LEASEHOLD VALUATION TRIBUNAL

Case number : CAM/00KA/LSC/2004/0038

Residential Property
TRIBUNAL SERVICE

Property	:	**Flats 1-60, Farley Lodge, Ruthin Close, Farley Hill, Luton, Beds LU1 5EN**
Application(s)	:	**Determination of liability to pay service charges [LTA 1985, s.27A]**
Applicant(s)	:	**R L Cattell & D Price t/a Pricat Property Services, 149a Shenley Road, Borehamwood, Herts WD6 1AH**
		J C Chippeck, 115 Trafalgar House, Grenville Place, Mill Hill, London NW7 3SA
represented by	:	**Mr Roger Cattell and Mr Stephen Chippeck**
Respondent(s)	:	**I A Opel t/a Opel Estates, 3 Gordon Road, Luton, Beds LU1 2QP**
represented by	:	**Mr Ian McCloone, solicitor, of Taylor Walton, solicitors**
those also present	:	**Mr Iftikhar Akmal Opel** **Mr Zesham Opel (his son)** **Mr Michael Harvey (a surveyor familiar with the estate)** **Mr Les Jones FRICS (of Peter Hill Chartered Surveyors)**

By application dated 7th July 2004 Mr R L Cattell applied to the Tribunal, on behalf of himself and Mr D Price t/a Pricat Property Services, for determination of their liability to pay the service charges levied by the landlord, I A Opel t/a Opel Estates, for the years 2001 to 2004 inclusive. At his request Mr J C Chippeck was later joined as an applicant.

Tribunal :	**G K Sinclair (Chairman), G J Dinwiddy (valuer), A Jackson (lay member)**
Hearing :	**Thursday 21st October 2004, at Vauxhall Recreation Club, Gypsy Lane, Luton**

THE DECISION OF THE TRIBUNAL

Handed down 22nd November 2004

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- Schedule 1 : Chronology prescribed by lease
- Schedule 2 : Allowable service charges for years 2001-2004 (subject to para 53)

Summary

1. This application concerns a development of 60 purpose-built flats constructed in about the 1960s or 1970s on a long, narrow, steeply sloping site just off Farley Hill, to the southwest of Luton town centre. The flats are arranged in five 3-storey blocks of 12 flats, with four blocks being built as pairs sharing a common external stairway. The flats have most recently been let on 99 year leases commencing from 29th September 1985, with some in leaseholder occupation but most owned by investors and let to sub-tenants on short lets. The 25 flats owned by the Applicants fall into the latter category.

2. Since its acquisition of the freehold to the estate in about April 2001 the Respondent landlord has done very little by way of management, has failed to ensure that it is placed in funds to provide the required services by not properly applying the service charge provisions in the lease, as a result of which the estate has become neglected, prone to vandalism and the abandoning of rubbish, thus making the flats unattractive to tenants. The management of the estate has very recently been taken over by the tenants through an RTM company but the general impression remains one of neglect and squalor.

3. Having read and listened to all the evidence, and for the reasons recorded below, the Tribunal is satisfied that the Respondent landlord has never once complied with the service charge provisions of the lease and that the demands made are also in breach of sections 20B (time limit) and 21(6) (certification of accounts summary). As no valid service charge demands have been made none are payable. Mr Chippeck is therefore entitled to recoup the amounts already paid by him under protest.

4. Should the Tribunal be found on appeal to be wrong on that principal finding then the amounts which the Tribunals consider have been reasonably incurred and allowable are as set out in the fifth column of Schedule 2. However, the Respondent having failed to show that he has complied with section 20B, the amounts recoverable are reduced further to those set out in the sixth column in Schedule 2. To the extent that the annual service charges exceed the amounts set out in the Schedule such charges are disallowed.

The lease

5. The one lease before the Tribunal, which it is believed is in the same standard form as others on the development, is that for flat 3 Farley Lodge. The lease, between Rimex Investments Ltd (landlord) and Matthew Peter Brown (tenant), is dated 5th September 1988 and is for a term of 99 years from 29th September 1985. The ground rent reserved during the first 25 years of the term is £35 per annum, payable by two equal half yearly payments in advance on 25th March and 29th September in each year [clause 2 & Sixth Schedule].

6. Due to the nature of the issues arising in this dispute it is necessary to consider carefully the provisions in the lease governing the recoverability as service charges of amounts expended by the landlord : what works are covered, how the cost is to be quantified, and when and how it is payable.

