

THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE

**DECISION OF THE SOUTHERN LEASEHOLD VALUATION TRIBUNAL ON AN
APPLICATION UNDER SECTION 27A OF THE LANDLORD AND TENANT ACT 1985**

FLATS 3, 4 AND 5, 42 CHURCH ROAD, ST LEONARDS ON SEA, SUSSEX TN37 6HB

Applicant: John Wright (Freeholder)

Respondents: (1) Mr G Past (Flat 3)
(2) Mr B Rhein (Flat 5)
(3) Mrs A Boswell (Flat 4)

Dates of hearing: 4 June, 6 August and 20 August 2007

Date of inspection: 4 June 2007

Appearances: Mr S Boon of Eyre & Johnson, specialist legal services, for
the applicant

Mr J Philipps of De Rance Philipps & Co, accountants, for
the first respondent (Mr Past)

Mrs Boswell in person (4 June and 6 August only)

Members of the Leasehold Valuation Tribunal:

Mr MA Loveday BA(Hons) MCI Arb
Mr B Simms FRICS MCI Arb
Ms J Dalal

BACKGROUND

1. This is an application under section 27A of the Landlord and Tenant Act 1985 ("LTA 1985") for a Determination of liability to pay service charges over a six year period. The applicant Mr Wright is the freehold owner of a property at 42 Church Road, St Leonards on Sea. The respondents are the leasehold owners of three of the flats there. The matter raises an unusual point of law in relation to grant aid under the Housing Grants Construction and Regeneration Act 1996 which (as far as the Tribunal is aware) has not been the subject of any previous determination by a Leasehold Valuation Tribunal. For this reason, the matter was heard over two full days in August 2007.
2. The application dated 14 February 2007 was for a determination in respect of the amount payable for service charges in each of the service charge years ending 24 March 2002, 24 March 2003, 24 March 2004, 24 March 2005 and 24 March 2006 and for liability to pay interim service charge for year ending 24 March 2007. The application named Mr Past (Flat 3) and Mr Rhein (Flat 5) as respondents. On 4 June 2007, Mrs Boswell (flat 4) gave notice that she wished to be joined as a respondent. The matter was first listed to be heard on that day, and the Tribunal inspected the property. At the hearing, the applicant was represented by Mr Boon of Messrs. Eyre & Johnson, and Mr Past was represented by Mr Philipps of De Rance Philipps. Mrs Boswell was in person and Mr Rhein did not attend at all. The Tribunal granted Mrs Boswell's application to be joined. It became apparent that none of the parties was really ready for the substantive applications to be heard, and the matter was adjourned with directions being given.
3. At the adjourned hearing on 6 August 2007, Mr Rhein did not attend. The applicant was represented again by Mr Boon and by Ms F Barnett of the applicant's former managing agents Remus Management Ltd. At the

outset of the hearing, Mr Boon explained that since the application was made, the 2006/07 service charge year had ended and the certified expenditure for that year was now known. He therefore applied to substitute an application for a determination that the actual relevant costs (as shown in the 2006/07 accounts) were payable instead of the application to determine interim costs for 2006/07. The other parties present agreed to this and the Tribunal allowed the amendment.

4. The total amount claimed in each service charge year is as follows (disregarding contributions to reserve accounts):
 - (a) 2001/02: £12,919.55
 - (b) 2002/03: £2,688.48
 - (c) 2003/04: £2,471.97
 - (d) 2004/05: £3,322.19
 - (e) 2005/06: £10,508.68
 - (f) 2006/07: £3,741.49

5. On the substantive issues, the parties agreed that six separate matters fell to be determined by the Tribunal. Although some issues were conceded by the respondents during the course of the hearing, it was agreed that the issues to be determined were:
 - (a) Insurance premiums
 - (b) Asbestos survey and fire safety check (2006/07 only)
 - (c) General repairs
 - (d) Management fees
 - (e) Grant Aid (2001/02 only)
 - (f) Further professional fees (2005/06 only)

When the hearing resumed on 20 August 2007, Mr Rhein again did not attend. Mrs Boswell indicated she was content to adopt Mr Philipps's submissions and she also therefore did not attend.

INSPECTION

6. The property is a mid-terraced Victorian house converted into five flats. It comprises three storeys basement and mansard under a concrete replacement tile roof with a rear addition. Externally it is generally in good decorative condition. Internally, there is a large uncarpeted entrance hall with meter cupboard and fire alarm control box. The main hallway has been redecorated although the carpet is somewhat old. There were recent fire precaution works evident to the common parts.

