Residential
Property
TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL
EASTERN RENT ASSESSMENT PANEL

LANDLORD AND TENANT ACT 1985
Sections 20C and 27A

Ref:	**CAM/26UE/LSC/2005/004**	
Property:	**11 Hartsbourne Park, 180 High Road, Bushey Heath Herts WD23 1SD**	
Applicant:	**Mrs June Singer**	
Represented by:	**Mr H Singer and Mrs M Shalet**	
Respondent:	**Bushey Management Limited**	
Represented by:	**Mr M Levene, Mr A Sears and Mrs S Bard**	
Tribunal:	**Mr John Hewitt** **Ms Marina Krisko** **Ms Cheryl St. Clair**	**Chairman** **BSc (EstMan), FRICS** **MBE, BA**
Date of Hearing:	**Thursday 7 July 2005**	

Decision of the Tribunal

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1. Decision

The Tribunal decides as follows:

1.1 The service charges payable by the Applicant are as follows

2002/3	Phase 2 Block	£28,047 @ 6.48% =	£1,817.45
	Phase 2 Estate	£24,464 @ 4.49% =	£1,098.43
2003/4	Phase 2 Block	£40,465 @ 6.48% =	£2,622.13
	Phase 2 Estate	£34,807 @ 4.49% =	£1,562.83
Total			**£7,100.84**

(See appendices 1 & 2 attached)

Less paid on account		
2002/3	£4,405.26	
2003/4	£4,012.77	£8,418.03

Credit balance in favour of Applicant **£1,317.19**

Cash Account of funds held by Respondent on behalf of Applicant

Agreed credit balance as at 30.06.02	£2,062.00
Add credit balance as above	£1,317.19
Credit balance as at 30.06.04	**£3,379.19**

1.2 On the Applicant's application under s20C of the Act, the Respondent's relevant costs in respect of professional advice obtained in connection with these proceedings shall be limited to such sum as may have been incurred, not to exceed £500.

1.3 On the Applicant's application for reimbursement of fees paid in connection with these proceedings, the Respondent shall within 30 days of the sending out of this Decision reimburse the sum of £250 to the Applicant.

1.4 The findings of the Tribunal and the reasons for the above decisions are set out below.

2. Background

2.1 The Applicant made an application dated 1 January 2005 (received by the Tribunal 11 January 2005) pursuant to s27A of the Act. It includes a related application pursuant to s20C of the Act.

2.2 The Property is a flat within a development known as Hartsbourne Park (the Park) which comprises two residential blocks of flats, Phase 1, comprising 8 flats, numbered 1-8 and Phase 2 comprising 20 flats, numbered 9-29 (there is no flat numbered 13). The flats in both blocks are constructed to a high quality specification and are set in spacious and well tended and security gated grounds. The lease structure, especially as regards the service charge regime raises complex issues, which we shall detail later in this decision.

2.3 The Application relates to service charges claimed by the Respondent to be payable in respect of the Property pursuant to the terms of a lease (the Lease) dated 10 June 1997 and made between:

Landlord: Westcity Homes (Bushey Phase 2) Limited

Adjoining Owner: Westcity Homes (Bushey) Limited
Management Company: Bushey Management Limited
Tenant: June Singer

2.4 The Respondent is therefore the Management Company. The landlord and the adjoining owner of Phase 1 are both now Hartsbourne Park Limited. We were told that this company is controlled by many of the lessees within the Park. Evidently the Applicant is not a member of it. However, the Mr Singer, the Applicant's representative, was a director of the Respondent until it became apparent that only lessees could be directors.

2.5 Broadly speaking the service charge accounts have been made up to the end of June in each year.

2.6 In recent years the Respondent commenced two sets of legal proceedings against the Applicant in the Watford County Court alleging arrears of service charges. Judgments were given on 16 December 2003 and 13 December 2004. On enquiry we were satisfied that both claims related to demands for on account service charges only and that in neither case had the judge made a determination on the reasonableness of the service charges payable nor on other matters set out within section 27A of the Act. At a preliminary hearing held on 14 April 2005 the Tribunal decided that it had jurisdiction to determine the application. Full reasons for that decision are set out in our Decision dated 14 April 2005, in which we also gave further directions for the hearing of the substantive issues.

2.7 Also on 14 April 2005 the Tribunal had the opportunity to inspect the Park and its grounds. Mr Singer, on behalf of the Applicant drew our attention to a number of features within the grounds.

2.8 It is evident from the correspondence passing between representatives of the parties and their conduct at the hearings held by us that there is a great deal of antipathy between them. It seemed to us that representatives of both parties went out of their way to be awkward or uncooperative with the other. Much of the correspondence was vituperative and, in our view unnecessarily insulting, verging on the immature. Inevitably such attitudes were unhelpful to us and often prevented the parties from taking a sensible and realistic view of certain matters.

2.9 The hearing was held on Thursday 7 July 2005. The Applicant was represented by her husband, Mr H Singer who was accompanied by his daughter, Mrs M Shalet. The Respondent was represented by three officers, Mr M Levene, Mr A Sears and Mrs S Bard. The Tribunal heard evidence and representations from the parties. Further directions were given so additional information could be made available to the Tribunal to enable it to make its decisions.

