Ref: LON/00AU/NSI/2003/0115

LEASEHOLD VALUATION TRIBUNAL

FOR

LONDON RENT ASSESSMENT PANEL

DETERMINATION

OF AN APPLICATION IN RELATION TO FLAT 22 THE APEX 60-63 BUNHILL ROW LONDON EC1Y 8NQ

Applicant:	Peverel OM Limited	(for Landlord)
Respondents:	Mr. Vijay Saujani FCA Mrs. Vibha Vijay Saujani	(Tenants)
Hearing:	26 April 2004	
Appearances:	The Applicant was represented by Mr. Michael White, Legal Services Manager The First Respondent appeared in person	

Members of the Leasehold Valuation Tribunal:

MR M A LOVEDAY BA(Hons) ACIArb, barrister

MR F L COFFEY FRICS

MISS R I EMBLIN JP

1 PRELIMINARY

1.1 This is a determination in respect of service charges payable under lease of a flat on the north side of the City of London. The matter relates to flat 22, The Apex, 60-63 Bunhill Row London EC1Y 8NQ. The flat is subject to a lease in favour of the Respondents dated 6 April 1998.

1.2 In this determination pages in square brackets refer to pages in the Respondents' bundle.

1.3 Two preliminary matters arose and the tribunal invited representations on those matters at the hearing of the application.

1.4 The first is the identity of the applicant. The matter came before the tribunal as a result of an order made by DJ Banks sitting at Uxbridge County Court on 8 September 2003. DJ Banks was giving directions in claim no. LU205310, a claim brought by the Applicant against the Respondents for unpaid service charges of £909.43 [p.28]. The Applicant is the Claimant in the county court claim.

1.5 It is common ground that the Applicant is in fact the managing agent for the property and that an associated company named Peverel Freeholds Ltd holds the freehold reversion. At the hearing, Mr. White readily conceded that it had been "a mistake" to issue the county court claim in the name of the agent, as opposed to issuing it in the name of the reversionary owner. The tribunal considers that whether the named Claimant has a cause of action is a matter for the county court (along with the associated question of whether Peverel Freeholds Ltd should be substituted as Claimant). We are satisfied that we can (and indeed must) consider the application referred to us by the District Judge – irrespective of any other defences available to the Defendant in the county court.

1.6 The second is the nature of the application. The order of DJ Banks sought the tribunal's determination of "the service charges due in connection with" the flat. The correspondence between the tribunal and the parties reflects the general nature of this order, and refers to the new jurisdiction under s.27A of the Landlord and Tenant Act 1985. At the hearing, the tribunal invited the parties to address the issue of the tribunal's jurisdiction. Neither party was able to be of assistance on this point.

1.7 In the absence of any representations, we find that the tribunal has only a limited jurisdiction to consider the service charges in this matter. The reason for this is as follows. The order of DJ Banks was made under s.31C of the Landlord and Tenant Act 1985, whereby the court may transfer "a question falling within the jurisdiction of a leasehold valuation tribunal under [the 1985] Act". At the date of his order, the tribunal's jurisdiction to determine service charges was limited (in effect) to questions of reasonableness under s.19 of the 1985 Act. The wider jurisdiction under s.27A of the Act was not effective until 30 September 2003 - three weeks after the District Judge's order was made: see paragraph 2 and Schedule 2 paragraph 6(b) of The Commonhold and Leasehold Reform Act 2002 (Commencement No.2 and Savings) (England) Order 2003.

1.8 In short, the tribunal can only consider reasonableness under s.19 of the Act and not wider issues. For example, the tribunal does not have the jurisdiction to consider whether the service charges are recoverable under the terms of the lease, whether they are limited by statute, whether there was a collateral agreement between the Respondents and anyone else to the effect that service charges would not be payable, whether the developer was in breach of its warranties under the contract of sale or to decide any counterclaims.

