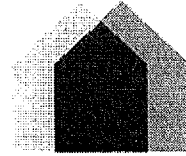


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Residential
Property
TRIBUNAL SERVICE

RESIDENTIAL PROPERTY TRIBUNAL SERVICE
LEASEHOLD VALUATION TRIBUNAL for the
LONDON RENT ASSESSMENT PANEL
LANDLORD AND TENANT ACT 1985

LON/00BK/LIS/2008/0012

Premises: West End Quay, Paddington, London W2

Applicants: Mr Raymond Gritz
Mr D Mosselson
Mr M H V Jeans
Mr Alan Sharr
Leasecliffe Ltd
Ms Bridget Walker

Represented by: Mr D Dovar (counsel)
Mr D Mosselson

First Respondent: West End Quay Management Ltd

Represented by: Mr P Brown (counsel)
Barker Gillette (solicitors)

Second Respondent Freehold Managers (Nominees) Ltd

Third Respondent (a) Paddington Basin Developments Ltd
(b) European Land & Property Ltd
(c) Paddington Basin Management Ltd

Represented by: Miss K Holland QC
Speechly Bircham (solicitors)

Tribunal: Miss S E McGrath
Mr P Roberts DipArch RIBA
Ms F P Dickie

Date of Hearing:

25/06/10

Date of Decision:

09/09/10

IN RE: WEST END QUAY, PADDINGTON , LONDON W2
DECISION

LON/00BK/LIS/2008/0012

Introduction

1. This is an application under section 27A of the Landlord and Tenant Act 1985 for a determination of the payability of service charges. On June 24th, 2010 a hearing to determine a number of preliminary issues was convened.
2. In this matter the first applicant is Mr Raymond Gritz who is the leaseholder of flat 610 sixth floor , Westcliffe Apartments, West End Quay, 1 South Warf Road, Paddington, London W2 1JB. West End Quay comprises three blocks in mixed residential and commercial use and occupies about 3 acres of land in the Paddington Basin area. It now comprises approximately 467 flats together with commercial units. The Basin area as a whole extends to about a 10 acre site. At the hearing of this matter, Mr Gritz was represented by Mr Dovar of counsel. Pursuant to directions, several other leaseholders were joined as applicants to the proceedings. Those leaseholders are: Mr D Mosselson (Flat 1205 Balmoral Apartments) ; Mr M H V Jeans (510 Balmoral), Mr Alan Sharr (807 Peninsula), Leasecliffe Limited (1205 Balmoral) and Ms Bridget Walker (604 Westcliffe). At the hearing Mr Mosselson represented the joined applicants.
3. Under the terms of their leases, the applicants are obliged to pay service charges to West End Quay Estate Management Ltd (WEQEM), the first respondent. At the hearing, WEQEM was represented by Mr Brown of counsel. WEQEM is a management company, now owned by the under-lessees of flats in West End Quay. The second respondent, Freehold Managers (Nominees) Ltd, holds the head lease of West End Quay. The second respondent did not appear and was not represented at the hearing.
4. Paddington Basin Developments Ltd is the third respondent and holds the head lessee of that part of the basin estate not let to the second respondent; European Land & Property Ltd is the fourth respondent and holds the beneficial interest in

the land. The fifth respondent is Paddington Basin Management Limited which was incorporated for the purpose of providing management services for the development. These three respondents were represented by Miss K Holland, Q.C.

5. The service charges at issue in this case relate to payments said to be due from WEQEM to Paddington Basin Management for estate management services payable under the terms of an estate management deed entered into in September 2005. WEQEM has sought to pass on those charges to the West End Quay underlessees on the basis that payment is due under the terms of their leases.