3. The Property, the Park and the Lease Structure

3.1 Phase 1 of the Park was constructed in or about 1993 the leases of the 8 flats within it being granted between October 1993 and September 1994.

3.2 The Tribunal was given a copy of a sample lease, that of flat 6. It is dated 17 September 1993. It was granted by Westcity Homes

(Bushey) Limited as Landlord. It recited that the Landlord was entitled to be registered as proprietor of the freehold land referred to in the lease as the Estate (but which we shall refer to as the Phase 1 Estate) registered at HM Land Registry under Title Number HD264663 and as identified on a plan (Plan A) attached to the lease. The plan shows the block of flats (the Apartment Block) and an adjacent block of lock up garages (the Garage Block). The lease defines 'Communal Land' as the (Phase 1) Estate but excluding the Apartment Block and the Garage Block. We shall refer to this land as the (Phase 1) Communal Land. Clause 10(2) of the lease empowers the Landlord, acting reasonably, to vary the definitions of the (Phase 1) Estate and the (Phase 1) Communal Land in certain limited circumstances. No evidence was offered to show that variations had been sought or made, nor apparently had the matter been considered.

3.3 The lease of flat 6 makes provision for the Respondent, as the Management Company to provide services and for the payment to it by the Tenant of a service charge:
Insurance Contribution: 11%
Service Charge Contribution (Apartment Block) 11%
Service Charge Contribution (Communal Land and the Estate) 11%
Clause 11(8) of the lease enables the Landlord and the Management Company to apply to the Landlord's Surveyor (as defined) to vary the service charge proportions should they determine, acting reasonably, that it is reasonable to do so in the interests of good estate management. As we understand it no such variations have yet been made.

3.4 The First Schedule to the lease sets out the rights granted to the Tenant. Included is the right, with or without vehicles to pass over and along (the Phase) Estate Road (as defined).

3.5 Phase 2 of the Park was constructed in or around 1996, the 20 leases of the flats within it having been granted between July 1996 and October 1997.

3.6 The Tribunal was given a copy of the Applicant's lease (the Lease), brief details of which are given in paragraph 2.2 above.

3.7 The Lease recites that the Landlord is the registered Proprietor of the freehold land registered under Title Number HD327927 (which we shall call in this decision the Phase 2 Estate) and that the Adjoining Owner is the registered proprietor of the freehold land registered under Title Number HD264663 (the Phase 1 Estate) which are together referred to as the 'Estate' In this decision we shall refer to this Estate as the Park Estate.

3.8 Definitions are set out in clause 1 of the Lease. Here at number 8
the Estate means

> 'all that freehold land and buildings shown edged blue on the first plan annexed hereto (Plan A) and known as Hartsbourne Park 176/180 High Road Bushey Herts'

We were not provided with a coloured copy of Plan A, but the monochrome copy shows a clear thick black line around both the Phase 1 Estate and the Phase 2 Estate, the two together being the Park Estate.

We have also seen official copies of the entries on the register of the two titles and the relevant title plans.
The Phase 1 Estate title, Title Number HD 264663 is described as 176 High Road Bushey. The title plan accords with the Plan A annexed to the lease of flat 6. On 23 October 1998 Hartsbourne Park Limited was registered as the proprietor.
The Phase 2 Estate title, Title Number HD327927 is described as 180 High Road Bushey. The title plan accords with Plan A annexed to the Lease save that it excludes the Phase 1 Estate. On 9 November 1998 Hartsbourne Park Limited was registered as the proprietor.

Other relevant definitions include:
the Apartment Block means
'the building shown for the purposes of identification only edged orange on Plan A'
the Communal Land means
'the Estate but excluding the Apartment Block'
Estate Road means
'the roadway (including any footpaths adjoining the same) forming part of the Communal Land'

3.9 Clause 5.8 of the Lease is a covenant by the Tenant to pay to the Management Company a composite service charge in the following proportions:
Insurance Contribution: 6.48%
Service Charge Contribution (Apartment Block) 6.48%
Service Charge Contribution (Communal Land and the Estate) 4.49%

3.10 The service charge regime is set out in clause 8. In essence it provides for:
On the usual quarter days payments in advance and on account of the tenant's liability, as the Management Company shall specify as its assessment of the amount of one quarter of the likely service charge for that accounting period
An accounting period from 24 June of each year to 23 June in the following year
An annual certificate by an independent auditor prepared as soon after the end of each accounting period as may be practicable, which shall contain a summary of the sums, costs, expenses and outgoings incurred or anticipated during the year to which it relates
A copy of the certificate to be supplied to each tenant as soon as it is available
An account after each accounting year to be supplied to the tenant, showing the service charges due from the tenant for the year, credit having been given for the on account payments made by the tenant. Any balance due to the Management Company is payable within 14 days. Any balance due to the tenant will be allowed as a credit against the next on account payment due.

3.11 Clause 9 (and the Fifth Schedule) set out the nature of expenditure which may be included in the service charges. Clause 9.5 allows for the inclusion of a contribution to a sinking fund as a reserve towards the estimated cost of the provision of services.

