



LRX/174/2007

LANDS TRIBUNAL ACT 1949

LANDLORD AND TENANT – service charges – management charges – inadequate reasons given by LVT in its substantive decision for reduction – this error not cured by the volunteering by LVT of an additional reason (which had never been put to the parties at the hearing) in LVT’s decision refusing permission to appeal.

**IN THE MATTER OF AN APPEAL FROM A DECISION OF THE LEASEHOLD
VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL**

BETWEEN

WISESTATES LIMITED

Appellant

and

**MS ALPA MULJI
MR M MOHAMED**

Respondents

**Re: Carmel Court,
Kings Drive,
Wembley,
Middlesex HA9 9JE**

Before: His Honour Judge Huskinson

**Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL
on 10 February 2009**

David Nicholls instructed by Teacher Stern LLP for the Appellant
The Respondents did not appear and were not represented

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DECISION

Introduction

1. The Appellant appeals from the decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel (“the LVT”) dated 20 September 2007. There were two applications before the LVT which were ordered to be heard together. Both applications constituted applications under section 27A of the Landlord and Tenant Act 1985 as amended and required the LVT to decide upon the amount of service charge payable by Mr Mohamed and Ms Mulji for the service charge years ending 31 December 2003, 2004, 2005 and 2006 for their respective flats, being Flat 93 and Flat 7 at Carmel Court.

2. The Appellant is the freehold owner of Carmel Court and also of the neighbouring Kings Court. The Respondents hold their respective flats on long leases from the Appellant. Carmel Court and Kings Court are described in paragraphs 6 to 11 of the LVT’s decision.

3. The terms of the leases make provision for payment of a service charge in accordance with Clause 4 of the lease and the Fifth and Sixth Schedules thereto. As is explained below, the present appeal to the Lands Tribunal only concerns the amount decided by the LVT to be payable as management fees as an ingredient in the overall service charge (or, to use the phraseology of the lease, of the “Maintenance Contribution”). So far as concerns the ability to charge for management fees, the Sixth Schedule to the respective leases sets out the categories of expenditure which can be included within the service charge and contains the following provisions in paragraph 1:

“To employ and pay the remuneration of a Chartered Surveyor to manage the Building and its curtilage and to collect the rents and maintenance contributions in respect of the flats therein 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 this Lease The Surveyor may (but need not) be a member director or employee of the Lessor and his remuneration herein shall not be more than is reasonably commensurate with his services in relation to the Building.”

4. There were various challenges advanced by the Respondents to the amount of the service charges for the relevant service charge years including challenges to the following items in respect of some or all of these service charge years:

- Charges for electricity for the common parts
- General repairs and maintenance
- Cleaning
- Garden maintenance
- Entry phone rental and maintenance
- Fire protection equipment
- Porter’s wages
- Pest control

- Replacement of a door to the cleaner's property
- The engagement of additional assistance for the upkeep of the grounds
- The installation and painting of bollards
- Insurance
- Accountancy fees
- Legal expenses
- Bank charges
- Management fees

Also in respect of the year ended December 2003 there was a challenge based upon the lack of invoices for that period.

5. As regards all the other matters in dispute, ie apart from the charge for management fees, the LVT found in favour of the Appellant and concluded that the sums charged for had been reasonably incurred and that the amount charged was reasonable.

6. As regards management fees the amounts included within the overall accounts (a certain percentage of which was then allocated to each tenant) for the relevant service charge years were as follows:

2003	£22,278
2004	£17,892
2005	£19,751
2006	£20,736.64

I was told that there are 73 flats in Carmel Court and accordingly the charge per unit in respect of management fees works out as follows (all figures given are inclusive of VAT):

2003	£305.18
2004	£245.10
2005	£270.56
2006	£284.06

7. There was evidence before the LVT that Country Estates Management Limited ("CEM") took over as managing agents of Carmel Court on 23 June 2003 from Maunder Taylor, who were the previous managing agent. There was evidence before the LVT that CEM initially calculated their management fees on a fixed fee per unit basis of £197.91 (exclusive of VAT), which comes to £232.54 inclusive of VAT (see Mr Rayden's witness statement of 28 June 2007). The reason why the charge per unit for the year ending December 2003 was substantially more than £232.54 per unit was because during the period of the year up to 23 June 2003 Maunder Taylor were managing and were charging at a substantially higher rate than CEM.