2 THE ISSUES

2.1 At the hearing, the parties agreed that the tribunal was to consider only the service charge accounting years ending 31 December 1999 and 31 December 2000. Mr. Saujani stated that he was not seeking any declaration in respect of subsequent years of account.

3 THE ORIGINAL SUBMISSIONS

3.1 Mr. Saujani. Mr. Saujani submitted a written "statement of disputed service charges" dated 23 February 2004 [p.A1]. He made detailed oral submissions at the hearing.

3.2 The 1999 service charge accounts for the Apex are dated 8 June 2000 [p.71]. Mr. Saujani's original written representations made a number of wide ranging criticisms of the sums set out in those accounts. However, early in the hearing, Mr. Saujani accepted that each of the relevant costs in the accounts [p.72] had been incurred in respect of the Apex and that the services and works provided were of a reasonable standard.

3.3 Mr. Saujani's first submission was that the Applicant had not spent any of the amounts set out in the list of expenditure in the accounts [p.72]. He stated that the Respondents purchased the subject property from the developers of the Apex, Berkeley Homes (Chiltern) Limited. He produced a copy of the lease dated 15 September 1999 [p.48]. The lease demised the subject premises to the Respondents for a term of 999 years from 1 January 1997 and it contained service charge provisions.

3.4 The management of the Apex appeared to be undertaken by a firm called Peverel Management Services Limited. The Applicants had disclosed a copy of the purported management agreement dated 6 April 1998 [p.7] made between Berkeley Homes (North London) Ltd and Peverel Management Services Ltd. Mr. Saujani emphasised that the former was not the

reversionary owner of the subject premises, and the latter was not the Applicant. The Applicant had never given a proper explanation as to the relationship between the various companies.

3.5 Mr. Saujani's second submission related to the contribution to the 1999 expenditure made by the developers. He relied on the "summary of use of funds" [p.71] that showed service charges levied on the flats in the Apex at £22,711.97. He contrasted this with the contribution of £1,155.62 made by the developers for "empty property costs". The essence of the complaint was that the apportionment between the developer's "empty property costs" and the service charge levied on the leaseholders was wrongly calculated and therefore unreasonable.

3.6 To this end, Mr. Saujani relied on a detailed statement of "Total Charges for property CITY POINT" included in the accounts [p.76]. This statement analysed the end of year service charges and the empty property costs and reconciled them with the sums paid by leaseholders. The service charge expenditure in this case is calculated in a complex way. The expenditure is calculated under 12 different headings and the lessees of each flat are charged a different percentage of each of these headings. Because of the differing dates that the developers sold off the various flats during the course of 1999, the expenditure for those limited days only, is taken into account (albeit that the developer would have incurred some costs before completion of the sales). However, in 1999 two flats (nos.30 and 34) were not sold. The landlord/developer's notional "contribution" for these two flats was calculated at £1,155.62.

3.7 Mr. Saujani contended that the error was made at that stage of the calculations. The leaseholders (including the Respondents) had in fact paid substantial costs on account of service charges when they completed the purchase of each flat. They were each credited with the overpayments at the end of the 1999

accounting year. The Respondents were entitled to a credit for £187.50 – as shown in the above statement. By contrast, the landlord/developer was not credited? with anything at all in respect of the two flats it occupied. The £1,152.62 was simply deducted from the "surplus" achieved at the end of the year for the whole the Apex. Mr. Saujani contended that this artificially reduced the surplus to be credited to the Respondents at the end of the year.

3.8 As far as the year ending 31 December 2000 is concerned, Mr. Saujani repeated the above two objections. The service charge accounts for that year are dated 21 July 2001 [p.77-82] and include a detailed statement of relevant costs [p.78]. In this instance the Developer/landlord's contribution was £363.82 [p.82].

3.9 Mr. Saujani also addressed the tribunal on the issue of an alleged collateral agreement made with the developers before the Respondents acquired the subject premises.