3.12 Despite the detailed framework for the service charge regime set out in the lease, the Respondent did not follow it. It preferred to follow a more relaxed approach (but not those provided for in the leases) albeit that they were based on an interpretation of the leases. Evidently, and it was not controversial, the practice of the Respondent was to prepare and circulate a budget. The total amount was divided between the 29 flats in certain proportions (but not those provided for in the leases). Each tenant's potential liability was then arrived at and divided by four to establish the amount of the quarterly payments. Tenants were then invited to pay the sum(s) arrived at. The budgets rarely provided for the reserve fund in the conventional sense. Instead any surpluses at year end were retained and put towards a notional reserve account. Evidently audited certificates and year end balancing accounts for each individual tenant were not prepared or sent out as a matter of routine.

3.13 The Tribunal wishes it to be clear to the parties that these informal arrangements whilst they might be more convenient to administer have added considerably to the complexities in this case to establish what sums are payable by the Applicant and what sum stands to her credit in the 'reserve account'. The more so when it is not clear whether sums in the 'reserve account' may have been applied to expenditure not strictly permitted within the terms of the leases. Further, in the experience of the Tribunal, informal arrangements might sometimes work reasonably well in a small development where there is harmony amongst the tenants. Where, as here, the Park is a sophisticated development with spacious grounds to be tended and with complex plant and equipment to be maintained, and where, as here, there is discord amongst tenants, it is inevitable that sooner or later the informal arrangements have to be unravelled and the lease regime applied.

3.14 In addition in this case the service charge percentages applied by the Respondent have not been compliant with the leases. This may be due to a defect in the regime set out in the Phase 2 leases.

The Phase 1 leases plainly apply a service charge obligation in respect of the (Phase 1) Apartment Block, the (Phase 1) garage block and the (Phase 1) Estate. It appears the costs have been divided between the 8 flats within Phase 1.

The service charge strategy for the Phase 2 leases does not appear to have been thought through carefully. The leases define the Estate as Phase 1 and Phase 2 combined, the Estate being the combination of the freehold land held under registered Title Numbers HD327929 and HD264663 The Lease then refers to the Apartment Block as the Phase 2 apartment block, but makes no mention of the Phase 1 Apartment Block. It then provides that the Communal Land is the whole of the Phase 1 Estate and the Phase 2 Estate combined, but excluding the Phase 2 Apartment Block. Thus within the definition of the (Phase 2) Communal Land is the whole of the Phase 1 Estate, including the Phase 1 Apartment Block. Plainly this is a nonsense. As things stand at present the Phase 1 tenants have a service charge

liability in respect of the Phase 1 Apartment Block, Estate and garages and the Phase 2 tenants also have a liability in respect of those areas.

3.15 Evidently, there may have been an intention at one time, to merge the Phase 1 Estate and the Phase 2 Estate into one estate, with the costs being shared between all 28 flats. Mr Singer produced to us a document which is dated 14 August 1995 headed 'Hartsbourne Park – Phases 1 and 2 Estate Service Charge Contributions ' which he said came from a marketing document. All 28 flats are listed, along with a brief description of them and internal measurements, together with a service % allocated and, in the final column, what may have been an estimated service cost. The service charge percentages given total 100%. In respect of flat 6 the percentage listed is 3.77% (contrast the 11%) specified in the lease of that flat.

In respect of flat 11 – the Property - the percentage listed is 4.49% (contrast 4.49% specified in the Lease in respect of Communal Land and the Estate).

Relevant extracts from this document are reproduced in Appendix 3 hereto.

However the two Phases have not been merged as may have been anticipated and the Phase 1 definitions of Estate and Communal Land, and the Phase 1 service charge proportions have not been varied as might have been intended.

3.16 The Tribunal was told that in practice the Respondent allocated service charge expenditure as follows:

Phase 1 Estate to include the Phase 1 Apartment Block and Garages

Phase 2 Estate to include the Phase 2 Apartment Block and Garages.

'Communal Parts' which it determined related to services across the Park and which tenants enjoyed.

It does not appear to be controversial that based on internal square footage the Applicant's proportion of Phase 2 Block service charges of 6.48% is a fair and reasonable percentage. Apparently the Respondent applied this percentage to what it regarded as Phase 2 expenditure whether it related to the Phase 2 Block or the Phase 2 Estate.

As to the 'Communal Parts' expenditure, the Respondent allocated 30.71 % to Phase 1 tenants and 69.29% to Phase 2 tenants. The Respondent sought to justify this on the basis that the internal square footage of all the flats totalled 40,505 sq ft. Of this total Phase 1 amounted to 30.71% and Phase 2 69.29%. See Appendix 3

The Respondent supported this practice with the following example.

Expenditure of £1,000 on Communal Parts.

As per the Lease the Applicant's share Estate expenditure of 4.49% amounts to a contribution of £44.90.

If the £1000 is split between the two Phases 30.71 : 69.29, £692.90 is allocated to Phase 2. The Applicant's share of Phase 2 Block expenditure is 6.48%. 6.48% of £692.90 amounts to £44.90.

Thus it is said that as long as the Communal Parts expenditure is split between the two Phases in the given percentages, it is fair that the Applicant should bear 6.48% of the (reduced) expenditure.