8. It may be noted in relation to the period of Maunder Taylor's management that in paragraph 91 of its decision the LVT stated as follows:

“It was also clear that there were difficulties with the handover of documentation from one managing agent to another, and there is evidence that after County Estate Management Limited took over the management, that they were able to produce invoices in support of the expenses and there was no pattern of poor record keeping.”

Insofar as there is any guidance on the point from within the decision of the LVT, it appears that the LVT considered that the record keeping of CEM was superior to that of Maunder Taylor. There is nothing within the LVT's decision to indicate that in any identifiable respect the management under Maunder Taylor was better than under CEM.

9. As regards the management charges the LVT dealt with these in paragraphs 101 to 104 of its decision. Paragraphs 102 and 103 are devoted to consideration of the issue of insurance and whether CEM was entitled to retain a commission upon the placing of such insurance. There is nothing within these two paragraphs which purports to give any reasons for reducing the amount of the management charges. As regards paragraphs 101 and 104 the totality of the reasoning of the LVT in relation to management charges is as follows:

“101. However when considering the management charges, the Tribunal considered the effectiveness of the management at Carmel Court.

104. The Tribunal note that there was a considerable service charge arrears problem at Carmel Court, and that despite a considerable amount spent on legal cost, the arrears problem still existed. There was little evidence of strategic planning to deal with this issue. The Tribunal decide that there ought to be a reduction in the management charges to reflect the fact that there are failures in management, and have accordingly reduced the charges to £200 per unit plus VAT. (For 73 flats at £235 plus VAT). The revised management charges will accordingly be”

The LVT then set out that the management charges would be £17,155 for each of the four service charge years ending December 2003 to December 2006, ie 73 Units at £235 per unit.

10. The Appellant applied to the LVT for permission to appeal to the Lands Tribunal. Permission was refused by the LVT and in giving its reasons for refusal the LVT appears to put forward additional reasons for concluding that £200 plus VAT was appropriate figure for management charges:

“(i) The Tribunal carefully considered all of the evidence, and on that basis made a decision that the figure of £200 plus vat was reasonable. The charge of £200 plus vat was considered to reasonable reflected the figure for management charges in the borough of Brent for properties similar to Carmel Court.

(ii) The evidence given at the Tribunal, was that Carmel Court had significant problems with service charge arrears, and that this was one of the factors which made it difficult to manage, and that had impacted on the ability of the managing agents to deal with issues raised by the tenants relating to the

standards at the property, paragraph 101 and 104 of the decisions comment on the evidence concerning the need for intensive management and illustrate a defect in the management.

- (iii) The Tribunal did consider whether the management fees were reasonable incurred. The Tribunal considered that the charges were reasonable incurred; however, on the question of quantum, the Tribunal considered that the scale of fees were too high and accordingly capped the fees to a level that was considered to be reasonable.”

11. The Appellant applied to the Lands Tribunal for permission to appeal. In granting such permission the President made the following observations:

“I note that the LVT appears to give two different, and on the face of it, inconsistent reasons for reducing the management charge. In para 104 of the substantive decision the reason is stated to be the need to reflect failures in management. In para 1(i) of the refusal of permission to appeal it said that the £200 plus VAT reflected the figure for management charges in the borough of Brent for properties similar to Carmel Court. I think that the contentions advanced in the grounds of appeal could well succeed. In particular it appears that there may have been procedural shortcomings in that matters on which the LVT based its decision, including a failure to put to the applicant the LVT’s perception of the general level of charges in Brent and the applicability of these to Carmel Court.”

The President stated that permission was limited to the issue of whether the LVT erred in its decision on management charges and would be by way of review.

12. Ms Mulji did not give notice of intention to respond to the Appellant’s appeal. In her letter dated 7 March 2008 to the Lands Tribunal (copied to the Appellant’s solicitors) indicating she did not propose to respond Ms Mulji raised the following point. She drew attention to the wording of paragraph 1 of the Sixth Schedule to the lease (set out in paragraph 3 above) and she contended that the lease required the managing agent to be a “Chartered Surveyor” and that CEM were not chartered surveyors and that accordingly their appointment was not in accordance with the terms of the lease and, by implication at least, she appears to contend that therefore no charges may be made under the service charge provisions for any purported management work carried out by CEM. As regards Mr Mohamed, he did give notice of intention to respond to the Appellant’s appeal and he served a statement of case. However, in due course, by a letter dated 19 January 2009, he stated that he was withdrawing his objection to the present appeal “as the Residents Association is pursuing a similar matter”. In the event neither of the Respondents was present or represented at the hearing before me.