7. It is first necessary to look at the definitions and recitals, from which it can be seen that the following expressions have the following meanings :

   a. "The Lessor's Property" [clause 1(F) & Recital (1)] means the land and buildings comprising the blocks of flats known as Farley Lodge, Farley Hill, Luton, Beds and comprised in Title No BD32824

   b. "The Building" [clause 1(F)] means the main and ancillary buildings standing on the lessor's property

   c. "The retained property" [clause 1(G)] includes all parts of the lessor's property not by this or any other lease or tenancy demised or let

   d. "The demised premises" [clause 1H)] means those parts of the lessor's property which are described in the First Schedule and are by clause 2 of the lease

demised – in this case flat number 3, excluding structural parts and any shared conduits. The demise also includes the rights set out in the Second Schedule

e. "The Surveyor" [clause 1(J)] means the surveyor or estate agent employed pursuant to paragraph (2) of Part II of the Fourth Schedule, ie to manage the lessor's property and to carry out such other duties as may from time to time be assigned to him by the lessor or are otherwise imposed on him by the provisions of the lease

f. The "Maintenance Year" [clause 1(L)] means every twelve-monthly period ending of the date specified in Part B of the Sixth Schedule, ie 25th December, the whole or part of which falls within the period ending on the date of expiry of the term granted by the lease

g. The "Maintenance Contribution" [clause 1(M)], for present purposes the service charge, means a sum equal to such proportion of the aggregate maintenance provision for the whole of the Building (computed in accordance with the provisions of Part I of the Fourth Schedule) as is specified in Part C of the Sixth Schedule, ie a one sixtieth share.

8. In clause 4 the tenant covenants that in respect of every maintenance year he will pay the maintenance contribution to the lessor by equal instalments on the rent day immediately preceding the maintenance year, ie on 29th September, and "on the subsequent rent days (sic) in the maintenance year" together with the rent reserved under the lease, and if any maintenance contribution or part thereof shall remain unpaid for 14 days it shall bear interest at the rate of 3% above the Barclays Bank base rate for the time being from the due date until payment.

9. By clause 6 the lessor covenants that, subject to the lessee paying the maintenance contribution pursuant to the obligation in clause 4, it will decorate and repair the structure, pay rates and taxes, insure the building against fire, etc, and itself pay the maintenance contribution for any unlet flat.

10. Amongst the rights and easements listed in the Second Schedule to be enjoyed by the tenant are rights of way over and along any private roads or forecourt (with or without

vehicles) and on foot over any paths [para 1], to place a dustbin or refuse bin in such position as shall from time to time be specified by the lessor or surveyor [para 5], in common with others to use the area of the lessor's property laid out as gardens [para 6] and, by para 7 :

> The right for the Lessee in common with all other persons entitled to the right to park his private motor car on such part of the retained property as may from time to time be specified by the lessor as reserved for car parking when space is available and subject to such regulations as the lessor may make from time to time.

11. The Fourth Schedule makes detailed provision for the service charge. Part I, which deals with the computation of the annual maintenance provision, begins by stating that it shall be computed not later than two months after the commencement of the maintenance year. By paragraphs 2 and 3 :

> 2. The annual maintenance provision shall consist of a sum comprising the expenditure estimated as likely to be incurred in the maintenance year by the lessor for any of the purposes mentioned in Part II of this Schedule
>
> 3. As soon as practicable after the end of each maintenance year the lessor shall procure that the accounts for that maintenance year shall be audited by an accountant in accordance with the provisions of the Housing Finance Act 1972 (as amended) and such audited account for each maintenance year shall be conclusive of the amount of the annual maintenance provision or the amount of any adjustment thereof for the maintenance year.

12. By paragraph 4, upon receipt of the audited account the lessor is to deliver a copy to the lessee and notify him of the amount by which the estimate under paragraph 2 shall have exceeded or fallen short of the actual expenditure in that year, upon which a balancing payment shall be made by or an allowance given to the tenant. During the third to fifth months following the end of the maintenance year the lessor must procure that the accounts relating to that preceding year are made available for inspection by the tenant upon his giving not less than 14 days written notice [para 5]. The assumption is that by then the accounts will have been completed and audited.

13. The rather complex timetable prescribed by the Lease appears in Schedule 1 below.

14. Part II of the Fourth Schedule lists the expenses incurred by the lessor which are to be reimbursed by the maintenance contribution. They include the performance by the lessor of its obligations under clause 6 [para 1], keeping entrance halls, staircases and passages, etc in good repair and condition [para 7], the employment of a surveyor or estate agent to manage the lessor's property, etc [para 2], the stocking, tending, keeping clean and tidy and general cultivation of the gardens, grounds, grounds, yards, forecourts, footpaths and roads which form part of the retained property [para 3], the effecting of buildings insurance [para 4], employment of full or part-time staff and providing and supplying such other services for the benefit of the lessee and the other tenants of the flats as the lessor shall in its discretion consider necessary or otherwise desirable [para 5].