3.17 However this is not the scheme provided for in the Lease. In addition not all expenditure which is not Block expenditure has been split in the ratio given above. Some expenditure, as evidenced by oral examination, has been split by the Respondent in a seemingly arbitrary manner.

4. The Law

The law relevant to this application is as follows:

4.1 Statutory Provisions

S18 of the Act

'(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.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose—

(a) ....

(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.'

S19 of the Act

'(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period---

(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

and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.'

S20 of the Act, as originally enacted required a consultation process as set out in subsection (4) and by subsection (3) provided that if subsection (4) was not complied with the amount of service charges recoverable in respect of the qualifying works was limited to the greater of £50 multiplied by the number of dwellings or £1000.

S20 of the Act, as amended with effect from 31 October 2003

'(1) Where this section applies to any qualifying works …the relevant contribution of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either---

(a) complied with in relation to the works…or

(b) dispensed with in relation to the works…by (or on appeal from) a leasehold valuation tribunal.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

Regulations made under subsection (5), namely, The Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003 No 1987 specify the 'appropriate amount'

The 'appropriate amount' for the purposes of subsection 3 is an amount which results in the relevant contribution of any tenant being more than £250 – see regulation 6.

For detailed consultation requirements for qualifying works – see regulation 7.

The relevant consultation requirements in respect of the works proposed to be carried out by the Applicant are set out in Part 2 of Schedule 4 to the regulations.

In summary, Part 2 of Schedule 4 to the Regulations, sets out requirements as follows:

1. The landlord shall give notice of intention to carry out qualifying works and shall describe, in general terms, the works proposed to be carried out, state the reasons for considering it necessary to carry out those works, invite written observations on those works and invite the tenant to name the person from whom the landlord should try to obtain an estimate for the carrying out of the proposed works.

   The tenant has not less than 30 days to respond to the initial notice.

2. Where, within the relevant period (30 days) a tenant nominates a person from whom the landlord should try to obtain an estimate, the landlord must try to do so.

   The landlord must then provide to the tenants:

   1. A statement setting out details of at least 2 estimates for carrying out the works. Copies of the estimates must be made available for inspection. At least one of the estimates must be that by a person wholly unconnected with the landlord.
   2. Where the landlord has received observations on his notice of intention to carry out works, a summary of those observations and his response to them.
   3. An invitation to make observations on the estimates. The landlord shall specify the closing date for observations, which shall be not less than

30 days from the date on which the invitation is delivered to the tenants.

The landlord has a duty to have regard to any further observations made by tenants.

3. Where a landlord then enters into a contract for the carrying out of qualifying works, he shall within 21days of entering into the contract, give written notice to each tenant stating his reasons for entering into the contract and where he received observations, a summary of them and his response to them.

S20ZA of the Act provides—

'(1) ...

(2) In section 20 ...--

"qualifying works' means works on a building or any other premises...'

4.2 Construction of the Lease.

A lease is construed in the same way as any other commercial contract, namely to give effect to the words used and what the contracting parties intended when the contract was entered into.

Lord Bingham in *BCCI (SA) v. Ali* [2002] 1 AC 251; [2001] 2 WLR 735 said,

'In construing this provision, as any other contractual provision, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties subjective states of mind but makes an objective judgment based on the materials already identified. The general principles summarised by Lord Hoffman in Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 WLR 896, 912-913 apply in a case such as this.'

4.3 The definitive modern approach came from Lord Hoffman in *Investors' Compensation Scheme Limited v. West Bromwich Building Society* [1998] 1 WLR 896, 912H - 913F when he set out the modern rules of interpretation.

'***The principles may be summarised as follows:***

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) *The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and subject to the exception to be mentioned next, includes absolutely anything which could have affected the way in which the language of the document would have been understood by a reasonable man.*

(3) *The law excludes from the admissible background the previous negotiations of the parties and their subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.*

(4) *The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: See Mannai Investments Co. Ltd v. Eagle Star Life Assurance Co. Ltd. [1997] A C 749.*

(5) *The rule that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had...'*

Lord Hoffman added a slight qualification to theses principles when in *Jumbo King Ltd v. Faithful Properties* Unreported 2 December 1999, Hong Kong Court of Final Appeal, he said,

'The overriding objective in construction is to give effect to what a reasonable person rather than a pedantic lawyer would have understood the parties to mean. Therefore, if in spite of linguistic problems the meaning is clear, it is that meaning which must prevail.'

4.4 Emphasis was made on the correct approach and the importance of the background in *Holdings and Barnes plc v. Hill House Hammond Ltd (No.1)* [2001] EWCA Civ 1334 when Clarke LJ said, about the above authorities,

'Those cases are to my mind of particular assistance here because they show that the question is what a reasonable person would understand the parties to mean by the words of the contract to be construed. It is important to note that the reasonable person must be taken to have knowledge of the surrounding circumstances or factual matrix. As appears below, that knowledge is of particular importance on the facts of the instant case.'

4.5 Paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 ('the 2002 Act') provides as follows—

'(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) ...'

5. Construction of the Lease

5.1 Applying the principle as outlined above the Tribunal gave careful consideration to the construction of the Lease. The Tribunal considered the words used in the Lease and what the parties intended in 1996 when the Lease was granted.