Appellant’s submissions

13. In summary, for the reasons set out below, Mr Nicholls on behalf of the Appellant submitted that the LVT gave no legally sustainable reasons within the body of its decision for reducing the management charges as contained within the overall service charges for the

relevant years. He submitted that this omission was not cured by the offering of a further reason within the subsequent document whereby the LVT refused to grant permission to appeal.

14. At the hearing I raised with Mr Nicholls the significance of the point raised by Ms Mulji in her letter of 7 March 2008 (see paragraph 12 above). It appeared that this point may have been raised before the LVT, see paragraph 85 of its decision, but that the LVT did not reach any conclusions upon it. I was concerned as to whether, supposing that I was persuaded by Mr Nicholls that the LVT's decision could not stand for want of any legally sustainable reasons, I would then need to consider this point raised by Ms Mulji when deciding whether the Appellant was entitled to any larger sum by way of management charges than was allowed by the LVT (Ms Mulji's point would, if correct, appear to result in nothing being properly chargeable by way of management charges). After a brief adjournment Mr Nicholls told me that, from his instructing solicitor's notes of what occurred at the hearing before the LVT and from his own recollection (which had been refreshed by these notes) the position at the hearing before the LVT on this point was follows. The point to the effect that CEM did not constitute a "Chartered Surveyor" within paragraph 1 of the Sixth Schedule was only raised in closing submissions by Mr Mulji, on behalf of Ms Mulji, at a stage where Mr Nicholls had already made his closing submissions. This being the position the Appellant responded to the point by saying that there was an employee at CEM, a Mr Steven Gayer (the spelling of whose name I may not have got correct) who is a Chartered Surveyor and who was supervising Sarah Belsham, who was responsible for the day to day management of Carmel Court on behalf of CEM. It was submitted to the LVT that therefore there was someone who was a Chartered Surveyor with a sufficient supervisory capacity to allow CEM's work to be properly treated as work by a Chartered Surveyor. It appears that the LVT was satisfied upon this point – in any event the LVT did not make any finding adverse to the present Appellant on this point. There is of course no cross appeal by either Respondent seeking to raise this point. In the light of this information given to me by Mr Nicholls and in the absence of any cross appeal by either Respondent seeking to raise this "Chartered Surveyor" point, I conclude that it is not proper for me to pursue this point in the present appeal and that the proper course is for me to proceed on the assumption (but without deciding) that there was during the relevant service charge years sufficient oversight by a Chartered Surveyor of the management provided by CEM to enable the Appellant to bring CEM's management charges within the Sixth Schedule paragraph 1 to the leases. I understand that there may be other proceedings before an LVT in relation to Carmel Court and it may be that this Chartered Surveyor point will fall to be considered, on full evidence, in those proceedings. I however must proceed in the manner mentioned above in relation to the present appeal.

15. Mr Nicholls first submitted that even if (contrary to his case) there were within the LVT's substantive decision sufficient reasons for reducing the management charges, the additional reason put forward by the LVT in its decision refusing to grant permission to appeal was of itself sufficient to vitiate the LVT's decision. He advanced the following points:

- "(1) It is not permissible for an LVT to seek to justify a decision, which is required to be given with reasons, by subsequently adding reasons which were not contained in the substantive decision. If the LVT relied on this additional

reason it was the LVT's duty to have said so in the body of its substantive decision.

- (2) The LVT failed to put this additional reason to any party at the hearing. This was a substantial procedural defect causing prejudice to the Appellant.
- (3) The LVT sought to justify £200 plus VAT as being the reasonable management charge on the basis that this "reflected the figure for management charges in the borough of Brent for properties similar to Carmel Court." However this was merely asserted without the evidence of any comparables being referred to. The Appellant was unable itself to put forward evidence in relation to management charges for properties which it contended to be similar to Carmel Court because it was unaware that this line of reasoning was being adopted by the LVT. Nor was the Appellant able to comment upon such properties as the LVT had in mind as allegedly being comparable because these were not identified.
- (4) Accordingly the apparent reliance by the LVT upon this additional reason, which was not included in the body of its decision and which had never been raised with the parties, was sufficient of itself to indicate that the LVT had relied upon a matter it should not have relied upon and to indicate that in consequence the decision could not stand.