PRELIMINARY ISSUE

7. A preliminary point was raised at the outset of the hearing on 6 August 2007. Mr Rhein has effectively played no part at all in the application. He has not filed any statements of case, submitted any correspondence or appeared at any hearing. By way of an application dated 13 July 2007, Mr Past asked that Mr Rhein should be "separated" as a respondent from the present application. At the hearing, Mr Philipps stated that Mr Rhein owed over £12,000 in charges and simply refused to pay anything whereas the other respondents genuinely contested "the validity and genuineness" of the charges. The other respondents wished to have nothing to do with him. The landlord should have applied to the County Court to deal with Flat 5's arrears of service charges rather than joining Mr Rhein as a respondent in the Tribunal application. There were two major differences between Mr Rhein and the other respondents. First, the landlord could have taken possession proceedings against Mr Rhein. Secondly, the lease of flat 5 was different from the remaining leases. Mr Boon wanted to leave Mr Rhein in the application. He stated that the two respondents had initially been included together simply for the sake of convenience. He accepted that Mr Rhein's arrears were much greater than Mr Past's. He submitted there was no disadvantage to the three respondents for them being dealt with together.

8. The Tribunal refused the application. Under paragraph 6(3) of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, the Tribunal has the power to grant or refuse an application for a party to be joined as a respondent. There is, however, no express power to order that a person ceases to be party. This can be contrasted with the express power of the court under paragraph 19.2(3) of the Civil Procedure Rules 2004 to order that a person cease to be a party. The procedure regulations appear to leave applicants a wide discretion as to whom they wish to join as respondents. This power is only subject to the Tribunal's power under paragraph 11 of the procedure regulations to dismiss an application which is frivolous or vexatious or otherwise an abuse of the process of the Tribunal. However, it cannot be said that the application against Mr Rhein, a lessee in substantial alleged arrears, is frivolous vexatious or otherwise an abuse of process. As part of its inherent jurisdiction to govern its own procedure, the Tribunal might (if it was minded to) order a separate hearing in respect of the application relating to Mr Rhein. However, the Tribunal is not minded to do this. There is a considerable saving in costs and time for all the parties for the three matters to be heard together. A single hearing is better use of the Tribunal's own resources. There is no obvious prejudice caused to any party by hearing the applications in this way: Mr Philipps was unable to point to any material discrepancies between the leases of the flats and in any event such differences as there were could be dealt with easily and quickly.

INSURANCE

9. The annual accounts show that actual expenditure by the landlord on insurance in each service charge year was £1,229.74 in 2001/02, £1,291.23 in 2002/03, £1,355.79 in 2003/04, £1,442.00 in 2004/05, £1,543.59 in 2005/06 and £1,602.43 in 2006/07. It was accepted that these relevant costs were recoverable under the terms of the leases of the flats. The

only issue was whether the relevant costs were reasonably incurred under LTA 1985 section 19.

10. Ms Barnett produced copies of summaries of insurance from insurers or brokers for each of the six years. He also produced a copy of the policy terms for the current policy with Fusion Insurance Services Ltd. The insurance was presently arranged by the leading brokers Jardine Lloyd Thompson. Their brief is to place comprehensive policies each year with a highly rated insurer at a reasonable premium. The policy was a block policy (covering hundreds rather than thousands of properties) for the portfolio of the applicant and a group of property interests known as Newby Associates. The total premium was then calculated for each property within the portfolio. This assessment was done each year. When questioned, Ms Barnett was unable to say whether any commission was paid to the landlord on the premium. Newby Associates dealt with the insurance and they were FSA registered – although he expected that they would receive a commission. Ms Barnett did not agree that in 2006/07 a reasonable premium would have been £1,022.10. He denied the insurance was not market tested; the insurance had been placed through a reputable broker.

11. Mr Past produced a copy of terms for Fusion Insurance which differed from the terms produced by the applicant. The general policy conditions and terrorism cover differed. Mr Philipps submitted that the premium quoted by the landlord was therefore “a sham”. The applicant's representatives should be in a position to say whether an insurance commission was paid to the landlord. Mr Past further produced six quotations for insurance cover for the present year which showed a pattern of much lower premiums than those which had been paid by the landlord. To illustrate this, he compared the premiums actually paid in each year with one of the estimates he had obtained