15. Paragraph 6 deals with the recovery of legal and other costs incurred by the lessor other than relating to recovery of ground rent (as distinct from maintenance contribution), ie it can seek to recover as part of the service charge its costs concerning the recovery of service charges but not of ground rent. It can also recover the cost of auditing the accounts.

16. It is important to note the precise requirements of the lease because they have not been complied with by the current lessor and, together with some of the statutory provisions cited below, affect the tenants' liability to pay the sums demanded.

The relevant law

17. The Tribunal's powers to determine whether an amount by way of service charges is payable and, if so, by whom, to whom, how much, when and the manner of payment are set out in the new section 27A of the Landlord and Tenant Act 1985. Please note sub-sections (5) & (6), which provide that a tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment, and that an agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement)[1] is void in so far as it purports to provide for a determination in a particular manner or on particular evidence of any question which may be the subject of an application to the

[1] Eg. provisions in a lease stating that the landlord's accountant's certificate shall be conclusive, or that any dispute shall be referred to arbitration

Tribunal under section 27A.

18. The overall amount payable as a service charge continues to be governed by section 19, which limits relevant costs[2] :

a. only to the extent that they are reasonably incurred, and

b. where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard.

19. Very relevant to this present dispute is section 20B, which applies a further control on service charges by imposing a time limit on the making of demands. It states :

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

20. In this case it is also pertinent to note the accounting requirements in section 21 :

(1) A tenant may require the landlord in writing to supply him with a written summary of the costs incurred-

(a) if the relevant accounts are made up for periods of twelve months, in the last such period ending not later than the date of the request, or

(b) if the accounts are not so made up, in the period of twelve months ending with the date of the request,

and which are relevant costs in relation to the service charges payable or demanded as payable in that or any other period.

...

(5) The summary shall... set out the costs in a way showing how they have been or will be reflected in demands for service charges and, in addition, shall summarise each of the following items, namely-

(a) any of the costs in respect of which no demand for payment was received by the landlord within the period referred to in subsection (1)(a) or (b),

(b) any of the costs in respect of which-

(i) a demand for payment was so received, but

(ii) no payment was made by the landlord within that period, and

[2] Including the costs of insurance

(c) any of the costs in respect of which-
(i) a demand for payment was so received, and
(ii) payment was made by the landlord within that period,
and specify the aggregate of any amounts received by the landlord down to the end of that period on account of service charges in respect of relevant dwellings and still standing to the credit of the tenants of those dwellings at the end of that period.

...

(6) If the service charges in relation to which the costs are relevant costs as mentioned in sub-s (1) are payable by the tenants of more than four dwellings, the summary shall be certified by a qualified accountant as-
(a) in his opinion a fair summary complying with the requirements of subsection (5), and
(b) being sufficiently supported by accounts, receipts and other documents which have been produced to him.

21. Section 28 goes on to define who may, and who may not, be regarded as a "qualified accountant" :

(1) The reference to a "qualified accountant" in section 21(6)(certification of summary of information about relevant costs) is to a person who, in accordance with the following provisions, has the necessary qualification and is not disqualified from acting.
(2) A person has the necessary qualification if he is eligible for appointment as a company auditor under section 25 of the Companies Act 1989.
(3) ...
(4) The following are disqualified from acting-
(a) ...
(b) an officer, employee or partner of the landlord or, where the landlord is a company, of an associated company;
(c) a person who is a partner or employee of any such officer or employee.
(d) an agent of the landlord who is a managing agent for any premises to which any of the costs covered by the summary in question relate;
(e) an employee or partner of any such agent.

22. In short, if accounts are required in respect of a service charge demand concerning more than 4 flats, they must be supported by all necessary receipts, etc and certified on their face by a totally independent person with appropriate accounting qualifications.

Inspection, hearing and evidence

23. The Tribunal inspected the development at Ruthin Close at 10:00 on the morning of Thursday 21st October 2004, when the weather was dry and sunny. Also present were Mr Cattell and Mr Stephen Chippeck (brother of Mr J C Chippeck) for the Applicants.

Messrs Iftikhar and Zesham Opel and Mr Michael Harvey were present on behalf of the Respondent.

24. The site and the layout of the blocks of flats are as appear in the lease plan. The site is narrow and approached by a steep, winding access road which is not wide enough for passing traffic. It is unadopted. Parking was seen to take place further up the road, where it is slightly wider, or on adjacent land. Apart from patches of mud and grass upon which vehicles may park there are no gardens to speak of. Before the furthest block of flats is a large turning circle, around which cars were parked. Leading off the turning circle, up past the side of the uppermost block of flats and around behind it, is a narrow roadway leading to a long forecourt or yard with two facing blocks of garages. This appears on the lease plan.