Background

6. The Paddington Basin site extends over an area of about 10 acres. The Tribunal inspected the site on 23rd June 2010 in the company of representatives of the parties. The site has been ambitiously developed over the last eight years and comprises a mixture of commercial, residential and retail premises built around the old Paddington Basin which terminates the Grand Union Canal and is adjacent to the West End.
7. The development is based on an original master plan by Terry Farrel and Partners (Architects). A series of articulated high quality buildings create linked spaces which are within the public realm. These waterside spaces are linked by pedestrian routes, with sculptural bridge; moorings and a turning circle are accommodated for canal craft as are shared facilities. Secure car parking for the blocks is provided at basement level. Further mixed development is planned for Merchant Square which lies to the north of the basin up to the elevated Westway (A40). To the south of the basin and to the west of West End Quay lies St Marys Hospital which is linked to the development. The developers objective of creating a dynamic, diverse and safe environment for residents, workers, and visitors is well progressed towards fruition.
8. On 5th December 1995, the British Waterways Board which retains the freehold of the whole area, granted Paddington Basin Developments Ltd a head lease of the Paddington Basin site for a term of 999 years. The lease excluded the stretch of water referred to as the Basin and its retaining walls. On 2nd August 1996, European Land & Property Development Ltd agreed with Frogmore

Developments Ltd that it would procure the transfer of part of the leasehold interest from Paddington Basin Developments Ltd to Frogmore Developments Ltd. The part to be sold was the West End Quay land.

9. That agreement contained provisions relating to the future provision of services to the contemplated development. Clause 13 of that agreement states:

“13.1 The Property includes areas of land and the Works include works which, in the context of the Seller’s proposals for the comprehensive redevelopment of the Retained Land and adjacent lands are intended (together with parts of the Retained Land and adjacent lands) to be common areas for the use and enjoyment of all persons having resort to the Retained land and adjacent lands and the Property. The Seller will develop as soon as conveniently may be, within the framework of its proposals for the comprehensive redevelopment, detailed arrangements (“Estate Services”) for the repair maintenance and renewal of all such common areas (“Estate Areas”) for the benefit of all occupiers of the comprehensive development of the Property. The cost of such Estate Services shall be borne on a fair and equitable basis by the occupiers of the comprehensive development inclusive of the Property (“the Estate Service Charge”)

13.2 The Seller currently anticipates that an estate management company will be created in order to provide the Estate Services and that this company will be granted leasehold interests in the Estate Areas. The Buyer will not unreasonably withhold agreement relating to the Estate Services and/ or the Estate Areas and/or the Estate Service Charge and will in particular, grant to any such estate management company a lease in such form as may be agreed with the estate management company, the Seller and the Buyer in relation to those parts of the Estate Areas which fall within the Property.”

10. On 29th December 1997 the Basin site was divided and the reversion split. The part which was to become West End Quay was sold to Frogmore Developments and Paddington Basin Developments kept the remaining parts (the retained land). This was carried into effect by simultaneously transferring part of the leasehold interest and making a Deed of Apportionment and Variation. The transferred part was then registered under a fresh title number.
11. On 5th May 2000, Frogmore’s interest in the West End Quay land was sold to West End Quay Limited (WEQ). The respective head lessees set up management companies. Paddington Basin Development set up Paddington Basin Management Limited and on 30th January 2002, West End Quay Limited

incorporated the first respondent, WEQEM. As explained in its Objects it was incorporated:

“To undertake the management and administration of the communal parts including car parking of the development known as West End Quay, Paddington, London W2, the leasehold title to which is currently registered at HM Land Registry under Title No. NGL758149, and to provide such services for the owners and occupants thereof and to carry out such reconstruction, renewal, repairs, maintenance or renovations thereto as may be necessary or desirable”.

West End Quay Ltd also caused three individual Block Management Companies to be incorporated each being limited by guarantee.

12. In the event and despite the 1996 agreement, no leases of the estate areas were granted to any management company. Furthermore no requirement was imposed in the headlease that West End Quay should make a contribution to any estate costs incurred by Paddington Basin Management.
13. The three blocks at West End Quay were completed in 2004 and West End Quay Limited granted residential underleases in a standard form. It was contemplated that control of WEQEM would pass to the lessees once the last flat was conveyed. It seems that the last flat was sold in 2004 but the handover of management did not occur until the Autumn of 2005.
14. In the meantime, on 5th September 2005 the Estate Management Deed (EMD) was entered into. The parties to the deed were (1) Paddington Basin Developments Ltd and European Land & Property Ltd (then known as Paddington Development Corporation Ltd) (2) Paddington Basin Management Ltd and (3) West End Quay Estate Management Ltd. Under the deed WEQEM covenanted to permit Paddington Basin Management Ltd to enter the West Quay Land in order to provide services to the whole of the Paddington Basin Estate (including West End Quay) including the maintenance of the common parts, the provision of security services and personnel, the maintenance of hard and soft landscaping, the collection and disposal of refuse and the control of traffic. WEQEM also covenanted to pay a fair proportion of the cost incurred by PBML in providing those services.
15. By clause 10.6 Paddington Development Corporation Ltd and Paddington Basin Management Ltd (but not WEQEM) are entitled to terminate the agreement by

serving six months notice to expire at the end of a financial year. Clause 11 provides that the agreement can be terminated by any party by six months notice being given at the end of every twenty five year period. So far as WEQEM is concerned therefore, the minimum duration of the EMD is 25 years.