(although of course any of the insurance quotations he obtained could be applied to any of the years in issue). The premium of £1,229.74 for the policy placed with Independent Insurance in 2001/02 could be compared with a recent quotation from Policyfast for £737.65. He compared the premium of £1,291.23 for the policy placed with Norwich Union in 2002/03 with recent quotations he had obtained from the same insurer for £1,022.10 and £831.22. The latter included terrorism cover. He compared the premium of £1,355.79 for the policy placed with NIG in 2003/04 with a recent quotation from NIG for £942.75. He compared the premium of £1,442.00 for the policy placed at Lloyds by Jardine Lloyd Thompson in 2004/05 with a quotation from Groupama for £761.02. He compared the premium of £1,543.59 for the policy placed at Lloyds by Jardine Lloyd Thompson in 2005/06 with a quotation from Fortis for £864.50. There was no evidence of a general increase in premiums in the insurance market during the period in question. Indeed, if one compared the NIG and Norwich Union policies referred to above, there appeared to be a fall in premiums over the relevant period. The average of the premiums obtained by Mr Past was £861.54 – nearly twice as much as the premium actually charged in 2006/07. Mr Philipps suggested that the premiums in each year should therefore be reduced by 50%.

12. Mr Boon accepted that there was a discrepancy between the Fusion Insurance terms produced to the Tribunal. One was the 2006/07 edition of the policy terms and the other was the 2007/08 edition. Mr Past had obtained much lower insurance quotations for 2006/07 than the premiums paid in previous years, but the quotations were not like for like. The landlord had obtained a block policy for a number of properties, not an individual one. Although he could not explain the big discrepancy between the 'alternative' NIG and Norwich Union quotations given by the respondents and the premiums paid by the applicant, a direct

comparison ought to be made with the same period. One had to dig a little deeper. For example, Mr Past's NIG estimate was subject to reference to an NIG underwriter for approval. The Fortis policy excluded terrorism cover, buildings in the course of alteration and properties occupied by DSS claimants. The Policyfast policy seemed to assume that all flats were filled with professionals and had 5 lever mortice deadlocks. Nothing was known about what was said by Mr Past about the claims history (there had been a flood in the subject property even though there had been no insurance claim). The second respondent's best quotation (Policyfast) was plainly based on wrong information. There was a whole range of reasonable premiums available in the market; it all depended on the information given to the broker. The point was that these small discrepancies could make a difference. Furthermore, the landlord did not have to show that the premiums were the lowest possible. The test was whether the landlord spending its own money would spend it in the way that it did. The landlord covenants to insure for someone else and must make sure that claims are paid and he cannot afford for the policy to be avoided just because something inaccurate was stated on the proposal form.

ASBESTOS SURVEY AND FIRE SAFETY CHECK

13. Initially, Mr Post contested the estimated costs of £500 which were included in the landlord's estimation of interim service charges for 2006/07. Again, there is no dispute this sum was recoverable under the terms of the leases of each flat. The only issue had been whether these relevant costs were reasonably incurred under LTA 1985 section 19. However, this sum has now been overtaken by events, in that the actual expenditure for 2006/07 is now known and the parties present at the hearing agreed that the issue is no longer part of this application.

GENERAL REPAIRS/HEALTH AND SAFETY

14. The annual accounts show that actual expenditure by the landlord on general repairs in each service charge year was £239.22 in 2001/02, £164.50 in 2003/04 (with health and safety costs of £105.75), £108.10 in 2004/05, £2,109.54 in 2005/06 and £883.52 in 2006/07. It was accepted that these relevant costs were recoverable under the terms of the leases of the flats.

15. Mr Philipps conceded (either at the outset or during the course of his cross examination or closing submissions) that the bulk of these costs were recoverable. These concessions eventually extended to the entirety of the general repairs/health and safety costs for 2002/03, 2004/05, 2005/06 and 2006/07. As for the remaining costs, Mr Boon accepted that part of the 2001/02 costs (an estate agent's board costing £39.72) should not have been included in the service charges, and subject to this, the balance of costs for 2001/02 (£199.50) were agreed. The only issue was therefore whether the relevant costs of general repairs in 2003/04 were recoverable. Mrs Boswell was happy to accept these concessions.

16. Ms Barnett produced receipted invoices for the various items of expenditure. The agents kept folders of local contractors in the office who had proved reliable and competitive for such minor works. For the sums involved, it was simply not worth market testing these costs. In respect of 2003/04, Ms Barnett produced receipts for drain jetting (£164.50) and a health and safety risk assessment (£105.75). The former was for a blocked drain and was not an insured risk. The latter was a visual assessment of risks to visitors to the building carried out by the agents which was now required every two years. He produced an invoice which detailed time taken for travelling, inspection and preparing a brief report. He had not got a copy of that report. The work had been carried out by a surveyor. It would have been reasonable to

subsume this cost in the annual management fee had this work been carried out by an employee – but this was not the case.

17. Mr Philipps challenged the cost of drain jetting in 2003/04 since this was an insured risk. However, he was unable to point to any provision of any insurance policy to show that this cost was capable of being recovered from insurers. The health and safety risk assessment was unnecessary. There was no visual inspection and no report prepared. The cost should have been included in the work carried out by the agents in return for their annual management fee.

