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MAN/00CG/LSC/2009/0124

RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

LANDLORD & TENANT ACT 1985 SECTIONS 19, 20C & 27A.

Property: Flat 15. Ivy Park Court. 35 Ivy Park Rd. Sheffield S10 3LA

Applicant: David Ian Turner

Respondent: Ivy Park Court Owners Association Limited

Tribunal members: Mrs M Oates. Mr J Platt. Mr M J Simpson.

8th March 2010.

Decision.

1. **The certification and format of the Annual Maintenance Account ('AMA') does not preclude the collection of the amounts due.**

2. **The Lease adequately provides for 'reserves' to be included in the AMA.**

3. **The AMA is not restricted to only those payments that have been made by the Respondent ('IPC') in any one year, but can properly extend to liabilities incurred but not disbursed before the year end and provisions and prepayments.**

4. **The Managing Agents' charges are reasonably incurred.**

5. **By virtue of S.20C of the Landlord & Tenant Act 1985 the Tribunal does not have jurisdiction to determine the reasonableness of the cost of the extant Court proceedings.**

6. **The Accountancy Charges are unreasonable to the extent that they relate to the management of IPC itself, as opposed to management of the development. On the evidence before us the**

extent of any potentially allowable items was not discernable and therefore the charges are not demonstrated to have been reasonably incurred.

7. **IPC are not in breach of Clause 4(vi) of the Lease.**

8. **The Tribunal does not have jurisdiction to determine the validity or reasonableness of claims by the Applicant against IPC, which the applicant seeks to set off against his liability for the AMA.**

9. **The Reserve provisions in the AMA are reasonable save for:-**
   - **9.1. Electrical Repairs - £2500**
   - **9.2. Accountants fees - £1750. Allowed at £750**
   - **9.3. 'Other' - £10,000.**
   - **9.4. 'Reserve' - £10,000.**
   - **9.5. 'Transfer to Reserves' - £26,387**

10. **The Respondent's costs of this application are relevant costs to be taken into account in determining the amount of any service charge payable by the tenants. The Applicant's application for a Section 20C Order is not granted.**

11. **Of the Tribunal's own volition, there be no Order for reimbursement of any Fees paid to the Tribunal.**

The application.

By an application lodged on 3 December 2009 Mr. Turner asks for a Determination, for the year ended 25 September 2009, in respect of the service charges payable to Ivy Park Court Owners Association Ltd. ("IPC")

On 10 December 2009 the Tribunal gave Directions for the just and expeditious preparation and hearing of the application, with which directions the parties have

complied, save that the Applicant's case as put to the Tribunal was not entirely consistent with his stated written case.

The Lease.

The lease ("the Lease") of flat 15 is dated 28th September 1972 between John Harding Construction Limited and Mr. Turner. The Term is 300 years from 25 March 1971. The Lease was modified by agreement by a Deed of variation dated 7 March 1990.
In its amended form the Lease provides, by clause 4, for the Lessee to pay 2/33rds of the Annual Maintenance Cost and to make payments on account, each of £82.50, on two occasions per year.

The mechanics of payment are set out in sub clause (ii), requiring the Lessor to serve an Annual Maintenance Account and certify the actual amount of the Lessee's liability to pay the annual Maintenance Cost for the previous year to 25th September, with provision for adjustment, forthwith, of any shortfall or excess, as the case may be.

By sub clause (iv) the Annual Maintenance Cost is defined as:-

....the total of all sums actually expended by the Lessor during the period to which the relevant Maintenance Account relates in connection with the management and maintenance of the Buildings (including the cost of procuring or providing any sums required in connection with the same where they exceed the moneys for the time being held by the Lessor as payments on account of the annual maintenance Cost or as a Reserve Fund) .....

There is then set out some particular items, without limitation to the generality of the foregoing. The particular items include the cost of the Lessor's performance of Clause 5 (ii), (iii), (v), and (viii) of the Lease.

Clause 5 (ii), (iii), (v), and (viii) of the Lease provide for the Lessor to maintain repair cleanse repaint redecorate and renew the Building and common parts, discharge rates and taxes and insure the Building.