The proceedings

16. WEQEM paid the first two instalments of charges under the estate management deed but thereafter failed to pay the quarterly instalments said to be due from and including the 25th March 2006. By the date of the Tribunal hearing the amount said to be owing was in excess of £1.5 million. If payments under the deed are enforceable, costs during the initial 25 year period may well exceed £12,000,000.
17. On 27th February 2008, the third, fourth and fifth respondents commenced High Court proceedings against WEQEM for outstanding amounts (around £600,000) said to be due under the Estate Management Deed. On 14th March 2008 Mr Gritz issued this application in the LVT. In his statement of case, Mr Gritz advanced several grounds in support of his contention that the charges under the EMD are either not payable at all or are not payable in full. In the High Court, WEQEM asserted that it was an implied term of the EMD that payment by WEQEM was contingent on its being able to recover the charges from the lessees.
18. On 26th March 2008, WEQEM served a defence in the High Court proceedings, which included an averment that the Estate Management Deed is a qualifying long term agreement within the meaning of section 20 of the Landlord and Tenant Act 1985. On 20th April 2010 Mr Justice Lewison decided, as a preliminary issue, that the EMD is a qualifying long term agreement.
19. Initially, the Tribunal had stayed Mr Gritz's application pending the High Court's determination on the section 20 issue. However, in August, 2009, that stay was lifted and in March, 2010, directions were given for the determination of several further preliminary issues.

The preliminary issues

20. The parties formulated the following preliminary issues to be determined by the Tribunal:
- (a) Do the provisions of the Applicant's underlease dated 2 October 2002 entitle the First Respondent to recover the costs of maintaining the land and premises which were the retained land under an Assignment of Part dated 29 December 1997 made between (1) the Third Respondent (2) European Land & Property Developments plc (3) Frogmore Developments Ltd and (4) Frogmore Estates?
 - (b) Is the Applicant prevented from pursuing the contentions advanced in paragraphs 10 to 14 inclusive of the Applicant's Reply dated 4 February 2010 ("the Applicant's Reply") by reason of the Order and judgment of Master Moncaster dated 24 October 2008 in the Chancery Division of the High Court of Justice in Claim No HC0800558?
 - (c) If the answer to the question raised in Preliminary Issue (b) above is 'No', is the Estate Management Deed dated 5 September 2005 made between (1) Paddington Basin Developments Ltd (now European Land & Property Ltd) (2) the Fifth Respondent (3) the First Respondent ("the Deed") void for the reasons alleged in paragraphs 10 to 14 of the Applicant's Reply dated 4 February 2010?
 - (d) If the answer to the question raised in preliminary issue (c) above is 'No', is the Deed voidable by reason of the matters alleged in paragraph 18 of the Applicant's Reply and if so, has it been avoided?

The First issue

21. For the reasons set out below the Tribunal determined that the provisions of the Applicant's underlease dated 2 October 2002 do not entitle the First Respondent to recover the costs of maintaining the land and premises which were the retained land under an Assignment of Part dated 29 December 1997 made between (1) the Third Respondent (2) European Land & Property Developments plc (3) Frogmore Developments Ltd and (4) Frogmore Estates plc.

The terms of the leases

22. The structure of the service charge provisions in the underleases reflects the management arrangements for the three blocks of flats at West End Quay. Thus, a “block management charge” is payable to a block management company in respect of each lessee’s apartment block and an “estate management charge” is payable to the estate management company” ie WEQEM. Additionally, if a tenant is granted the right to use a parking space, a further parking area service charge also becomes payable to the estate management company.