25. The garages appear to total 20 or 21 in number and are derelict. Those on the left (facing uphill) or eastern side still have corrugated roofs while those on the facing block have been removed by the current landlord due to the risks from damaged asbestos caused by vandals walking on or attempting to break through them. Creepers and other vegetation covered some of the eastern garages and none have working doors, although the damaged remains of some were evident. These could not be inspected properly because the landlord has recently had constructed a high wooden panel fence blocking off the entire area. Part of the top of the fence (which includes locked vehicular gates) had been broken down, evidently to enable vandals to gain access.

26. The blocks of flats are typical of their age, with three floors of four flats reached by a free-standing external concrete stairway connected by concrete bridges to the entrance hall for each floor. Some of the metal railings to these bridges were insecurely fixed to the staircase and unsafe to lean on. The blocks which have doubled up share such a stairway between them. At the foot of each stairway is an area where bins may be stored, but it was apparent that some tenants just throw rubbish in there. In one case the evidence of a severe fire at the foot of a stairwell – the only means of escape from the flats – was clearly visible. Entrance doors to the flats on different levels were frequently damaged, with glass panels smashed or boarded up. The same was true for

the doors of the small cabins on the flat roofs containing the cold water tanks. The roofs themselves had patches of standing water, established vegetation growing, and sometimes loose and/or defective guttering and downpipes.

27. An extensive patch of damp could be seen extending over half way down the wall of one block, the result of a prolonged and still dripping overflow from what the Tribunal was told was flat 28. A very few flats – mainly those occupied by their leaseholders – have replaced windows with new PVCu double glazed units and look tidy, but others look derelict or have the remains of old, poor quality furniture or tenants' effects piled on the balconies and exposed to the elements. Quantities of litter were visible at the foot of stairwells as well as around the estate. The general effect was unimpressive, and was in marked contrast to the condition of the newish estate of owner-occupied houses just to the east (Lawn Gardens), and the blocks of new flats just over the estate wall to the west, both of which looked well-kept and non-vandalised.

28. At the hearing Mr Ian McCloone, of solicitors Taylor Walton, attended to represent the landlord, Mr Iftikhar Opel. Mr Michael Harvey, present on the inspection, adopted a non-speaking role and expert evidence was given on the Respondent's behalf by Mr Les Jones FRICS, of Peter Hill Chartered Surveyors. Although father and son each chipped in with information from time to time during the hearing both declined, due to the stress of a close family member being seriously ill, to give evidence. By contrast, Mr Cattell and Mr Chippeck gave evidence and were cross-examined by Mr McCloone at some length.

29. Each of the parties had submitted extensive written representations and evidence in advance of the hearing, including a series of photographs taken over a prolonged period. On the day Mr Stephen Chippeck also introduced into evidence a schedule showing items of expenditure which were challenged, in fact prepared by Mr Cattell, but which he adopted as part of his case.

30. The subject matter canvassed by Mr Cattell in his written evidence and submissions was itemised under the following headings :

a. Accounting matters

b. Service charges (by which he meant the management fees being charged by Opel Estates)

c. Insurance

d. Cleaning & rubbish (including rent being charged by the landlord for providing a garage for storage of cleaning materials, etc)

e. Repairs (including fencing off of the garage area)

He also referred to the steps taken by the leaseholders, through a new RTM company – Farley Lodge Ltd – to take over the management of the estate. This was initiated by a Notice dated 29th June 2004 and came to fruition at the end of September 2004, when the RTM company took over management of the estate. It had therefore just recently taken over control at the date of the inspection and hearing.

Accounting matters

31. On the subject of accounting matters it was clear [from his annexe A] that no demand had made for payment of anything between an invoice (not seen) dated 25th March 2002 and an incorrect invoice dated 7th April 2004. This was corrected, after protest by Mr Cattell, and a fresh invoice issued on 4th May 2004 [annexe B]. This prompted the Tribunal to raise with Mr McCloone the issues of :

a. The 18 month rule in section 20B of the 1985 Act

b. The fact that the various service charge accounts produced for 2001, 2002 and 2003 [annexes E1, 2 & 3] expressly stated that no audit had been carried out, contrary to Schedule 4, Part 1, paragraph 3. Neither were the accounts certified in accordance with section 21 of the Act.

32. These issues clearly surprised the Respondent and, after taking instructions, Mr McCloone stated that other invoices had been served before April 2004. He was asked to produce them. Mr Cattell denied ever receiving any earlier invoices, pointing out that annexes A and B each referred to sums brought forward from the invoice dated 25th March 2002. This would not be so if there had been any intermediate invoices, he said. Eventually an invoice was produced – dated 2nd April 2003, for the period up to 25th March 2003 – but it was one issued to Mr Chippeck, not to Mr Cattell. Ironically, it was

specifically issued at Mr Chippeck's own request, as he did not want the landlord to be able to argue that no work was being done because the leaseholders did not pay. He demanded a bill and then paid it in full, albeit under protest.