Further, sub clauses (v) and (vi) of Clause 4 provide:-

(v) In addition .... there shall be included ...such sums as the Lessor's Managing Agents or Surveyors shall reasonably consider desirable to be retained by the Lessor by way of Reserve Fund as a reasonable provision for future expenditure.

(vi) The Lessor will use its best endeavours to maintain the Annual Maintenance Cost at the lowest reasonable figure consistent with the due performance and observation of its obligations herein and when the Lessor or its Managing Agents for the time being shall consider such performance to be reasonably necessary .....

The Parties written submissions and evidence.

Mr Turner's Statement of Case.

This is dated 14th January 2010. It raises 6 main issues, with some of those issues encompassing sub issues.

1. The Annual Maintenance Account is not properly certified. If it is properly certified, the amounts are wrong. The amounts claimed do not take into account monies due from IPC to Mr Turner.(Paragraphs 7,8.9 & 10)
2. There has not been compliance with the statutory Consultation Procedures.(Paragraph 11(a))
3. The amount of the Annual Maintenance Account is unreasonable.(Paragraph 11(b))
4. There is no entitlement to include an item for a Reserve for future maintenance in the sum of £159,447.00. If such a reserve is properly included, then the amount is unreasonable. (Paragraph11(c))
5. The Lease, by Clause 4 (iv) restricts the Annual Maintenance Cost to sums *'actually expended.... during the period to which the relevant Maintenance Account relates'* (paragraph 11(d))
6. IPC has failed to use its best endeavours to maintain the Annual Maintenance Cost at the lowest reasonable figure consistent with the due performance and observation of its obligations, as required by Clause 4(vi), *above.* It has failed to act on Fire Risk Assessments and has neglected, in previous years to skilfully manage the Annual maintenance Costs. (Paragraph 11(e))

IPC's Statement of Case.

This is dated 3rd February 2010. It sets out the background from IPC's point of view, highlighting the inadequacy of the Lease, IPC's acquisition of the freehold in 1978 as tenants' management company, the litigation leading to repayment of £14,000.00 to the P.R. of a former lessee, the changes of managing agents, and the haphazard conduct of maintenance and repairs and service charge collection.

Since the appointment of Mr. Parsons of WPA as managing agents from 1 April 2009, there had been a General Meeting of IPC on 20th July 2009, attended by a majority of tenants (strictly speaking, in their capacity as members of the Company), when a way forward to address the outstanding difficulties had been discussed and approved. Consequently the Annual Maintenance Account was prepared promptly after 25th September and included items which the agent considered desirable as provisions to take account of the budget for 2009/10. All lessees, except Mr. Turner, have paid the amounts demanded of them.

IPC rely on Clause 4(v) to justify the approach that has been taken to the service charge demands.

The salient features of IPC's relevant response to the specific issues raised in the Statement of Case as follows:-

1. The service charge accounts show the total service charge for the year to 25th September 2009, the interim amounts received and the balance collectable, which has been demanded of Mr Turner by the invoice of 23rd October 2009 in the sum of £12158.12. It has been acknowledged that Mr. Turner has paid £1,110.00 (6 payments of £185 between October 2008 and March2009). The payments made and claimed as set off by Mr. Turner are disputed. Reference is made to repayment of £1500 in respect of a loan to IPC.
2. None of the contracts come within the scope of S20 or S20ZA of the Landlord & Tenant Act 1985 as either 'qualifying long term agreements' (QLTA) or 'qualifying works'. To the extent that they may be so defined, consultation has taken place. If the Tribunal find otherwise, dispensation is sought under S20(9) of L & T Act 1985.
3. IPC avers that the services charge demanded is reasonable. It produces copy invoices for the consideration of the Tribunal.
4. IPC does not accept the distinction between 'Reserve Fund' and 'sinking fund'. In any event the managing agent considers the provision for future expenditure to be a reasonable one, particularly having regard to the provisions of the RICS Service Charge Residential management Code. The provision for £26,387 was to reverse a negative reserve in Account of the previous year.
5. Expenditure incurred within the period should be included in the accounts, and the Annual Maintenance Account, irrespective of whether physical payment is actually made before, during or after the relevant accounting period. Invoices are provided.
6. IPC asserts that, on the advice of qualified managing agents, it has used and continues to use its best endeavours to maintain the Annual Maintenance Cost at the lowest reasonable figure consistent with the due performance of its obligations under the Lease.