MANAGEMENT FEES

18. The annual accounts show expenditure on basic management fees (exclusive of VAT) of £562.50 for 2001/02, £600.00 for 2002/03, £600 for 2003/04, £675.00 for 2004/05, £762.50 for 2005/06 and £750.00 for 2006/07. Management had been carried out by Remus for most of the relevant period, but new managing agents Austin Rees Chartered Surveyors had taken over in 2006.
19. Ms Barnett stated that Remus charged a basic annual fee with an additional fee to cover unusual non-recurring items such as major works. The basic fee included accounts, handling minor repairs and two visits to the property a year. The basic fee did not include production of the annual accounts but it did include operating the service charge accounts, sending out invoices etc. There was a written management agreement but he had no copy. For items outside the basic fee a charge was made on a time basis rather than a percentage of expenditure. In some years, there was a lot of work to do under the basic fee (such as unusually heavy correspondence) and in others not such a lot. Ms Barnett produced quarterly invoices from the agents for management costs in each year. He calculated that the fees amounted to between £112.50 and £150.00 per flat per year plus VAT which in his

experience sounded "about right". He was unable to reconcile two specific invoices dated 23 March 2006 and another dated 19 September 2006. In cross examination, Ms Barnett accepted that the agents' costs had increased above inflation. Mr Boon conceded that Ms Barnett had been unable to reconcile the three invoices, but this had been a result of an apportionment by the agents of costs over two different accounting years. As for increases above inflation, he believed that an annual charge of £112.50 per flat had been too low to start with. There were no comparables (other than a comparison between the fee charged by Remus and Austin Rees).

20. Mr Philipps accepted that it was reasonable to incur a cost for management of the property and that a charge of £562.50 was a reasonable figure to charge for management in 2001/02. However, he did not accept that the fee should increase in each year above the rate of inflation. A reasonable increase would have been no more than 5% per annum.

GRANT AID

21. The second respondent challenged costs of £5,000.60 and £5,666.01 included in the 2001/02 accounts in respect of building costs and professional fees which were alleged to be covered by grant aid. It should be noted that the respondents accepted that no issue arose under LTA 1985 section 20 and although no section 20 consultation documents were produced at the hearing, there are references in the correspondence to section 20 notices having been served.
22. Ms Barnett stated that the costs were derived from a schedule headed "Service Charge Working Papers - Expenses Recovery Sheet". The landlord had spent £9,161.80 in the 2001/02 service charge year on emergency roof repairs and scaffolding. However, the landlord had

already collected £4,188.63 on account of these costs in the previous year. This sum was therefore credited against the 2001/02 account to produce a net expenditure of £5,000.60. Of the £5,666.01, the bulk was for the surveyor Richard Metcalfe who had handled the grant application referred to below. He charged £4,824.24. In addition, Remus made a time charge of £841.77 for dealing with the grant application. Ms Barnett produced a fee note dated 21 December 2001 and an invoice dated 24 March 2002 to support these costs.

23. The background to the grant aid issue was that there had been water ingress through the roof of the property. In November 2000, an application had been made to Hastings Borough Council for 'Discretionary Renewal Grant' under the Housing Grants Construction and Regeneration Act 1996 ("HGCARA 1996") to cover the cost of repairs. In January 2001, Hastings BC served a statutory notice requiring works under the Public Health Acts (no copy of the notice was produced). Pending the outcome of the application for grant aid, emergency work was carried out and scaffolding was erected. Estimates from various contractors were then obtained and on 12 April 2001 Remus submitted these to the Council as part of the application. The costs included the sums already spent on scaffolding and other emergency works, surveyor's fees and the agents' costs in supervising the process. Eventually, the total amount of grant claimed amounted to £140,808.68. On 17 September 2001 the Council approved the grant aid, a copy of the approval in respect of "*The First Floor Flat*" being sent to Mr Past. However, it did not pay the whole of the sum claimed to the landlord. First, the Council disallowed costs of £5,881.81, which were works of repair that had been included in the grant application but were not eligible for grant aid. Secondly, it deducted means-tested contributions of £13,492.76 from the lessees (including the notional contribution from the landlord referred to below). Thirdly, it paid the