23. Clause E of the lease sets out the tenant’s covenants and at paragraph 3, imposes an obligation on the leases to pay a due proportion of:

“...all amounts sums costs expenses and outgoings of each and every kind whatsoever which may from time to time during the continuance of this Lease be expended or incurred or become payable by the relevant Management Company in relation to the Apartment Block and the Estate such service charges to be payable in accordance with the provisions of Clauses I and J”

By clause A12 ‘the estate’ is defined by reference to a plan as the three blocks and directly adjacent open spaces at West End Quay. Peverels are contracted to carry out management functions on the estate.

24. Under the lease, it is the estate management company, WEQEM, that provides the estate services to the lessees. Clause H sets out the estate management company’s covenants and provides:

“The Estate Management Company hereby covenants with the Tenant and as a separate covenant with the Landlord to provide the services specified in Part 1 of the Fifth Schedule....”

25. Clause I sets out the mechanics for the assessment and collection of the service charges.

Clause J is entitled “Matters to be included in the service charge” and states:

“It is agreed and declared that there shall be included in the Service Charges:

1. The provision by the respective Management Companies of the services specified in the Fourth and Fifth Schedules (“the services”)

2. The reasonable and proper costs to the relevant Management Companies incurred in the general observance and performance of its obligations including any reasonable and proper charge or fee of any managing agents accountant and/or auditor surveyor solicitor or other person appointed by the relevant Management Companies.
 3. The cost of taking all steps deemed desirable or expedient by the relevant Management Company acting reasonably for compliance with making representations against or otherwise contesting the incidence of the provisions of any legislation or order or statutory requirements thereunder concerning town planning public health highways drainage or other matters relating to or alleged to relate to the Apartment Block or the Estate or any part thereof.
 4. Any payments to be made by the Landlord and/or by the relevant management Company to the Superior Landlords and/or to the company authority or body which manages and maintains the whole area known as the Paddington Basin of which the Estate forms part whether under the provisions in the Headlease or otherwise including the maintenance of the Basin as set out in the Headlease
 5. The proper costs and expenses incurred by the Management Company in relation to the observation and performance of any of its covenants and obligations or the provision of any additional services which the relevant Management Company shall in its reasonable discretion deem desirable or necessary for the benefit or enjoyment of the Apartment Block or the Estate or any part thereof.
 6. An amount as reasonably determined by the relevant Management Company to be charged in any Accounting Period as a contribution to the establishment of a sinking fund as a reserve towards the cost of the future provision of the services and items aforesaid.
 7. Any interest bank or other charges arising from the borrowing of money or the giving of guarantees by the relevant Management Company to enable it to carry out its obligations under this Lease.”
26. Various services are to be provided under part 1 of Schedule 5 to the Lease including the maintenance and repair of the estate, its decoration, insurance, garden maintenance, lighting, refuse, the employment of staff, managing agents

and other professionals. Paragraphs 17, 18 and 19 are of particular relevance and provide:

“17. To contribute towards the repair maintenance renewal rebuilding lighting or cleaning of any structures facilities conduits or any other matter or thing whatsoever which may be used by the Estate in common with any other premises

18. To comply with the proper requirements and directions of the Superior Landlords and/or the company authority or body which manages and maintains the whole area known as the Paddington Basin of which the Estate forms part including but without prejudice to the generality of the foregoing the matters set out in the Sixth Schedule of the Headlease

19. To provide and maintain any other services which the Estate Management Company or the Landlord shall in their reasonable discretion decide are desirable for the benefit of the users or occupiers of the Estate.”

27. There is no requirement in the headlease (defined as a lease of the Estate dated 5th December 1995...as varied by the December 1997 Deed) to make a contribution to management costs envisaged by the September 2005 Estate Management Deed.

Submissions/reasons

28. On behalf of the third, fourth and fifth respondents, Miss Holland relied on the provisions of clause J4 above in support of her contention that the EMD costs are recoverable under the terms of the underleases. Mr Dovar, Mr Brown and Mr Mosselson argued to the contrary.

29. It was common ground between the parties that the correct approach to the construction of the lease is to be found in the speech of Lord Hoffman in *Investors Compensation Scheme Limited v West Bromwich Building Society* [1998] 1WLR 896 where at page 912 he said

“My Lords, I will say at once that I prefer the approach of the learned judge. But I think I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed. I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn v. Simmonds* [1971] 1 W.L.R. 1381,

1384-1386 and *Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989, is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of 'legal' interpretation has been discarded. 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 to the exception to be mentioned next, it includes absolutely anything which would 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 declarations of 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 common sense 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 Diplock made this point more vigorously when he said in *Antaios Compania Naviera S.A. v. Salen Rederierna A.B.* [1985] 1 A.C. 191, 201:

‘if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.’”

