay under Mainstay's management agreement with the Respondent/Landlords only to the extent that :

- the Respondent/Landlords are entitled to interest at all
- interest is allowed to be so charged under the Leases
- the amount of interest is reasonable

b. Miss Hannis claimed that interest was owing under the 1998 Act

c. the Tribunal does not have any comment from the Respondent/Landlords about the Respondent/Landlords' liability or otherwise for that claim

d. in any event, the Tribunal has not been referred to any provision in the Leases as allowing interest to be included in the service charge

e. paragraph 8 allows the Respondent/Landlords to include in the service charge "costs and expenses which [the Respondent/Landlords] may reasonably incur in the best interests of the Estate"

f. it is not "in the best interests of the Estate" for the Respondent/Landlords to have incurred interest on management fees

g. in any event, in all the circumstances, it is not reasonable for any interest to be included in the service charge

110. The Tribunal therefore finds that this item is not payable by way of service charge

Section 20C application

111. The Tribunal finds that :

a. the Respondent/Landlords are entitled to include in the service charge payable by the Applicant/Leaseholders the Respondent/Landlords' costs of the proceedings before the Tribunal only to the extent that those costs are allowed to be so charged under the Leases, and only to the extent that they are reasonable

b. the only provision in the Leases to which the Tribunal has been referred as allowing costs to be included in the service charge is paragraph 8 of Part II of the Fifth Schedule

c. paragraph 8 contains no express entitlement for the Respondent/Landlords to do so

d. the wording of paragraph 8 is not wide enough to entitle the Respondent/Landlords to do so by implication

e. in any event, in all the circumstances, it is not reasonable for any such costs to be included in the service charge

112. The Tribunal therefore finds that any costs incurred by the Respondent/Landlords in these proceedings are not payable by way of service charge, and that it is unnecessary for the Tribunal to make an order under section 20C

Costs application by Applicant/Leaseholders

113. The Tribunal finds that :

a. the way in which Gleesons and Mainstay have dealt with the handing over of the management of the Estate and of the transfer of control of Charter Court Management Company Limited leaves a lot to be desired

b. however, the Respondent/Landlords have not "acted frivolously, vexatiously, abusively, disruptively, or otherwise unreasonably in connection with the proceedings" for the purposes of paragraph 10 of Schedule 12 to CLARA 2002, and there are no circumstances which justify an order under regulation 9 of the 2003 Fees Regulations

114. The Tribunal therefore declines to make an order in respect of the costs of the Applicant/Leaseholders

Costs application by Mainstay

115. The Tribunal finds that :

a. Mainstay is not a party to the Leases, and is not a party to the proceedings before the Tribunal

b. it accordingly has no standing to make an application for costs in its own right

c. its appearance before the Tribunal was on behalf of the Respondent/Landlords, not on its own behalf, as such

d. any costs incurred by the Respondent/Landlords in these proceedings are not payable by way of service charge, for reasons already given

116. The Tribunal therefore declines to make an order in respect of Mainstay's costs

Summary

2003 service charges

117. The following costs are payable by way of service charge :

a. Electricity – £215.54

b. Gardening - £1010

c. Sinking fund – £3900

d. Cleaning – £415.35

118. The following costs are not payable by way of service charge

a. Bin store - £870

b. Parking posts – £1200.85

c. Garage wall repair – £120

2004 service charges

119. £55 of the meeting room fees of £87 are payable by way of service charge

120. The following costs are not payable by way of service charge

a. The remaining £32 of the meeting room fee of £87

b. Management fees – £1725.25

2005 service charges

121. Interest on Mainstay's fees are not payable by way of service charge

Section 20C application

122. Any costs incurred by the Respondent/Landlords in these proceedings are not payable by way of service charge, and it is therefore unnecessary for the Tribunal to make an order under section 20C

123. **Costs application by Applicant/Leaseholders**

124. The Tribunal declines to make an order in respect of the costs of the Applicant/Leaseholders

Costs application by Mainstay

125. The Tribunal declines to make an order in respect of Mainstay's costs

Dated the 23 December 2005

Signed
Peter Boardman
(Chairman)

A Member of the Southern Leasehold Valuation Tribunal
appointed by the Lord Chancellor