whole of the balance (£118,350.02) directly to the main contractor, Ellis Builders of Eastbourne. This was despite efforts by Remus (see letter 1 March 2002) to get the Council to pay some of the grant directly to the agents. This last point created a practical difficulty. The grant was supposed to cover not only the main contractor's own costs and profit but also professional fees and the emergency works and scaffolding bills already paid by the landlord. Ellis was owed approximately the same amount as the cheque sent to it by the Council. Ellis took the whole of the grant aid paid by Hastings BC in satisfaction of its own element of the works. The landlord was therefore left to pay the professional fees and the emergency works it had already carried out without these outgoings being covered by the grant cheque. To deal with the shortfall, the agents invoiced each lessee for their respective means-tested contribution and sought the rest of the shortfall by way of the present service charge demands. As far as the grant process is concerned, this was administered by the Council, but the application was put together by the grant surveyor Metcalfe Stanley Hicks. Mr Metcalfe viewed himself as employed by the landlord as can be seen from the certificate for payment for the works dated 6 June 2003 in which the surveyor described Remus as the "employer".

24. As far as the means tested contributions are concerned, they are set out in a schedule entitled "unforeseen works@ 42 Church Road – calculation of amended grants". There is more than one version of this document, but the latest one shows the freeholder making a 'contribution' of £9,088.57 towards the cost of the works. This was explained as a notional contribution only, to reflect the point that Mr Rhein was not eligible for grant aid at all. In fact, the landlord participated in the grant application in his own right. Mr Past was liable to make a contribution of £1,444.57 and has paid this sum to Remus.

25. When asked to address the Tribunal on LTA 1985 section 20A(1), Mr Boon submitted that the limitation in that section referred to "the amount of the grant". This must mean the net amount of grant paid to the contractor, rather than the gross grant including any means tested contributions. The grant itself appeared to be Common Parts Grant under HGCARA 1996 section 1(3). The fact that the works were grant-aided did not mean they were not costs recoverable under the service charge provisions in the leases. The £5,000.60 was the cost of emergency building works and scaffolding. The application for grant aid was effectively a composite application made by both landlord and tenant.
26. He accepted he could not produce any agreement between Mr Metcalfe and the landlord to show the surveyor was employed by the applicant, but Mr Metcalfe had clearly referred to its client as Remus in the certificate for payment and in a letter dated 6 July 2007 to the applicant's legal representative (a letter produced by the second respondent). The professional costs were all costs involved in supervising the emergency works and the grant application. Had they not been involved, the grant aid would have been much smaller and the lessees would have incurred much higher costs.
27. Mr Past gave evidence that the grant aid related to the Southwater Renewal Area. Early on, he had contacted Remus to explain that grant aid was available to 'do up' the property. Remus began work and erected the scaffolding some 18 months before the grant aided works started. Each resident then received a bill for about £16,000-£17,000. They therefore went down to the renewal area office and asked that the works should stop. It took a long time, but the residents persuaded Hastings BC to make means-tested grants to the residents. He was clear that the application was made by the leaseholders and not the landlord. Mr Metcalfe came on board because he was already

employed by the landlord – so the Council decided to stay with him. As far as the residents are concerned, the Council instructed the builder. A few months after the application was submitted, the leaseholders completed means-testing forms and he personally received a bill for £1,444.57. He paid this either to Remus or the Council, but he could not remember which. In fact, Mr Past took out a loan to cover the contribution. After the work was completed, he also received a service charge demand. He was paying the service charge to top up the grant, to “to put into the pot”. Every leaseholder paid something different and the landlord paid for flat 5.

28. Mr Philipps submitted that the grant was given to the tenant, not to the landlord. The respondents had already made a contribution to grant as required by the legislation, and they were now being asked to pay for something which was covered by grant aid. The landlord had been paid grant to cover the scaffolding and emergency works and the surveyor's and agents' costs. The grant aid had nothing really to do with the landlord at all. In addition, the landlord did not reasonably incur the professional costs: Mr Metcalfe was employed by the Council and Remus's work was unnecessary since the project was supervised by Hastings BC.

FURTHER PROFESSIONAL FEES

29. The 2005/06 accounts include further professional fees of £5,755.60. The bulk (£5,170.34) related to further work by Metcalfe Stanley Hicks. There were also bills amounting to £585.26 for further fees for Remus for work carried out from September 2005 onwards.
30. Mr Philipps submitted that LTA 1985 section 20B barred recovery. Mr Metcalfe rendered his first fee note on 21 December 2001. This provided that although work had already been carried out, further fees were due

at 10% of the eventual contract sum. The building works were completed in 2002 by which time the contract sum had increased. The costs had been "incurred" in 2002 when Metcalfe completed its work. Alternatively, the cost was "incurred" on 13 December 2004 when Mr Metcalfe eventually rendered his final fee note to Remus. That note provided 28 days for payment. If he was wrong, the cost was "incurred" on 14 February 2005 when Remus appears to have authorised payment. That fee note was eventually paid by cheque on 13 July 2005. No service charge demand was made for the additional professional fees before August 2006 when the 2004/05 accounts were produced. The balancing charges based on those accounts were claimed from leaseholders on 6 September 2006. It followed that the latest date for the cost being "incurred" under section 20B was 6 March 2005, a date 18 months before the relevant costs were demanded.