16. However Mr Nicholls also submitted that, quite apart from the points mentioned above in respect of the additional reason given by the LVT, the body of the decision itself showed that the LVT had no legally sustainable reasons for reaching the conclusions it did regarding management charges.

17. Mr Nicholls pointed out that the Appellant had succeeded upon all the numerous points of challenge (see paragraph 4 above) which had been raised by the Respondents in relation to the service charges. Thus, put broadly, the Appellant through the management provided by CEM had provided services to a reasonable standard and had charged a reasonable amount for them. No criticism of CEM can be detected so far. The only criticism of CEM is to be found in the passages in paragraphs 101 and 104 of the decision (see paragraph 9 above). When examined these show that the LVT concluded that there were "failures in management". However the only matter which is identified as being capable of constituting a failure in management is the fact that there was a considerable service charge arrears problem at Carmel Court and that despite a considerable amount spent on legal costs the arrears problem still existed and

"There was little evidence of strategic planning to deal with this issue"

18. Mr Nicholls contended that the LVT had erred in that:

- (1) The LVT had not explained what it meant by "strategic planning" and had not put to the Appellant during the hearing that it was minded to conclude that there was lack of "strategic planning" and that it was minded in consequence to reduce the allowable management charges.

- (2) Also Mr Nicholls argued that the LVT had elided difficulties in management with defects in management in that the LVT appears to have assumed that because there are problems in managing this property this therefore shows that there must be defects in the management provided, such as to justify a lesser management charge. It might equally logically be argued, he submitted, that because there are problems in managing this property this justifies more intensive management input and therefore justifies a higher management charge.
- (3) Mr Nicholls further argued that even if, contrary to his submissions, any reduction in management charges was justified, no reason had been advanced by the LVT as to why there should be a uniform reduction over each of the four service charge years. Instead the LVT should have considered each year separately and, further, the LVT should in any event have concluded that there should be a difference in the recoverable management charges, at least to reflect inflation if nothing else, as between the successive years.

Conclusions

19. In my judgment the LVT's decision to limit the management charges in the manner it did is flawed and cannot be allowed to stand. My reasons for so concluding are substantially those advanced in argument by Mr Nicholls and can be summarised as follows.

20. The LVT's decision proceeded on the basis that the Appellant did in fact incur by way of management charges the amounts shown for each service charge year as set out in paragraph 6 above. There was no criticism of the management provided by CEM so far as concerns the various services which were provided. Thus numerous items were challenged by the Respondents but upon all of these the LVT found in favour of the Appellant and concluded that for the item in question the charge was reasonable and was properly recoverable through the service charge having regard to section 19 of the Landlord and Tenant Act 1985.

21. The only reason given for cutting down the amount of the management charges is contained within paragraphs 101 and 104 of the decision and is said to reflect "failures in management". However the mere fact that there was a considerable service charge arrears problem does not of itself indicate failures in management or that the charges for management should be less than would otherwise be appropriate. Indeed the contrary would appear to me to be the more logical conclusion, namely that if there is at any particular property a considerable service charge arrears problem then this is likely to require additional management time and thereby justify higher (rather than lower) charges for management. Accordingly the entire justification, as contained within the LVT's substantive decision, for cutting down the management charges would appear to be contained within the sentence

"There was little evidence of strategic planning to deal with this issue".

In my judgment this is an insufficiently particularised criticism to justify a reduction in the management charges. The LVT does not explain what form of strategic planning it would expect of a reasonably competent managing agent and to what extent CEM had fallen short of this standard.

22. In my judgment there is not contained within the LVT's substantive decision any clear and sufficient reason for reducing the claimed management charges.

23. The question then arises as to whether this deficiency in the reasoning within the LVT's substantive decision can be cured by the volunteering of the further reason contained in the document refusing permission to appeal. I was not referred to any authority as to whether it is open to a Tribunal, having given the reasons for its decision, thereafter to add additional reasons. However even supposing, contrary to the Appellant's argument, that it is permissible to add such reasons, the reason which has been added in the present case is not one which can lead to the LVT's overall decision being upheld. This is because the point regarding "the figure for management charges in the borough of Brent for properties similar to Carmel Court" was never raised with the parties, such that the Appellant was prejudiced by a substantial procedural defect in that it was unable to deal with the point. Also this additional reason, given by the LVT, is wholly unparticularised and does not identify any allegedly comparable properties within Brent where the management charges are allegedly in the order of £200 (plus VAT) per unit.