3.10 Mr. White. Mr. White relied on the Statement of Claim dated 29 January 2004 and his response to the Respondents' statement dated 2 March 2004. He also made oral-submissions at the hearing.

3.11 In response to Mr. Saujani's first submission, Mr. White gave the history of the various companies involved. Peverel OM Ltd (the Applicant) is part of the Peverel group of companies. They are managing agents with over 70,000 properties under management. Berkeley Homes is a major house builder. The Peverel group of companies has entered into a number of management agreements for Berkeley Homes properties, typically managing newly built flats pending and immediately after their sale to the public.

3.12 On 6 April 1998 a Berkeley Homes subsidiary Berkeley Homes (North London) Ltd entered into a management agreement with a company called Peverel Management Services Ltd in relation to the Apex (also known as City Point). Shortly thereafter Peverel acquired the OM group. One of OM's subsidiaries was called OM Services Ltd. The two groups were rationalised and it was decided that OM companies should take over all non-sheltered properties formerly managed by Peverel group companies. Pursuant to this decision, management of the Apex was transferred to OM Management Services Ltd. This company in turn changed its name on 6 September 2000 to Peverel OM Ltd [p.47].

3.13 Mr. White was unable to say whether the benefit of the management contract had ever formally been assigned to OM Management Services Ltd, but submitted that the latter was the subagent for the Peverel Management Services Ltd. There was no written sub-agency agreement.

3.14 On about 1 December 2000 Berkeley Homes disposed of the freehold reversion to another Peverel company, Peverel Freeholds Ltd. Management is therefore with Peverel OM Ltd. He admitted the claim was issued in the name of the agent rather than the landlord and that no application had been made to substitute the correct Claimant in the county court.

3.15 As far as the second submission was concerned, Mr. White accepted that the "Developers empty property costs contribution" for 1999 in the sum of £1,155.62 [p.71] was not a good estimate. It assumed 100% occupancy of the Apex over the whole year, and during the early part of 1999 many of the services were not being provided to the Apex. The accounts were certified rather than audited accounts and the Respondents could have inspected the vouchers at any time. The managing agents had a duty to recover service charges.

3.16 When questioned about the method of calculating the developers' empty property costs he stated that he did not know but sought permission to adduce further evidence on this point.

3.17 As far as the 2000 year of account is concerned, Mr. White adopted the same arguments.

3.18 Mr. White also addressed the tribunal on the issue of the alleged collateral agreement but stated he was not privy to any such agreement.

3.19 At the conclusion of the hearing the tribunal gave permission to the Applicants to make further submissions and for the Respondents to reply to these. The direction limited further submissions to the Developers' empty property costs contribution for the years ending 31 December 1999 and 31 December 2000.

4 THE FURTHER SUBMISSIONS

4.1 On 5 May 2004 the Applicants made a further written submission. Mr. White stated that as a result of his investigations the "Developer's empty property costs contribution" should have been £2,858.18. This resulted in an adjustment to the credits to be made to each flat in the Apex. In the case of the Respondents' flat, the credit amounted to an additional £12.42 for the year ending 31 December 1999.

4.2 Mr. Saujani replied to this by an undated further submission. He did not take issue with Mr. White's revised calculations. However, he submitted that the Applicant should give similar credit for the "void" periods before each of the other flats was sold. He calculated that this would produce a further credit of £15,785.07 to be applied to each of the flats by apportionment in accordance with the service charge provisions of the lease. The principle was that liability for the service charges in the

first year should fall equally at the agreed proportion rates to all the flats – on the developer up to the point of sale and to the owners after the sale.

4.3 Mr. Saujani then went on to raise a number of fresh issues that had not been addressed in oral submissions at the hearing, although some had been canvassed in his earlier written submissions. These included the following points:

(a) That as a result of building works, flat 22 was effectively unusable for most of 1999 and that it was therefore unfair to levy any service charges.

(b) More than 2 flats were unoccupied in the year 1999. There should have been additional Developer's empty property costs contributions for flats 28, 30, 34 as well.