30. The Tribunal started with the structure of the lease itself. Clause J brings together a list of costs towards which the tenants are obliged to contribute by way of a service charge. It supports the payment of costs incurred or to be incurred under the landlord’s or management companies’ obligations and powers and associated costs to be found elsewhere in the lease. Hence, the costs of discharging obligations and exercising powers contained in Part 1 of Schedule 5 to the lease are included as clause J1; management costs, including professional costs which are concomitant to the discharge of obligations are included as clause J2; costs associated with compliance with or contesting legislation relating to planning and other matters outwith the landlord’s immediate control are included at clause J3; costs (if payable) of contributions to the management of the Paddington Basin are included at clause J4; costs incurred in the exercise of the management company’s power are included at paragraph J5; costs to be allocated to a reserve fund are included at paragraph J6 and the cost of servicing loans and bank charges are included at paragraph J7.

31. In the case of clauses J1 – J3 and J5 – J7, either a duty, an obligation or a power can be identified to justify the inclusion of the costs in the service charge. The question for the Tribunal therefore was whether there was a duty, an obligation or a power that would justify the inclusion in the service charge of:

“Any payment to be made by the Landlord and/or by the ... Management Company to the Superior Landlords and to the company authority or body which

manages and maintains the whole are known as the Paddington Basin....whether under the provisions in the Headlease or otherwise.....”

32. The Tribunal considered that the words “Any payment *to be made*” must refer to a subsisting contractual obligation or power or other duty. Miss Holland submitted that clause J4 itself triggers an obligation to pay any charges incurred by the Landlord or Management Company in this respect and gives them a discretion to enter into such contracts as they consider appropriate. Alternatively she submitted that payment was supported by paragraph 19 of Part 1 of Schedule 5 to the Lease under which the management company is entitled to provide and maintain any other services which in their reasonable discretion they decide are desirable for the benefit of the users or occupiers of the Estate.
33. The Tribunal did not accept the proposition that clause J4 could bear the meaning contended for by Ms Holland. The drafting of the lease was not unusual. Clauses similar to J4 were often used to identify service charge costs where there was a obligation to pay either under the terms of a headlease or some other binding obligation. There is no such obligation in the head lease and at the time the residential leases were created there was no binding obligation in any other contract. Had there been such an obligation there would have been no need for the EMD.
34. It was the Tribunal’s view that J4 referred to obligations or powers to pay extant at the date the residential leases were granted. Here, for example, there is an obligation in clause 6.2 of the Deed of Apportionment and Variation which imposes an obligation to contribute 20% to the cost incurred by the British Waterways Board in the fulfilment of its functions in relation to the basin. The Tribunal noted that clause E, which sets out the tenant’s covenants, refers to contributions towards costs which may “be expended or incurred or *become payable*,” however it took the view that this relates to future liabilities under current obligations and powers.
35. It was clear that there had been an intention, before the occupational leases were granted, that a scheme would be put in place for certain management services to be provided by PBD to the whole of the Paddington Basin Area. It was also clear that it was intended that a contribution to those costs would be made by West End

Quay. The August 1996 sale agreement, for example, envisaged some form of Paddington Basin estate-wide management company. However the scheme described in clause 13 of that contract was never put into effect (in any event the party referred to as the seller was in fact agreeing to procure the sale by a third party and furthermore it had no beneficial interest in the land) and neither was any other obligation created.