5.2 The Tribunal finds that the Lease is quite clear and defines the Estate as Phase 1 and Phase 2 combined. This may have been in preparation for the combing of the two Phases for service charge purposes.

The Lease plainly specifies a service charge proportion of 6.48% applicable to insurance and the Apartment Block. Given the square footage of the Property compared with the square footage of the other flats within Phase 2 (see Appendix 3), the Tribunal can readily see that such a service charge percentage is understandably fairly arrived at.

The Lease also plainly provides for a service charge percentage of 4.49% in respect of the Communal Land and the Estate. The Estate is defined as the Phase 1 and the Phase 2 estates together. It seems to the Tribunal that despite that the parties cannot have intended that there would be duplication of payment, that is to say that both the Phase 1 tenants and the Phase 2 tenants should both and simultaneously be contributing to the same expenditure. Further the Tribunal does not consider that the parties intended that the Phase 2 tenants should contribute to the Phase 1 Block services. Doing the best it can with the imperfect materials and evidence available to it, the Tribunal determines that the lease is to be construed as limiting the Phase 2 tenants' liability for Communal Land and Estate service charges to those applicable to the Phase 2 estate, until such time as the Phase 1 leases were varied or modified so as to provide for the Phase 1 tenants to be responsible for the Phase 1 Block and Garages, the Phase 2 tenants to be responsible for the Phase 2 Block and for the Communal Land and Estate expenditure to be shared across both Phases. The Tribunal finds that the parties did not intend for the Phase 2 tenants to contribute to expenditure which the Respondent was entitled to recover in full from Phase 1 tenants.

5.3 Accordingly, on this construction, the Tribunal finds that to ascertain the Applicant's liability to service charges there has to be a fair and reasonable apportionment of the Estate expenditure between the two Phases. Having made such an apportionment, the amount attributable to the Applicant is 4.49%, that percentage being plainly and clearly specified in the Lease. The Tribunal acknowledges that in taking this approach it might be the case that the Respondent will suffer a shortfall in recoverable service charges. The Respondent will have to fund any such shortfall from other resources. The Tribunal does not consider that the rules of construction permit the allocation of a service charge percentage other than that plainly set out in the Lease. If the implications are unsatisfactory it may be that the Respondent will see fit to seek a variation of the Phase 1 arrangements as provided for in the Phase 1 leases or apply to a Tribunal for relief under Part IV of the Landlord and Tenant Act 1987. However this Tribunal considers that it is inappropriate for it to deal with those wider issues on this occasion. The Tribunal is limited to making determinations on the applications presently before it.

5.4 The Tribunal also bears in mind that a tenant's liability for service charges should be clearly and unambiguously set out in the lease. The Tribunal notes that the approach to construction of a service charge provision in a residential lease was reviewed *in Gilje v Charlesgrove Securities Ltd [2001] EWCA 1777,* where ambiguous provisions were looked at in respect *of a* notional rent on the caretaker's accommodation. Laws LJ said

> *'On ordinary principles there must be clear terms in the contractual provisions said to entitle him to do so. The lease, moreover, was drafted or proffered by the landlord. It falls to be construed contra proferentem. '*

In the same case Mummery LJ said

`First, I note what is stated in paragraph 55 on page 71 of the 5th Edn of the Encyclopedia of Forms and Precedents Vol 23 on Landlord and Tenant in the section relating to the drafting of provisions in leases for services charges. 1t is stated as follows:

`The draftsman should bear in mind that the courts tend to construe the service charge provision restrictively and are unlikely to allow recovery for items which are not clearly included'

He went on to say

`The proposition is obvious. .. indeed the proposition reflects a particular application of the general principle of construction in the contra proferentem rule.'

6. The Specific Service Charges in Dispute

6.1 During the course of the hearings both parties felt able to make concessions. The Respondent voluntarily withdrew or adjusted its some its claims to services. Equally, Mr Singer for the Applicant was, on reflection and perhaps with the benefit of explanatory materials, able to withdraw challenges to some areas of expenditure.

6.2 The issues that remained in contention are dealt with below.

Insurance

6.3 In respect of Phase 2, the Respondent claimed

	2002/3	2003/4
	£4,175.	£6,058
made up as to:		
Basic premium	£3,550.32	£3,778.43
Lift engineering	519.56	519.56
Terrorism	0.00	444.29 (2002/3)
		536.84 (2003/4)
Director's liability (50%)	105.00	133.13
Totals	£4,174.88	£5,412.25

6.4 Having been given the breakdown for 2002/3, Mr Singer said that he did not challenge it. Mr Levene for the Respondent explained that the insurance cover had not changed in principle, but was subject to indexation. Despite making enquiries of brokers and accountants, Mr Levene was unable to explain to the Tribunal the sum claimed and the breakdown provided. Mr Singer has no representations to make and left it to the Tribunal to make a determination. In the circumstances the Tribunal determined that the claim to £6,058 was unreasonably incurred and that the sum payable was limited to £5,413.