(c) There should have been no contribution to reserves in the year 1999. The building should have been finished to a high standard.

5 FINDINGS

5.1 As stated above, the tribunal considers that its jurisdiction is limited to the question of reasonableness under s.19 of the 1985 Act. In the light of Mr. Saujani's concessions (see paragraph 3.2 above) the sole issue is whether for the 1999 and 2000 service charge years the relevant costs were "reasonably incurred" under s.19(a) of the 1985 Act.

5.2 As far as the first of Mr. Saujani's submissions is concerned, the tribunal has no hesitation in rejecting it. This is for two reasons. First, whatever the precise contractual obligation of the landlord and/or the managing agents to pay sums to third parties for insurance, services and the like, Mr. Saujani accepted that the sums were incurred in relation to the Apex, and that the services etc. provided were of a reasonable standard. It is hard to see how the relevant costs were not "reasonably incurred". Secondly, the landlord is under an obligation to reimburse the Applicant for its expenditure. Even

if Mr. White's submission that the Applicant is a sub-agent is wrong, the landlord would be under a duty to reimburse the Applicants under principles of restitution.

5.3 This does not mean that the Applicant escapes criticism entirely. The documents are certainly confusing as to the history of the reversion and the management of the Apex. Mr. White's chronology was succinct and clear. It may well be that a simple letter to the Applicants in similarly succinct and clear terms would have satisfied the Respondents that the charges were made by the right entity. Furthermore, additional confusion seems to have arisen because the claim in the county court was made in the name of the wrong party – which Mr. White quite properly accepted.

5.4 The second of Mr. Saujani's submissions raises more difficult questions. Mr. White has now adjusted the figures that he claims downwards by £12.42. The question is whether for the year ending 31 December 1999 the tribunal must decide whether the recalculated service charge credit of £199.95 suggested by Mr. White should be increased still further.

5.5 The tribunal considers that Mr. Saujani has failed to establish that this credit should be increased. This is for two reasons. First, the essence of a complaint under s.19(1)(a) of the Act must be that "relevant costs" were not "reasonably incurred". It is at least arguable that the issues raised by Mr. Saujani do not go to the question of the relevant costs at all – they go to the contractual right (or lack or any contractual right) to set off other costs against sums otherwise due.

5.6 However, even if the tribunal can consider the quantum of the developer's notional contribution, the burden of proof is still on the Respondents to show that the Developer's empty property costs figure for 1999 is not reasonable. The principles are set out in the judgment Wood J in ***Yorkbrook Investments v Batten*** [1985] 2 EGLR 100 at 102L. Once the claim is

issued, the burden passes to the Respondents to establish an argument that the standard or the costs are unreasonable. If the Respondents give evidence establishing a *prima facie* case, then it is for the landlord to meet those allegations.

5.7 In this case, Mr. Saujani's initial submission was that the landlord failed to give full credit for the two flats it failed to sell. Although it has not given any real details of its concession, the landlord now gives credit for service charges of £2,858.18 for the two unsold flats for the service charge year 1999. Comparing this to the other flats in the "Total Charges for property CITY POINT" table [p.76], the credit compares favourably with the totals for the other flats. For example, flat 22 itself is charged £120.50 for the period 15 September to 31 December 1999. There is no *prima facie* evidence that the rather larger provision for the two flats retained by the landlords was inadequate.

5.8 Mr. Saujani then falls back in his further submissions on the argument that the landlord should give credit at a similar rate for the void periods for each of the other flats before they were sold. For example, in the case of the subject premises the void period would be from 1 January-14 September 1999. The tribunal considers that this argument is unsustainable. The landlord has already given credit for the void period before the leases were granted. The calculation of "total charges due" for each flat in the table [p.76] is, according to Mr. White, based on the number of days after the date of completion of each lease. This certainly appears to be the case on a cursory examination of the Total Charges for property CITY POINT" table. Mr. Saujani did not challenge Mr. White on this point or provide any evidence to the contrary.