36. Miss Holland submitted that the expressed intention to procure estate wide management services was important and supported the proposition that a lessee would understand and anticipate that there may be a future liability to contribute to the wider estate charges. The Tribunal rejected that proposition and had regard to the guidance given by Lord Hoffman in the *Investors Compensation Scheme Limited v West Bromwich Building Society* to the effect that the law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent.
37. The Tribunal also rejected the contention by Mr Dovar that payments under clause J4 might be confined only to payments in respect of the “Basin” itself. The wording of J4 is clear in that it provides for the service charge to include “any payments.....whether under the provisions in the Headlease or otherwise *including* the maintenance of the Basin as set out in the Headlease”. In the Tribunal’s view, this cannot therefore confine the clause solely to payments in respect of the Basin.
38. In reaching its conclusion that to be supported by clause J4 any obligation had to be a subsisting obligation at the date of the lease the Tribunal took into account the following matters:
 - (a) Very clear words would be necessary to bind a tenant to making future unspecified and unlimited payments under a contract not subsisting at the date of the lease. The wording of clause J4 does not achieve this. The wording is too generalised and uncertain to support the meaning contended for by Miss Holland;
 - (b) Clause J4 is intended to operate as part of the mechanism necessary in the lease to ensure that costs are payable as service charges rather than creating

freestanding obligations. There is nothing in the lease or the headlease that would alert “a reasonable person having all the background knowledge which would reasonably have been available” to the possibility that they might, in the future, be liable to contribute to costs incurred by Paddington Basin Management. If the lessees had been aware of the provisions of the 1996 sale agreement, they would also have been aware that despite any intention to create an obligation to contribute, none had been made;

- (c) The Tribunal accepted Mr Dovar’s submission that regard also ought to be had to the Lands Tribunal decision in *Earl Cadogan v 27/29 Sloane Gardens* [2006] 2 EGLR 89 and that the landlord had not shown that a reasonable tenant would perceive that the lease obliged it to make the payment sought.
- (d) The extent of the obligations contained in the EMD both in terms of cost and the length of its term militate against the construction contented for by Miss Holland;
- (e) Finally, if there was any doubt about the import of clause J4, the Tribunal considered that ought to be resolved contra proferentem and in favour of the lessee (*Gilje v Charlgrove Securities* [2002] 1 EGLR 42)

39. The Tribunal also rejected Miss Holland’s contention in respect of paragraph 19 of Part 1 of Schedule 5. It was clear to the Tribunal that the discretionary expenses envisaged under to the lease were dealt with by clause J5 (which deals with discretionary service costs) rather than clause J4. In any event, the Tribunal did not consider that the discretion under paragraph 19 was wide enough to contemplate binding the tenants into an agreement which would make them liable for substantial costs for at least a 25 year period.
40. Accordingly, there is no provision in the underleases that would oblige the lessees to make contributions towards WEQEM’s liability under the Sept 2005 Estate Management Deed.

The second issue

41. In view of its finding on the first issue, it was not strictly necessary for the Tribunal to go on and consider the remaining preliminary points. However, it considered that it would be helpful for it do so.

42. For the reasons set out below the Tribunal finds that the applicants are prevented from pursuing the contentions advanced in paragraphs 10 to 14 of Mr Gritz's reply by reason of the order and judgment of Master Moncaster dated 24th October 2008 in the Chancery Division of the High Court in claim number HC0800558.
43. In paragraph 10 to 14 Mr Gritz had contended that the Estate Management Deed was either void or voidable by reason of the manner and circumstances in which it was executed. In October 2008, WEQEM applied to amend its defence in the High Court proceedings referred to above, to include those contentions. Having heard full argument from counsel for the parties, Master Moncaster decided to reject the application and to refuse permission to amend. In his reasoned decision, the Master concluded that the amendments should not be allowed as the points sought to be raised were without merit.
44. Mr Gritz is not a party to the High Court proceedings and it was contended on his behalf that he is not precluded from raising the same issues before the LVT. Mr Dovar pointed out that the scope of section 27A is wide and that the Tribunal has jurisdiction to decide all matters necessary to determine the payability of a service charge. On behalf of the third, fourth and fifth respondents, Miss Holland argued that raising an issue that had already been determined by a Master of the High Court amounts to an abuse of process.
45. Mr Dovar contended that in order to raise a defence of issue estoppel or estoppel by record, the decision must have been finally determined; Master Moncaster's decision was, he said, an interim decision. In support of this proposition he referred the Tribunal to *Tanfern Ltd v Cameron-MacDonald* [2000] 1 WLR 1311 and to *Scribes West Ltd Relsa Anstalt (Practice Note)* [2005] 1WLR 1839 and to CPR 52 PD para 2A.2.
46. He also argued that even if this were a final decision it would only preclude Mr Gritz from raising the issues if it were a decision *in rem*. Because this was a decision on the issue of whether or not WEQEM should be allowed to amend its claim, there was no decision made as to the status of the EMD and the decision cannot have been *in rem*. On that basis he contended, the decision would only bind a party to that action or to their privies. He pointed out that Mr Gritz is not a

party or a privy for these purposes. Whilst he could have made an application to join the High Court proceedings he cannot be criticised for not doing so.