Water

6.5 The Tribunal was informed that water to the Phase 1 estate was not separately metered and took its water from Phase 2 to take advantage of cheap rates. Phase 2 is metered and there are several meters which serve it. The Respondent allocated the charges as follows:

	Phase 1 Estate	Phase 2 Block	Estate
2002/3	£611	£3,854	£1,000
2003/4	£611	£4,301	£1,500

Mr Singer for the Applicant contended for a complex formulae involving ascertaining the water costs for each Phase 1 flat, multiplying by 20 and deducting that sum from the water cost. The Tribunal did not consider such an approach to be reasonable and proportionate. In the absence of any detailed accounts of consumption of water between the various parts of the Park from which it could work, the Tribunal prefers a broad approach

6.6 In the absence of any detailed breakdown the Tribunal was prepared to accept the Respondent's allocation of the charges for the year 2002/3, because, so far as it could tell it appeared to be a reasonable allocation.
The charges for 2003/4 are plainly greater. The Respondent has sought to place all of the increase on Phase 2.The Respondent was not able to provide any explanation, let alone a satisfactory explanation, for such an apportionment for 2003/4. In the absence of evidence, the Tribunal using its general experience in estate management took a broad view and considered that the increased charges should be spread more equitably as to:

Phase 1 Estate	Phase 2 Block	Estate
£800	£4,301	£1,311

Outside Decoration

6.7 The Respondent claims to have expended £4,693 on external redecoration. Mr Singer for the Applicant objected to the expenditure solely on the basis that the Respondent had failed to consult tenants in accordance with s20 of the Act. Mrs Bard told the Tribunal that the contract was placed in March or April 2004 and the work carried out in early June 2004. She said that an informal consultation process had been carried out. Mrs Bard also accepted that a formal consultation ought to have been carried out. During the course of the hearing Mrs Bard made an oral application under s20ZA(1) of the Act for dispensation with all or part of the consultation requirements. The Tribunal explained that it was neither able nor prepared to accept such an application part way through the hearing of an application by

one tenant pursuant to s27A of the Act. For avoidance of doubt the Tribunal wishes it to be clear that it finds that the relevant consultation provisions are those set out in the Regulations, following the amendment of the Act.

6.8 The cost of works at £4,693 was not challenged. The works related to Phase 2 only. On that basis the Applicant's contribution at 4.49% amounts to £210.71. The maximum contribution is 5.16% payable by flat 26 which amounts to £242.31.

6.9 The relevant consultation requirements are those set out in the Regulations mentioned in paragraph 4.1. Since the works do not result in any tenant being required to make a relevant contribution of more than £250, the Tribunal finds that the Regulation do not apply. Accordingly, the Tribunal finds that the Applicant's challenge on this point fails.

Water Softener and related works

6.10 Evidently a problem with the water softener equipment occurred in the late summer of 2003. The existing equipment required to be replaced. Invoices relating to the work were issued as follows:

29.09.03	£2,116.00	Kinetico UK Ltd. Supply of equipment
31.10.03	£ 161.80	T.L.S Building Services. Alterations to pipe work and supply and fit NRV and outlet pipe.
09.03.04	£ 381.88	Kinetico UK Ltd. Commissioning, installation and drain extension.
Total	£2659.68	

Mr Singer, on behalf of the Applicant said that it was accepted that replacement equipment was required, that the cost of supply and installation was reasonable and the expense was reasonably incurred. The one and only objection that the Applicant had was that the Respondent has not consulted with tenants in accordance with s20 of the Act.

6.11 Mrs Bard, on behalf of the Respondent conceded that there had not been consultation compliant with s20. She explained that the works were needed to be carried out urgently. The old equipment ceased to work. It required replacement and was in fact replaced within one week she said. Mrs Bard also told the Tribunal that several quotes for the supply of the replacement equipment were obtained and they were comparable. Mrs Bard also said that one of the main complainants about the inadequacy of the old equipment and the need for urgent replacement was Mr Singer himself.

6.12 The Tribunal accepted Mrs Bard's evidence on this issue. In the view of the Tribunal the Respondent acted promptly, sensibly and reasonably in respect of the replacement water softener.

6.13 The liability for the expense was incurred prior to 31 October 2003. Accordingly the consultation regime was that as originally enacted by s20 of the Act. The consultation requirement is triggered if the cost of relevant qualifying works exceeds the limit, namely whichever is the greater of £1000 or £50 times the number of dwellings concerned. There are 20 flats within Phase 2. The limit is thus £1000.

6.14 The relevant cost of the works exceeded £1000. The Respondent concedes that the statutory consultation did not take place. Accordingly, the excess above £1000 is not recoverable by the Respondent. The Tribunal has accordingly adjusted the service charges payable in respect of this item.

6.15 Given that Mr Singer accepted that the works were required, were reasonable in amount and reasonably incurred, the Tribunal considered it disappointing that the Applicant felt the need to challenge this item of expenditure. The county court, and only the county court has jurisdiction under s20(9) of the Act as originally enacted to dispense with the relevant requirements if it was satisfied that the landlord had acted reasonably. In case this matter is to be referred to the court, the Tribunal wishes to record that in its view, for what it may be worth, the Respondent had acted reasonably in connection with the water softener. If this matter is to be pursued the parties will want to give careful consideration to costs consequences that might arise.