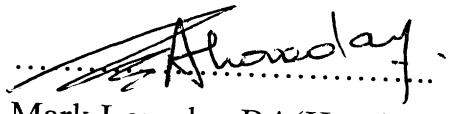
5.9 The same principles plainly apply to the service charges for the year ending 31 December 2000.

5.10 Finally, there are Mr. Saujani's additional submissions mentioned in paragraph 4.3 above. The tribunal is not inclined to consider these since they go well beyond the limited directions given at the hearing, and the Applicants have not been given the opportunity of responding to the same. In any event, they principally concern matters outside the tribunal's jurisdiction.

6 CONCLUSIONS

6.1 For the reasons given above, the tribunal determines that under s.19 of the Landlord and Tenant Act 1985 the relevant costs set out in the service charge accounts for the years ending 31 December 1999 [p.72] and 31 December 2000 [p.78] were reasonably incurred. Further, where they were incurred on the provision of services or the carrying out of works, the services or works were of a reasonable standard.

6.2 We do not consider that we have jurisdiction to determine the whole of the issue put to the tribunal by the District Judge, namely "the service charges due in connection with Flat 22, the Apex, 60-63 Bunhill Row, London EC1". We have considered only the question of reasonableness under s.19 of the 1985 Act for the service charge years 1999 and 2000. However, this does encompass the most substantial objection made by the Respondents – namely the notional contribution by the developer in the 1999 service charge accounts.



Dated 2.VI.04

Mark Loveday BA(Hons) ACI Arb

Chairman

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Appearances:	The Applicant was represented by Mr. Michael White, Legal Services Manager	
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Members of the Leasehold Valuation Tribunal:

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1 PRELIMINARY

1.1 This is a determination in respect of service charges payable under lease of a flat on the north side of the City of London. The matter relates to flat 22, The Apex, 60-63 Bunhill Row London EC1Y 8NQ. The flat is subject to a lease in favour of the Respondents dated 6 April 1998.

1.2 In this determination pages in square brackets refer to pages in the Respondents' bundle.

1.3 Two preliminary matters arose and the tribunal invited representations on those matters at the hearing of the application.

1.4 The first is the identity of the applicant. The matter came before the tribunal as a result of an order made by DJ Banks sitting at Uxbridge County Court on 8 September 2003. DJ Banks was giving directions in claim no. LU205310, a claim brought by the Applicant against the Respondents for unpaid service charges of £909.43 [p.28]. The Applicant is the Claimant in the county court claim.

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2 THE ISSUES

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3 THE ORIGINAL SUBMISSIONS

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5 FINDINGS

5.1 As stated above, the tribunal considers that its jurisdiction is limited to the question of reasonableness under s.19 of the 1985 Act. In the light of Mr. Saujani's concessions (see paragraph 3.2 above) the sole issue is whether for the 1999 and 2000 service charge years the relevant costs were "reasonably incurred" under s.19(a) of the 1985 Act.

5.2 As far as the first of Mr. Saujani's submissions is concerned, the tribunal has no hesitation in rejecting it. This is for two reasons. First, whatever the precise contractual obligation of the landlord and/or the managing agents to pay sums to third parties for insurance, services and the like, Mr. Saujani accepted that the sums were incurred in relation to the Apex, and that the services etc. provided were of a reasonable standard. It is hard to see how the relevant costs were not "reasonably incurred". Secondly, the landlord is under an obligation to reimburse the Applicant for its expenditure. Even

if Mr. White's submission that the Applicant is a sub-agent is wrong, the landlord would be under a duty to reimburse the Applicants under principles of restitution.

5.3 This does not mean that the Applicant escapes criticism entirely. The documents are certainly confusing as to the history of the reversion and the management of the Apex. Mr. White's chronology was succinct and clear. It may well be that a simple letter to the Applicants in similarly succinct and clear terms would have satisfied the Respondents that the charges were made by the right entity. Furthermore, additional confusion seems to have arisen because the claim in the county court was made in the name of the wrong party – which Mr. White quite properly accepted.