31. Ms Barnett stated that the Metcalfe bill was the second instalment of fees for supervision of the grant-aided works. The surveyor's fee note was rendered on 14 December 2004 and paid on 13 July 2005. Mr Boon described this cost as 'a bolt from the blue' for the agents. Remus was not in funds and had to transfer moneys from the reserve fund to cover the bill. Mr Boon accepted that unless the relevant costs were "incurred" on 13 July 2005 when the fee note was paid, the landlord was not entitled to recover this cost under section 20B. He realistically admitted that he could not show that the costs was actually incurred on that date, but relied on estoppel. The additional fees for the surveyor were included the schedule of "unforeseen works" and at all times after the grant was made, Mr Past should have been aware that the expenditure was going to be incurred. It did not seem fair that the leaseholders would obtain a windfall by having the surveyor's bill paid. In any event, £585.26 of the total cost related to Remus's work, not Mr Metcalfe's. This

was work charged on a time-costed basis over and above the basic fee for supervision of works etc.

FINDINGS

32. Insurance. The requirement under section 19(1) of the Act is not that the premiums were "reasonable", but rather that relevant costs were "reasonably incurred". The principles were considered in **Forcelux v Sweetman** [2001] 22 EGLR 173 and **Veena SA v Cheong** [2003] 1 EGLR 175. There is a two stage test involving consideration (1) whether the action taken by the landlord in placing the insurance was reasonable and (2) whether it is out of line with the market norm. The Tribunal rejects the suggestion that any of the landlord's insurance summaries are a sham. It accepts that the discrepancy between the two sets of insurance terms for Fusion Insurance produced can be explained by one being for 2006/07 and one for 2007/08. There is no evidence that the discrepancy between the two sets of Fusion policy terms make any difference to the premium which ought to be charged. The Tribunal accepts the submission by Mr Boon that a range of premiums in the market may be "reasonably incurred" and that a landlord does not have to select the cheapest option. Considerations such as avoidance of risk when making claims and the convenience to the landlord of placing insurance by way of a block policy are perfectly proper factors to take into account. Here, the landlord's agents stated (without challenge) that insurance premiums were tested annually and insurance placed with reputable insurers and/or through reputable brokers. These actions by the landlord are plainly reasonable. A more difficult issue is whether, notwithstanding the testing of the market, the relevant costs were out of line with the market norm so as to make the relevant costs not reasonably incurred. Here, the real difficulty is that the information provided to both the landlord's insurers/brokers and the information provided by Mr Past for his alternative insurance quotations are wholly

absent. Mr Boon points to a number of ways in which some of Mr Past's quotations are either provisional or inconsistent with the terms of the policies actually taken out. Moreover, the alternative estimates are premiums estimated for 2007 whereas there is no information given about historic premiums in St Leonards on Sea. We accept there is force in these submissions and, although the quotations might at first glance appear to show that the premiums incurred were out of line with the market norm, we are not prepared to find that this is the case without expert evidence (e.g. from an insurance broker).

33. The Tribunal allows the cost of insurance in each year.
34. Asbestos survey and fire check. As stated above, this point is no longer a live issue.
35. General repairs. The Tribunal notes the concession by the landlord which limits the costs claimed for 2001/02 to £199.50. Subject to this, all costs for general repairs are agreed, apart from two items in 2002/03. The Tribunal finds for the landlord on both these points. The agents gave details of a reasonable system for procuring the work to be carried out in the light of the modest level of costs involved. There is no evidence the works could have been carried out more cheaply. In respect of the cost of drain cleaning, the respondents produced no evidence that this was an insured risk. In respect of the health and safety risk assessment, this is something an ordinary prudent landlord would undertake. Although we were not shown the agents' terms of engagement, a health and safety survey by a surveyor is typically something that agents would charge for in addition to their basic fee. There is therefore no evidence this cost was or should have been contractually included in the work covered by the management fee.