33. Neither Mr McCloone nor his client had any answer to the point that the lease required the accounts to be audited as soon as practicable after the end of each Maintenance Year, yet the accounts seemed all to have been prepared together in late 2003, and were expressly neither audited nor certified in accordance with the Act. They were received only after Mr Cattell asked for sight of them in May 2004.

34. Mr Cattell stated that the reasoning behind works or audits not being undertaken, or people even being chased for bills, was because Opels were paying for it themselves. No other management company, he said, would allow that amount of arrears to build up. No other management company would not prepare estimated accounts. On the subject of the production of figures, this showed the level of accounting control. He said that it took him to ask for an invoice for 2 years service charges, having never received any formal accounts or budgets. "It has been put to me that I am one of these debtors, and it is therefore my fault. I am one, but purely because I was never asked."

35. Mr Cattell also stated that he had asked in writing for sight of the documents supporting the accounts, shortly after receiving them in May 2004, and to visit Opels' premises. He had been unable to do so. This was disputed by the Respondent, but the Applicants were insistent that they eventually got access only to the 2004 accounting documents because they (through the new RTM company) were soon to take over management of the estate and needed to discover what was going on. This, they said, did not include documents in respect of the earlier years, which were disclosed only for this hearing.

Insurance

36. On the subject of insurance, Mr Cattell had not yet had any information on the claims history and had therefore been unable to obtain comparative quotes, but to him the premium seemed high. After some questioning of the parties by the Tribunal, however, it appeared :

a. That the insurance value of the property was either £2 million (Opel) or £2½ million (Cattell, according to what the broker had told him)

b. That the brokers, Houghton Insurance, were instructed to shop around for the best policy

c. That the estate has a bad claims record

d. That the insurers, AXA, are a large institution

e. That the 2004 insurance premium is £4,413, or about £75 per flat

f. That under the previous landlord the insurance premium from 1st May 2001 was only £2,011.43.

37. It should also be recorded that in his written and oral evidence Mr Cattell referred to two instances where, in respect of claims by tenants against the insurer, the landlord was in one case dilatory or incompetent in causing delay [annexe C, paragraph 3] and in the other obstructive [annexe L].

Cleaning & rubbish

38. The Applicants addressed the Tribunal at length, and with some passion, on the subject of cleaning and rubbish. According to Mr Cattell :

> "The accumulation of rubbish has built up – it is a constant problem – it may be due to persons on site, but nothing has been done to deal with it. Within the accounts in 2001 it was £1,400, in 2002 £2,700, in 2003 £2,800, and so far in 2004 it is £2,100. Those in terms of invoices relate purely to *A to Z* Cleaners. You will note on each invoice that one of their duties is to clean the bin stores. They have not done so. The council has had to come on site on occasion to clear up – to clear up bin stores, and to undertake special collections. Those special collections are supposedly only to be requested by residents. But the council has done them free of charge."

39. Written complaints about rubbish and the general condition of the estate by the other Applicant appear as his exhibits SC1, SC2 & SC3. In oral evidence Stephen Chippeck drew the Tribunal's attention to the various invoices from *A to Z* relied upon by the Respondent, commented on the lack of any audit trail, on spelling mistakes in the letter head, and asked where was their address or telephone number on their documents. He also challenged their veracity and stated :

> "The items charged by *A to Z* have patently not been undertaken. I would have

expected managing agents to challenge these and not pay them. I visit constantly, about 3 times per week. We manage other blocks in Luton, so as part of a round robin trip we pop in to see what is happening."

40. The Tribunal noted, and raised with the Respondent, the fact that all of the invoices produced by him were receipted, or recorded the cheque number and date of payment, except for the extensive number from *A to Z*. These showed no evidence that they had ever been paid. Mr Iftikhar Opel responded by stating that these were just ordinary blokes, not professionals, and they were paid in cash. Was this not all the more reason, asked the Tribunal, to obtain confirmation of payment?

41. The other issue under this heading was that of a charge of £800 per year for the rental of a garage[3], allegedly for the storage of ladders, light bulbs and cleaning materials by the caretaker. The Applicants challenged this as being both unnecessary, not required by the previous landlord nor by the new RTM company, and exorbitant. Evidence was produced, from newspaper advertisements, that the cost of renting lock-up garages in Luton was in the order of £8 per week or £42 per calendar month, less than £500 per year.