Entry Phone System

6.16 The Tribunal made a modest adjustment to the Respondent's claim to properly reflect the invoices submitted to support the claim to the expenditure.

7. Cash Account

7.1. In a prestigious block where annual service charges amount to almost £100,000 per annum, the Tribunal would have expected to find within the accounts, an identified Reserve Fund for cyclical maintenance and repair. Lessees would be asked to contribute to this via the service charge, and the annual accounts would show any movement on the fund (income and planned expenditure).

7.2 The Respondent however, chose to create a Reserve Fund, by retaining individual lessees' surpluses on the service charge account at the year end. Some expenditure was then charged against this surplus, but with little or no rationale. This is evidenced by the fact that the figures published in the 2003 and 2004 accounts, were arbitrarily altered by the Respondent and given as evidence following Directions given on 7 July 2005

7.3 This method of creating a Reserve Fund actually allows for individual lessee arrears to build up un-noticed, often until a prospective purchaser makes detailed enquiries. Additionally the Respondent had said at the May 2004 AGM, that monies were not held on a separate deposit account, since they would have to be taxed, and the cost of the tax returns would nullify any additional monies raised

7.4 Despite this, the published accounts show that Bank interest has been earned, albeit of a minimal amount. Obviously, a Reserve Fund earning interest helps keep pace with the cyclical costs over an extended period. If no interest is earned, then up-front payments from lessees are positively disadvantageous to them. The Tribunal were surprised that other lessees had not taken issue over this situation,

particularly since in the absence of any proper demand or provision for a Reserve Fund, lessees are entitled to request that their surplus service charge payments at the year end, are credited to their service charge account in the following year, or repaid to them.

7.5. It is not surprising that in these circumstances the Applicant found it difficult to understand and follow her own personal account and the value of her portion of the reserves held by the Respondent

7.6 The parties have subsequently agreed that payments made by the Applicant and credits to which she is entitled in the years ending 30 June 2003 and 2004 are as set out in paragraph 1.1 above.
Accordingly, the Tribunal having determined the Applicant's liability for service charges as set out above, the Tribunal determines that as at 30 June 2004 there is the sum of £3,379.19 standing to the credit of the Applicant in the reserves held by the Respondent. In the view of the Tribunal the Applicant is entitled to request that this credit be applied against her annual service charge account, or repaid if formally requested.

8. The s20C Application.

8.1 The Applicant has made an application under s20C of the Act.

8.2 The Lease does not make express provision for the costs incurred in proceedings before a court or leasehold valuation tribunal to be recoverable as a service charge. Clause 9 specifies what matters are to be included in the service charge. Clause 9.2 provides for:

'The proper costs to the Management Company incurred in the general observance and performance of its obligations including any proper charge or fee of any Managing Agents, Accountant and Auditor appointed by the Management Company.'

8.3 The Respondent told the Tribunal that that whilst it had incurred legal fees of approximately £1,600 in connection with these proceedings, the Respondent did not propose to put them through the service charge as relevant costs for the purposes of ss18 and 19 of the Act. The Respondent said that it had sought advice and incurred accountants fees in connection with the accounts featured in these proceedings. The invoices were not to hand, but the estimate of costs was in the region of £300. Mr Singer objected to these being recoverable on the footing that the advice was not necessary and there several accountants within and available to the Respondent.

8.4 The Tribunal finds that clause 9.2 of the Lease is to be construed as including costs of accountants that might reasonably and properly be incurred in connection with proceedings before a court or leasehold valuation tribunal. Given the complexities in ascertaining the Applicant's liability for service charges in this matter, the amount of them and the sum standing to her credit in the reserves, the Tribunal considers that it was reasonable for the Respondent to incur modest costs in obtaining advice from accountants.

8.5 The Tribunal therefore decides that costs of the accountants, not exceeding £500 incurred in connection with these proceedings shall be regarded as relevant costs to be taken into account in determining the amount of service charges payable by the Applicant.

9. Reimbursement of Fees

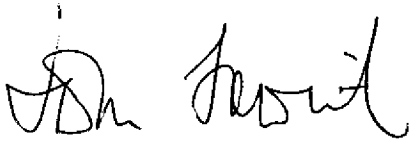
9.1 The Applicant made an application for reimbursement of fees of £250 paid by the Applicant in connection with these proceedings. Mr Singer argued that he was forced to the Tribunal because the directors of the Respondent would not listen to his arguments. He said the Respondent was intransigent, would not reply to his letters or provide him with relevant information.

9.2 Mr Levene, on behalf of the Respondent argued that the hearing was unnecessary and that Mr Singer, for the Applicant was a difficult man who was often rude and unreasonable in his demands. He suggested that Mr Singer should pay his own fees.

9.3 The Tribunal gave careful consideration to the competing and rival arguments. On balance the Tribunal considered that the Applicant, Mrs Singer, has succeeded on a number of her claims and the Respondent had made concessions. The Respondent had failed to provide accounts and certificates in conventional format and in conformity with the requirements of the Lease. Had it done so the Applicant may not have found it necessary to bring these proceedings. The Tribunal acknowledges that the Respondent's officers are voluntary and doing what they can to run the Park in a sensible, convenient and cost effective way to the mutual benefit of all tenants. The Tribunal recognises that the Respondent has made concessions. However, in the view of the Tribunal they have not shown they have the relevant expertise in what is now quite a complex area of law and good practice and in respect of a sophisticated development such as the Park. If professional help had been sought earlier, many of the Respondent's shortcomings might have been averted.