36. The Tribunal allows the cost of repairs and health and safety inspections in each year subject to the concession by the landlord in relation to the agent's board in 2001/02 (£39.72).
37. Management fees. The Tribunal accepts that the sums recorded in the certificated accounts were incurred in each year. Although it is difficult to reconcile the three invoices referred to above with the sums charged, we note that the 2005/06 and 2006/07 accounts are both certified by accountants in accordance with LTA 1985 section 21 (2). The figures recorded in the accounts also follow a logical and straightforward method of charging for the basic fee as described by the agents. The landlord carried out some market testing of costs – as evidenced by the fact that he changed agents in 2006 to a cheaper option. The only real criticism made by the respondents is that the charge should not have increased over the years above inflation. The Tribunal notes that over the period March 2002 to March 2007 the RPI measure of inflation rose by 17%. The fees in this case rose in three out of the five years, but remained the same or fell in two years. The significant increase was in 2004/05 and the agents' fees are now some 33% higher than they were in 2001/02. However, there are many possible explanations why an agent should increase its charges above the rate of inflation; the point raised by Mr Boon (that the charges were too low to being with) being merely one of them. Without any specific evidence about the prevailing rates charged by agents in this area the Tribunal is not prepared to find that the costs were excessive. Indeed, using its own experience, the Tribunal considers a charge of between £112.50 and £150.00 per flat is relatively modest in Sussex.
38. The Tribunal allows the full cost of management fees in each year.
39. Grant aid. The starting point here is that it is not disputed that the costs were incurred by the landlord, and that the sums of £5,666.01 and

£5,000.60 are properly recoverable under the terms of the leases. Subject to these points, the costs are payable unless they are not 'reasonably incurred' under section 19 of the 1985 Act. The Tribunal considers separately the issue of LTA 1985 section 21B below.

40. There is not much dispute about the facts in relation to this aspect of the application. The only significant issues of fact are who made the application to the local authority for grant aid, and whether the landlord or the local authority employed Ellis builders and Mr Metcalf. On the first of these issues, it probably matters little for the purpose of this application. By HGCARA 1996 section 15(1), an application may be made either by the landlord or by three quarters of the lessees. Applications are thereafter treated in the same way. Insofar as it is necessary to make a finding of fact on this, the Tribunal finds that the application was effectively a composite application by both landlord and lessees. The letter of 17 September 2001 to Mr Past does not relate to the whole of the application and specifically refers to only the first floor flat. It is also plain that the landlord and Remus had a substantial input into the amount of the grant. For example, they indisputably arranged the temporary works and scaffolding. On the remaining two issues of fact, the documents shown to the Tribunal suggest Mr Metcalfe considered himself employed by Remus and/or the landlord (see fee note dated 21 December 2001, fax dated 2 August 2002 and letter dated 6 July 2007). Similarly, the documents show that Mr Metcalfe and Ellis both considered the builder to be employed by the landlord (see the certificate for payment dated 13 February 2002 and the invoice dated 22 February 2002).
41. However, the main issue raised is that the costs incurred are not reasonable because they were covered by grant aid. On this, the landlord's version of events is not challenged. In essence it is said that

the two sums set out above were costs which were not covered by the grant of £118,350.02 paid by the local authority. After this grant aid was used to pay the main contractor, the emergency works costs/scaffolding (£5,000.60) and Mr Metcalf's and Remus's bills for dealing with the grant (£5,666.01) were still payable. The only reasons these costs were not covered by the grant cheque were that £5,881.81 was not eligible for grant and because £13,492.69 of the grant application was deducted as a result of means testing. On the first of these, there is no dispute that the works fell within the repairing covenants and that the landlord incurred the cost. There is therefore no reason why these costs should not be passed onto the leaseholders by way of a service charge. The lessees' 'contributions' raise a much more difficult question. On the face of it, these ought to be recoverable from the various lessees according to the local authority's calculations of the contribution they should make. However, the problem here is that HGCARA 1996 does not provide any machinery to do this. Section 39 requires all grant payments to be made either directly or indirectly to the contractor. Once this is done, there is no means for the contractor, the landlord or the local authority to require any lessee to make the means tested contribution. Certainly the local authority may apportion liability between lessees (see section 39), but the Act provides no means for enforcing the apportionment. In any event, in this case the 'contributions' in the Schedule do not purport to make any apportionment under section 39. The effect of this can be seen rather starkly in the case of flat 5. Here, Mr Rhein's means reduced the amount of the grant by £9,088.57. The landlord has no means to recover this sum from Mr Rhein directly. It would be unfair to the landlord to expect him to have to pay this cost, and the scheme of the service charge provisions in the lease is plainly designed to enable a landlord to recover fully his outgoings on repairs etc from the lessees. The counter argument by Mr Philipps also has force – it is unfair for Mr Past and other lessees who have

made a contribution under the HGCARA 1996 scheme to then have to pay a proportion of the sums notionally contributed to by Mr Rhein. However, the test here is whether the sums claimed by the landlord were "reasonably incurred" under LTA 1985 s.19. The Tribunal considers that the applicant has acted reasonably in seeking to spread the cost of Mr Rhein's notional contribution (and indeed the other shortfalls in grant aid) between all six leaseholders rather than bearing the cost himself.