24. I therefore conclude that the LVT's decision reducing the amount of the management charges cannot stand. The question consequently arises as to what the Lands Tribunal should do upon the present appeal, which is by way of review, for the purpose of deciding what amount is properly chargeable for management charges.

25. I am unable to accept Mr Nicholls' submission that, once it is decided the LVT's decision reducing the claimed management charges cannot stand, the only course the Lands Tribunal can take is to conclude that the full amount claimed by the Appellant for management charges must be properly payable. I consider that it is for the Lands Tribunal, if it is able to do so on the material before it, to reach a conclusion for itself as to the amount which is payable in accordance with section 27A of the 1985 Act.

26. I find the following points of particular significance:

- (1) The Respondents' challenges to all of the other items charged for through the service charge were rejected by the LVT. This suggests that the management provided by CEM was of an adequate standard.
- (2) CEM's fees were substantially less than the previous managing agents, namely Maunder Taylor.
- (3) The initial rate of charge adopted by CEM was £197.91 (exclusive of VAT) per annum for each unit, which is slightly less than the figure adopted by the LVT.

- (4) For the year ended 2003 I therefore conclude that CEM's management can properly be charged at the rate of £197.91 per annum plus VAT for that part of the year during which CEM acted as manager.
- (5) It appears that CEM's management was if anything better rather than worse than Maunder Taylor's management. There is nothing before me to justify a higher rate of charge for Maunder Taylor during that part of 2003 during which Maunder Taylor acted as manager.
- (6) Accordingly I conclude that a reasonable rate of charge for the year ended 31 December 2003 is a charge at CEM's own rate of £197.91 per annum which becomes £232.54 per unit per annum once VAT is added. On the basis that £232.54 per unit per annum is properly chargeable for management charges for the year ended December 2003, I see no reason to conclude that the amounts charged by CEM for the years ended December 2004, 2005 and 2006 are unreasonable. The amounts charged were as follows (with the percentage uplift on the previous year being shown in brackets) namely:

2004	£245.10 (5.4%)
2005	£270.56 (10.4%)
2006	£284.06 (5%)

27. Accordingly, I conclude that for the years ended December 2004, 2005 and 2006 the total amount properly to be included within the service charge account in respect of management charges is the figure given in respect of that year in paragraph 6 above. As regards the year ended December 2003 I conclude that the total amount properly to be included within the service charge in respect of management charges is a figure obtained by multiplying £232.54 by 73. In the result therefore the amounts to be included within the service charge accounts for management charges become as follows:

2003	£16,975.42
2004	£17,892
2005	£19,751
2006	£20,736.64

28. At the conclusion of the hearing Mr Nicholls made an application for costs against Mr Mohamed. The jurisdiction for the Lands Tribunal to award costs is limited by section 175 of the Commonhold and Leasehold Reform Act 2002. The Tribunal may not order a party to the appeal to pay costs incurred by another party unless he has, in the opinion of the Tribunal

“acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the appeal”

Mr Nicholls submitted that Mr Mohamed had acted in such a manner by giving notice of intention to respond and by serving a statement of case, but then not participating in the appeal. In my judgment Mr Mohamed did not act in any of the manners aforesaid in giving notice of

intention to respond and by submitting a statement of case, thereby seeking to resist the Appellant's appeal. He was entitled to decide not to participate in the oral hearing and to withdraw his objection. The fact that he had given notice of intention to respond did not, of course, necessitate a hearing which could otherwise have been avoided. It was for the Appellant to persuade the Lands Tribunal that the LVT's decision was wrong. The Appellant would have faced this task whether or not Mr Mohamed had put in documentation seeking to support the LVT's decision. He did not act unreasonably and I make no order for costs against him.

29. There is no application by either of the Respondents under section 20C of the Landlord and Tenant Act 1985 seeking an order that all or any of the costs incurred in relation to these proceedings before the Lands Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application. Accordingly, there is no application for me to consider under section 20C. Mr Nicholls indicated he wished to reserve the argument as to whether, supposing a tenant subsequently made an application under section 20C in respect of these proceedings before the Lands Tribunal, such an application would be too late having regard to the wording of section 20C(2). Any such argument, if advanced, would need to be considered if and when it became relevant.

30. In the result I allow the Appellant's appeal to the extent indicated in paragraph 27 above.

Dated 13 February 2009

His Honour Judge Huskinson