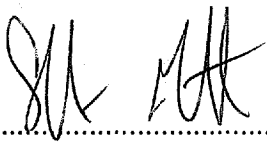
47. On behalf of the first respondent, Mr Brown supported Mr Dovar's submissions. He suggested that since the determination was nothing more than a decision on an application to amend a pleading, WEQEM was "free to seek the determination of those issues in the LVT, subject to the jurisdiction of the LVT to dismiss any attempt to do the same if appropriate as an abuse of process under the principle of *Henderson v Henderson* (1833) 3 Hare 100". However he said that principle was not one of absolute application and referred to the decision of the House of Lords in: *Johnson v Gore Wood & Co* [2002] 2 AC 1.
48. On behalf of the third, fourth and fifth respondents, Miss Holland submitted that this was an issue of broad policy and the question was whether the issue should be re-litigated. She informed the Tribunal that Master Moncaster had heard the application to amend over a full day and pointed out that his decision was not confined to procedural issues but that he had rejected the application to amend on the basis of the merits of the arguments.
49. Miss Holland also pointed out that Mr Gritz is a shadow director of WEQEM and on that basis, it was incorrect to say that he did not have an opportunity to be involved in the High Court proceedings. In her submission, it would be an abuse to allow the issues to be raised at the LVT. In support of her contentions Miss Holland referred first to *Reichel v Magrath* (1889) 14 App Ca. 665 where an attempt to revisit an issue already determined by a judge and confirmed on appeal was said to be an "abuse of the process of the court" and secondly to *Ashmore v British Coal Corporation* [1990] 2 Q.B. 338 where an attempt to revisit a determination made in respect of a number of sample cases not involving the applicant, was also regarded as an abuse of process.
50. In response, Mr Dovar argued that if there is no estoppel then there can be no abuse. The authorities relied upon by Miss Holland all related to final decisions and could therefore be distinguished. Although Mr Gritz is a shadow director of WEQEM, he is a party in his own right at the LVT.
51. In reaching its determination, the Tribunal had regard to the words of Lord Bingham in *Johnson v Gore Wood & Co* at page 31A-F:

“There underlying public interest is...that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis of efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings, may, without more, amount to an abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at allIt is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. This is to adopt too dogmatic an approach to what should in my opinion be a broad merits-based judgment which takes account of the public and private interests involved and also take account of the facts of the case, focussing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.”

52. Whilst the Tribunal had some sympathy with Mr Gritz’s position on this issue, it considered that it would be an abuse of its proceedings, to seek to reconsider those matters subject to Master Moncaster’s determination. Master Moncaster did not decide the issue of whether the EMD was void or voidable on the evidence, instead, his rejection of the application to amend was on the basis that even if the facts were demonstrated, the matter was not properly arguable. It seemed to the Tribunal that this went beyond being simply a procedural matter.
53. Furthermore although the Tribunal accepts that Mr Gritz is an applicant in his own right before the LVT, the connection between the High Court proceedings and the LVT proceedings is close, despite the fact that Mr Gritz is not a party in the High Court.
54. In the Tribunal’s view, the proper approach here would have been for WEQEM to have sought to appeal Master Moncaster’s decision or for Mr Gritz to have applied to join as a party to the High Court proceedings and to have sought then to appeal the decision. The Tribunal appreciates Mr Gritz’s desire to have his challenge determined in a forum which has minimal costs shifting powers, however that in itself is not sufficient for the Tribunal to take on the task of revisiting a matter that has already been the subject of a court order.
55. Accordingly the Tribunal made no determination in respect of issues (c) or (d)

Section 20C

56. In the light of the Tribunal's findings in respect of the first issue, the application is now determined. In his application, Mr Gritz seeks an order under section 20C of the Landlord and Tenant Act 1985. The parties are invited to make written submissions in respect of section 20C within 14 days of the date on which this decision is issued. For the avoidance of doubt, the time for appeal will not start to run until a supplementary determination has been given on this aspect of the matter.

Chairman..... 

Date..... 