Repairs (and garage area)

42. The issue of repairs, on paper, seemed to concern the extent of repairs to broken glass in doors, etc and took up little time at the hearing, but it also included an important point concerning rubbish collection and the garages. Much of the rubbish had been allowed to pile up in front of the garages, which had never been specified by the landlord as an area reserved for parking.[4] The invoices from *Hales Waste Control* [Mr Cattell's annexe Q1 to Q4] largely concern the supply of skips for the removal of rubbish from this area, including one stating "asbestos only" [Q1]. At the request of the council [annexe S] a timber fence was then erected across the access to this area. These costs were included in the service charge account for 2003, but should they have been?

43. Does the garage area form part of the landlord's "retained property", over which the

[3] One of two secure garages at lower ground level in the first block of flats (1-12)

[4] See Second Schedule to the lease, at paragraph 7

tenants may have some rights but in respect of which they have obligations to pay under the Fourth Schedule? On the face of the lease plan (which of course was uncoloured) the car park would appear to be part of the "retained property", but are the garages part of the "ancillary buildings" falling within the definition of "building" in clause 1(F)? There was some discussion about this garage area and how if the remaining structures were knocked down the whole area could be used as a much needed parking area. If used by the tenants it was more likely to be kept in better order. However, Mr McCloone said that it was not certain if this did form part of the freehold title. He said he would check and supply the Tribunal with a copy of the filed plan later.

44. Under cover of a letter from Taylor Walton dated 28th October 2004 the Tribunal duly received a copy of the lease plan for flat 3, as provided by HM Land Registry. The plan contained no red line denoting the boundary of the freehold estate. A copy of the filed plan for Title No BD32824 would have been conclusive. However, Mr McCloone's letter states, in its second paragraph :

> This would appear to suggest that the communal areas do not extend to the garage area and that as such it may be that a proportion of the expenses involved in clearing the site (being that part attributable to the garage area) may have to be proportionately reduced.

45. It is the Tribunal's duty to determine what sums by way of service charge are payable, by whom and to whom, but it lies outwith its jurisdiction to determine a boundary dispute. As the burden lies on the party seeking to recover the moneys the Tribunal shall therefore treat the above letter as a concession that sums in respect of works to the garage area are not recoverable by the landlord. However, should the leaseholders at any future stage wish to exercise a right to enfranchise through an RTE company then this decision shall not be capable of founding or supporting any argument that they are estopped from seeking to argue that the freehold title includes the garage area.

Management fees

46. Mr Cattell argued that in terms of the overall level of reasonable costs incurred for the flats, the management fee is extremely high. He said :

> "Even at that point, if one was paying even a lower level of service charge, one would have expected a far better level of service. The fixed fee charged is way

beyond the norm, as most would charge as a percentage of the cost, not a flat £6000 fee. The freeholder contends that his fee would not increase if a higher level of service charge were levied to do with all the things which need to be done, which only brings me to believe that if it is at an acceptable level for a higher level of service charge, it is unacceptable for a lower one. If we had believed that management was being undertaken correctly we would not have taken the action we have concerning the right to manage. It has been contended that the management charge needs to be that high because of such high arrears, but that is a Catch 22."

47. On behalf of the Respondent landlord Mr Les Jones FRICS said, in contrast, that :

"I know this development, having done a number of valuations for mortgage purposes. Mr Opel did ask me what needed to be done about management on site. My general attitude was that the cost, at £100 per flat, was fairly realistic. At one time many managing surveyors would tend to quote on a percentage basis. In my experience, with my company and other agents, we quote on a fixed fee basis. If it was a fixed fee, the only other additional fees we would be looking for would be for major expenditure, and supervision of works. That would be on a percentage of the work. As for a rate per hour, of £17 per hour, if I were doing it on an hourly rate, it would be £90 per hour. I would not be charging £30,000 per annum, but I would be bidding about £125 per flat, because of current condition. Also, over the next year or two there would be some major expenditure, so I could increase my fee by doing the tender for works, and supervision, etc.

"I see a number of blocks of flats, some a lot worse than this – with or without management companies. With a predominantly owner occupier basis, management costs are low. If bought to let, costs get higher and higher because those in occupation do not care."

48. Cross-examined by Mr Cattell, Mr Jones stated that he had done a number of Building Society valuations, and that the units themselves are wind and water tight – not good, but adequate. Some windows had been replaced. He denied that it was an appalling standard of maintenance, giving his opinion that it was adequate rather than reasonable.

49. In his concluding remarks, and referring to two letters produced by the Respondent, Mr McCloone stated that his clients had spoken to two other agents, Thornes and Hartwell, about the fees they would want for this job – but one would not be willing to do it. He said that a cost of £6,000 pa does not seem a lot – £1.90 per flat per week. However, he admitted that his client had not been so active in recovering money, instead waiting until properties were on the market for sale before attempting recovery of arrears.