5.4 The second of Mr. Saujani's submissions raises more difficult questions. Mr. White has now adjusted the figures that he claims downwards by £12.42. The question is whether for the year ending 31 December 1999 the tribunal must decide whether the recalculated service charge credit of £199.95 suggested by Mr. White should be increased still further.

5.5 The tribunal considers that Mr. Saujani has failed to establish that this credit should be increased. This is for two reasons. First, the essence of a complaint under s.19(1)(a) of the Act must be that "relevant costs" were not "reasonably incurred". It is at least arguable that the issues raised by Mr. Saujani do not go to the question of the relevant costs at all – they go to the contractual right (or lack or any contractual right) to set off other costs against sums otherwise due.

5.6 However, even if the tribunal can consider the quantum of the developer's notional contribution, the burden of proof is still on the Respondents to show that the Developer's empty property costs figure for 1999 is not reasonable. The principles are set out in the judgment Wood J in ***Yorkbrook Investments v Batten*** [1985] 2 EGLR 100 at 102L. Once the claim is

issued, the burden passes to the Respondents to establish an argument that the standard or the costs are unreasonable. If the Respondents give evidence establishing a *prima facie* case, then it is for the landlord to meet those allegations.

5.7 In this case, Mr. Saujani's initial submission was that the landlord failed to give full credit for the two flats it failed to sell. Although it has not given any real details of its concession, the landlord now gives credit for service charges of £2,858.18 for the two unsold flats for the service charge year 1999. Comparing this to the other flats in the "Total Charges for property CITY POINT" table [p.76], the credit compares favourably with the totals for the other flats. For example, flat 22 itself is charged £120.50 for the period 15 September to 31 December 1999. There is no *prima facie* evidence that the rather larger provision for the two flats retained by the landlords was inadequate.

5.8 Mr. Saujani then falls back in his further submissions on the argument that the landlord should give credit at a similar rate for the void periods for each of the other flats before they were sold. For example, in the case of the subject premises the void period would be from 1 January-14 September 1999. The tribunal considers that this argument is unsustainable. The landlord has already given credit for the void period before the leases were granted. The calculation of "total charges due" for each flat in the table [p.76] is, according to Mr. White, based on the number of days after the date of completion of each lease. This certainly appears to be the case on a cursory examination of the Total Charges for property CITY POINT" table. Mr. Saujani did not challenge Mr. White on this point or provide any evidence to the contrary.

5.9 The same principles plainly apply to the service charges for the year ending 31 December 2000.

5.10 Finally, there are Mr. Saujani's additional submissions mentioned in paragraph 4.3 above. The tribunal is not inclined to consider these since they go well beyond the limited directions given at the hearing, and the Applicants have not been given the opportunity of responding to the same. In any event, they principally concern matters outside the tribunal's jurisdiction.

6 CONCLUSIONS

6.1 For the reasons given above, the tribunal determines that under s.19 of the Landlord and Tenant Act 1985 the relevant costs set out in the service charge accounts for the years ending 31 December 1999 [p.72] and 31 December 2000 [p.78] were reasonably incurred. Further, where they were incurred on the provision of services or the carrying out of works, the services or works were of a reasonable standard.

6.2 We do not consider that we have jurisdiction to determine the whole of the issue put to the tribunal by the District Judge, namely "the service charges due in connection with Flat 22, the Apex, 60-63 Bunhill Row, London EC1". We have considered only the question of reasonableness under s.19 of the 1985 Act for the service charge years 1999 and 2000. However, this does encompass the most substantial objection made by the Respondents – namely the notional contribution by the developer in the 1999 service charge accounts.

.....Loveday..... Dated ..2.VI.04.....

Mark Loveday BA(Hons) ACI Arb

Chairman