42. As to the costs of Mr Metcalfe and Remus in supervising the grant work, the Tribunal has already found they were employed by the landlord and not the local authority. Substantial work was plainly undertaken in relation to the works by both these advisers. The Tribunal finds these costs were reasonably incurred.

43. The Tribunal itself further raised the question of section 21B of the Act. That provision states:

Limitation of service charges: grant-aided works.

21A *Where relevant costs are incurred or to be incurred on the carrying out of works in respect of which a grant has been or is to be paid under ... any provision of Part I of the Housing Grants, Construction and Regeneration Act 1996 (grants, &c. for renewal of private sector housing) ... the amount of the grant shall be deducted from the costs and the amount of the service charge payable shall be reduced accordingly.*

44. HGCARA 1996 section 30 states that in relation to renovation grants:

30(3) *If in the case of an application for a renovation grant to which this section applies the financial resources of the applicant exceed the applicable amount, the amount of any grant which may be paid shall, in accordance with regulations, be reduced from what it would otherwise have been.*

Means testing also applies to common parts grants: see section 32(5). Under regulations 12(1) and 12(2) of the Housing Grants Construction and Regeneration Regulations 1996 (as amended) "the amount of

grant" is to be reduced by means testing. Once this is calculated, section 35 of the Act then states:

35(1) *Where the local housing authority have approved an application for a grant, they shall pay the grant, subject to the following provisions of this Chapter.*

45. It follows from the above that the "grant" payable in HGCARA 1996 section 35(1) is the figure payable after the means testing. "The amount of the grant" under section 21A of the Act must, as Mr Boon submits, therefore be the net figure paid by Hastings BC to the contractor. Since the sums sought by the landlord through the service charges are sums which are either means tested or for non-grant aided works, section 21A of the Act does not bar recovery of these relevant costs.
46. The Tribunal allows the cost of works of £5,000.60 and professional fees of £5,666.01 in 2001/02.
47. Further professional fees. LTA 1985 section 20B provides:

"Limitation of service charges: time limit on making demands.
20B-(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."
48. Here, it is accepted that no demand for payment was made earlier than 6 September 2006. Under sections 20B(1) and (2), the 18 month period therefore runs from 6 March 2005. As Mr Boon accepts, the lessees are not liable to pay Mr Metcalfe's bill if the costs were "incurred" when Mr Metcalfe carried out the work in 2002, when the fee

note was sent on 13 December 2004, when the 28 days allowed for payment expired on 10 January 2005 or when the agents authorised payment on 14 February 2005. He only succeeds if the costs were incurred when the cheque was actually paid on 13 July 2005.

49. The Tribunal rejects Mr Boon's primary submission on section 20B. "Incurred" here must mean when the landlord pays the bill or is under a legal obligation to do so. Here, it is at least arguable that the landlord was not under an obligation to pay the bill until 10 January 2005, but it cannot realistically be argued that a liability is only "incurred" at the date it is discharged. The agents here had plenty of time to serve notice under section 20B(2) but failed to do so.

50. The Tribunal also rejects the argument based on estoppel. No representation by the lessees has been identified, let alone an unequivocal representation. There is no evidence that the landlord paid Mr Metcalfe's bill as a result of anything said or done by the lessees. There may well have been detriment, but detriment alone is insufficient to found a promissory estoppel.

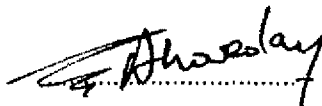
51. Finally, the Remus "time costs" were incurred well within the 18 month period allowed by section 20B. No real challenge was mounted to these costs, and the Tribunal finds that the sum of £585.26 was payable for the additional work carried out by the agents.
52. The Tribunal therefore allows £585.26 for further professional fees in 2005/06.

CONCLUSIONS

53. It follows that the Tribunal finds for the applicant on all issues except the estate agents board in 2001/02 (£39.72) and the additional fees of Metcalfe Stanley Hicks in the 2005/06 accounts (£5,170.34). The following relevant costs are payable by the respondents:

- (a) 2001/02: £12,879.83
- (b) 2002/03: £2,688.48
- (c) 2003/04: £2,471.97
- (d) 2004/05: £3,322.19
- (e) 2005/06: £5,338.34
- (f) 2006/07: £3,741.49

These sums do not reflect any issue about contributions to reserve accounts which were not the subject of any argument before the Tribunal.



Mark Loveday BA(Hons) MCI Arb

Chairman

29 October 2007