Findings & decision

50. Section 27A of the 1985 Act requires the Tribunal to make a determination whether a service charge is payable, irrespective of whether or not any payment has already been made.[5] Only if that question is answered in the affirmative need it go on to determine the persons by whom and to whom it is payable, the amount payable, etc.

51. In order to make that first determination the Tribunal must look to the provisions in the lease and also to the law. A series of questions are involved :

a. Has the Annual Maintenance Provision been computed within the time allowed by and in accordance with the principles set out in the Fourth Schedule, Part I, paragraphs 1 & 2?

b. Has any such sum been demanded in accordance with the lease?

c. As soon as practicable after the end of each Maintenance Year have the accounts for that year been audited as required by the Fourth Schedule, Part I, paragraph 3?

d. Alternatively to c. above, have the accounts been certified in accordance with section 21 of the 1985 Act?

e. Have copies of such audited accounts been served upon the tenants, as required by the Fourth Schedule, paragraph 4?

f. Under the same paragraph, has the landlord demanded any balancing payment?

g. If the answer to f. above is in the affirmative, has such payment been demanded within 18 months of the amount being incurred (section 20B)?

52. Having considered the lease and read and listened to the evidence the Tribunal finds that these questions must be answered as follows :

a. No. There is no evidence that, since acquiring the estate in about April 2001, the Respondent has ever prepared a budget of estimated expenditure

b. No. The tenants were never shown budgets or asked to pay any service charge in advance

c. No. Although the three sets of accounts for 2001, 2002 and 2003 [annexes E1, E2 & E3] each include the exact same charge of £205.62 as an "audit fee", and

[5] Section 27A(1) & (2)

the certificate endorsed in each case by GKP Chartered Accountants states that "we can confirm that we have examined the relevant accounts, without carrying out an audit...", it is clear that all three sets of accounts were prepared at the same time, but not to the standard required by the lease

d. No. The accounts are not certified in accordance with section 21(6)

e. No. Copies of all three sets of unaudited accounts were not served until May 2004, and then only after being requested by Mr Cattell as evidence justifying the demand for payment dated 4th May 2004 [annexe B]

f. No. Demand was made for payment on 4th May 2004 (correcting an earlier demand dated 7th April 2004 [annexe A]), but not in accordance with the lease

g. Even if – contrary to the Tribunal's finding – the accounts served were regarded as acceptable, the first (incorrect) demand was made only in April 2004 and therefore, unless a valid demand had been made earlier, all expenses incurred before October 2002 were incurred more than 18 months earlier. It is clear that demands were made of Mr Cattell in March 2002 and Mr Chippeck in November 2002, but the Tribunal has not seen them and therefore is not satisfied that the Respondent landlord has proved that they complied with the provisions of the lease. It is unlikely, given the above findings, that they did. At his own request Mr J Chippeck obtained an invoice from the Respondent dated 2nd April 2003, for sums due up to 25th March 2003, but – again – this was not a demand made in compliance with the lease. Neither does section 20B(2)[6] assist the Respondent. Nowhere is the tenant told that a particular amount for which he will be invoiced later has been or is about to be incurred, eg for electricity, repairs, or as an insurance premium.

53. The Tribunal is forced to conclude, therefore, that the Respondent landlord has never once complied with the service charge provisions of the lease, and that the demands made are also in breach of sections 20B (time limit) and 21(6) (certification of accounts summary). As no valid service charge demands have been made none are payable. Mr

[6] Sub-section (2) reads :

> Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Chippeck is therefore entitled to recoup the amounts already paid by him under protest.

54. Were it to be found, on any appeal, that the Tribunal's decision on this aspect was incorrect, then the following findings may be of assistance on the two questions of reasonableness and quantum.

55. The Tribunal finds as fact :

a. That, in contrast to the payments carefully recorded or acknowledged on other invoices, the documents produced by *A to Z* are unsatisfactory and unacceptable as proof that these amounts have been incurred by the Respondent. The other, receipted invoices (eg from Glasswatch, Hales, and Saxons) would be allowed as both legitimate and reasonable (subject to the 18 month limit)

b. That the use of casual, non-professional labour paid on a "cash only" basis to look after the estate does not inspire confidence and is unacceptable

c. That the standard of maintenance and cleaning carried out on the estate is poor and historically has been consistently poor, as evidenced by the photographs and oral testimony of Messrs Cattell and Chippeck. Mr Jones' description of it as adequate rather than reasonable is not accepted, save to confirm that it has not been even as high as reasonable – the expression used in the statute

d. That very substantial damage was caused to and rubbish accumulated in the garages and forecourt at the top end of the site, an area since fenced off from use and which the Respondent believes does not form part of the retained land. A concession has been made by him that costs attributable to this area may have to be disallowed. The Tribunal agrees