9.4 The Tribunal also notes the tone and style of much of the correspondence sent by Mr Singer, on behalf of the Applicant to representatives of the Respondent is inappropriate and unreasonable. Mr Singer may find in future that a more polite and less confrontational style might yield more positive results. The Tribunal has been weighed down by written evidence from both parties, where much has been neither fact nor figures, but expression of personal opinions. As such it has not made the Tribunal's job any easier, nor did it allow for the hearings to proceed with the level of courtesy that the Tribunal would expect.

9.5 Having regard to all of the circumstances the Tribunal decides that it requires the Respondent to reimburse the Applicant fees of £250 paid by the Applicant. This requirement is made pursuant to regulation 9(1) of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003.



John Hewitt
Chairman
6 November 2005

BUSHEY MANAGEMENT LTD : Y/E 30.06.2003

	PHASE 1			PHASE 2			
	BLOCK	ESTATE	TOTAL	BLOCK	ESTATE	TOTAL	GRAND TOTAL
Outside décor		-	-				-
Water		611	611	3,854	1,000	4,854	5,465
Insurance	1,969	100	2,069	4,025	150	4,175	6,244
Gardening		5,926	5,926		6,079	6,079	12,005
Electricity	1,422	100	1,522	3,441	250	3,691	5,213
Cleaning	3,358	800	4,158	8,583	2,146	10,729	14,887
Repairs & Maintenance	932	571	1,503	2,103	3,497	5,600	7,103
Lift Maintenance	1,049		1,049	2,700		2,700	3,749
Telephone	83		83	290		290	373
Entry System		3,358	3,358		10,768	10,768	14,126
Accountancy	216		216	489		489	705
Windowcleaning	640		640	2,285		2,285	2,925
Miscellaneous	29		29			-	29
Motor Damage					574	574	574
Legal fees				15		15	15
Bank Charges				95		95	95
Sundry Expenses				90		90	90
Depreciation of equipment				77		77	77
Reserve Fund	4,291		4,291			-	4,291 Item deleted as original accounts did not provide for a sum to go to reserve fund.
TOTALS	13,989	11,466	25,455	28,047	24,464	52,511	77,966

BUSHEY MANAGEMENT LTD : Y/E 30.06.2004

	PHASE 1			PHASE 2			GRAND	
	BLOCK	ESTATE	TOTAL	BLOCK	ESTATE	TOTAL	TOTAL	
Outside décor		1,422	1,422		4,693	4,693	6,115	Sum allowed
Water		800	800	4,301	1,311	5,612	6,412	Adjusted to reflect a more equitable split
Insurance	2,498	125	2,623	5,212	200	5,412	8,035	Adjusted to reflect what R could justify
Gardening		5,453	5,453		6,639	6,639	12,092	
Electricity	1,408	100	1,508	5,334	400	5,734	7,242	
Cleaning	3,813	400	4,213	9,272	2,318	11,590	15,803	
Repairs & Maintenance	788	295	1,083	8,501	7,705	16,206	17,289	Adjusted to reduce cost of water softener works to £1000
Lift Maintenance	1,101		1,101	2,784		2,784	3,885	
Telephone	79		79	367		367	446	
Entry System		3,169	3,169		11,541	11,541	14,710	Adjusted to accord with invoice submitted
Accountancy	217		217	488		488	705	
Windowcleaning	720		720	4,037		4,037	4,757	
Miscellaneous	16		16	81		81	97	
Legal fees				30		30	30	
Depreciation of equipment				58		58	58	
Reserve Fund	3,263		3,263				3,263	Deleted as inappropriate to include in this account
							-	
TOTALS	13,903	11,764	25,667	40,465	34,807	75,272	100,939	

Hartbourne Park
Table Of Floor Areas

Appendix 3

Flat No.	No. of Bedrooms	Internal Area Sq Ft excl Terrace	Service Charge Pecent
Phase 1			
1	2	1305	3.22%
2	2	1308	3.23%
3	3	1440	3.56%
4	2	1305	3.22%
5	2	1308	3.23%
6	3	1526	3.77%
7	3	2258	5.57%
8	3	1990	4.91%
Total		**12440**	30.71%
Phase 2			
9	2	1220	3.01%
10	3	1385	3.42%
11	3	1820	4.49%
12	3	1386	3.42%
14	2	1248	3.08%
15	1	959	2.37%
16	2	1267	3.13%
17	3	1385	3.42%
18	3	1385	3.42%
19	2	1248	3.08%
20	2	1098	2.71%
21	2	1267	3.13%
22	3	1385	3.42%
23	3	1385	3.42%
24	2	1248	3.08%
25	2	1098	2.71%
26	3	2090	5.16%
27	2	1947	4.81%
28	3	2067	5.10%
29	2	1177	2.91%
Total		**28065**	69.29%