e. That the Respondent has discharged the electricity bills when demanded

f. That the Respondent has asked its brokers to shop around for insurance and has obtained the best deal possible, given the claims history. It is not possible to say whether better management and a firmer control of difficult tenants would have enabled the brokers to obtain a better quote, but at around £75 per flat the current deal is very reasonable

g. That the Respondent has done very little by way of active management, and precious little to get in funds from tenants. Complaints about having to pay for the work himself could have been avoided by studying the lease, making an

estimate of future expenditure, and obtaining payment in advance. Nevertheless, some time has been spent and there is a minimum cost which ought to be allowed. The Tribunal assesses this at 15% of allowable expenditure.

56. The amounts which the Tribunal would allow, if it were wrong in its principal finding on liability, are set out in Schedule 2.

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Graham Sinclair – Chairman

for the Leasehold Valuation Tribunal

SCHEDULE I

CHRONOLOGY PRESCRIBED BY THE LEASE[7]

Date	Event	Reference
September	½ yearly ground rent payable	clause 2 & Sixth Schedule, Pt E
	1st ½ yearly instalment due for **next** Maintenance Year[8]	clause 4
December	End of Maintenance Year	clause 1(L) & Sixth Schedule, Pt B
"as soon as practicable"	Accounts for the previous Maintenance Year to be audited by an accountant	clause 1(M) & Fourth Schedule, Pt I, para 3
February	Accounts for the previous Maintenance Year to be open for inspection by tenant	Fourth Schedule, Pt I, para 5
	Last date for computation of Annual Maintenance Provision for current Maintenance Year	Fourth Schedule, Pt I, para 1
March	½ yearly ground rent payable	clause 2 & Sixth Schedule, Pt E
	2nd ½ yearly instalment due for current Maintenance Year	clause 4
May	Inspection period closes	Fourth Schedule, Pt I, para 5

7 To avoid having to create monthly equivalents of the usual quarter days, the table refers to months only, the operative date being sometime in the fourth week.

8 It is not clear just how the tenant is supposed to know the true amount payable, when the final date for its computation is 28th February, five months later

SCHEDULE 2

SCHEDULE OF ALLOWABLE SERVICE CHARGES : 2001-2004
(ONLY IF ANY SERVICE CHARGES ARE ALLOWABLE – SEE PARA 53)

Period end	Doc	Item	Claimed	Reasonable	w/i 18 mths
25-Dec-01	E1	Bank charges	£72.91	£0.00	£0.00
		Caretaker	£1,402.07	£0.00	£0.00
		Electricity	£923.64	£923.64	£0.00
		Insurance	£2,011.43	£2,011.43	£0.00
		Repairs	£1,213.71	£0.00	£0.00
		Audit fee	£205.62	£0.00	£0.00
		Management Fee (Opel)	£4,000.00	£440.26	£0.00
		Interest	(£21.24)	(£21.24)	(£21.24)
		sub-total		**£3,354.09**	**(£21.24)**
25-Dec-02	E2	Caretaker	£2,680.00	£0.00	£0.00
		Electricity	£244.82	£244.82	£0.00
		Insurance	£2,468.97	£2,468.97	£0.00
		Repairs	£3,161.83	£2,495.00	£0.00
		Storage rent	£800.00	£0.00	£0.00
		Audit fee	£205.62	£0.00	£0.00
		Management Fee (Opel)	£6,000.00	£781.32	£0.00
		sub-total		**£5,990.11**	**£0.00**
25-Dec-03	E3	Bank charges	£80.00	£0.00	£0.00
		Caretaker	£2,819.95	£0.00	£0.00
		Electricity	£229.08	£229.08	£229.08
		Insurance	£4,246.44	£4,246.44	£4,246.44
		Repairs	£3,897.06	£2,689.71	£2,689.71
		Storage rent	£800.00	£0.00	£0.00
		Audit fee	£205.62	£0.00	£0.00
		Management Fee (Opel)	£6,000.00	£1,074.78	£1,074.78
		sub-total		**£8,240.01**	**£8,240.01**
28-Sep-04		Electricity	£324.92	£324.92	£324.92
		Insurance	£4,413.87	£4,413.87	£4,413.87
		Management Fee (Opel)	?	£710.82	£710.82
		sub-total		**£5,449.61**	**£5,449.61**
		Total		**£23,033.82**	**£13,668.38**
		Each 1/60th share =		**£383.90**	**£227.81**

Notes :

a. Management fees calculated at 15% of allowed expenditure
b. Repairs allowed only against receipted and/or credible invoices
c. Right hand column based on expenditure from October 2002 only