Mr. Turner's written Response.

This is dated 16 February 2010. It takes the opportunity to expand upon some of the issues identified in the Statement of Case. The salient features of Mr. Turner's relevant responses are as follows:-

Issue is taken with IPC's position regarding the car parking dispute and the linked issue of Fire Risk Assessments. The Tribunal noted that these items had apparently featured in other litigation between Mr. Turner and IPC and are regarded by Mr. Turner as matters of particular importance.

The extent of the explanations given to the tenants at the AGM on 20th July 2009 is disputed and the minutes of the meeting are exhibited.

The budget is not reliably cast, having regard to the known, normal, yearly level of expenditure. Particularly, IPC are inconsistent is classifying some of the works set out in one of the Fire Risk Assessments as excessive, whilst still providing for those excessive costs in the budget upon which the Reserve Fund is based.

There are items to set off against any service charge liability of Mr. Turner, specifically £4011.25 in respect of McBride Wilsons' bill, for which authority was given at IPC's AGM on 10th July 2007 and two further amounts for work to the communal Satellite TV system (£150) and fire safety work (£546.)

Issue is taken with the reasonableness of the costs of the Solicitors employed by IPC to defend the 'car parking' litigation brought by Mr. Turner.

The reasonableness of the managing agents' charges is challenged.

The accumulated loss of £26,387 has accumulated over several years. It has been carried forward in previous years, in varying amounts. The items giving rise to the accumulated loss should have been included in the years in question and should not now be charged to the annual Maintenance Cost for 2009.

The Inspection.

The Tribunal inspected the development, on the morning of 8th March, immediately preceding the hearing, in the presence of Mr. Turner, Mr Wheeler, Mr. Parsons and Mr. Pritchett.

Ivy Park Court is a residential development of 17 Apartments and 21 garages set in its own gardens and ground. It was built in the Ranmoor area of Sheffield on the site of 35 Ivy Park Road in 1970/71 by John Harding Construction Limited.
The interlocking blocks are of concrete frame construction with external brick walls and concrete stairs and floors. Access to the upper flats is via 2 enclosed external staircases. Built on a sloping site the flats are on various levels between 1 and 6 storeys.
The property has a flat asphalt roof (which was inspected)

Ranmoor is a desirable residential area. The flats are of larger than average proportions and would properly be regarded as high value luxury dwellings.

The law.

Is set out in the attached Schedule.

The hearing.

Mr Wheeler, introduced by Mr Turner as a former solicitor who now works with Mr Turner, represented Mr. Turner. Mr Pritchett of Counsel, represented IPC.

We had the benefit of Mr Wheeler's skeleton argument lodged at the commencement of the hearing and Mr. Pritchett's skeleton lodged four days previously.

The representations on behalf of the parties.

Firstly the issue of procedural non compliance with Clause 4(ii) of the Leases was pursued. On the assumption that the letter of 23 October 2009 and enclosures

(Pages 25-35 in Applicant's Statement of Case) is intended to be the Annual Maintenance Account, ('AMA') then it does not comply with Clause 4(ii).
Relying upon *Leonora Investment Company Limited v Mott Macdonald Limited [2008] EWCA Civ 857* the requirements should be strictly construed. It is not sufficient that IPC's accounts have been professionally drawn and certified, or that the deficit is identified, or that the letter identifies the amount payable (as a balancing charge) in respect of each flat or that it contains a signature and a statement that the balancing charge is payable by reference to those accounts. Calculation, certification and demand of the amount due as a balancing charge does not adequately certify the actual amount of Mr. Turners liability for the service charge period in question, as required by the Lease

Response
The letter and enclosures of 23 October does comply with clause 4(ii). The documents are sufficient. The lengthy list of items (certified accounts etc) which the applicant says are insufficient represents, on a purposive interpretation of clause 4(ii), a substantial and sufficient compliance.
Leonora involved a differently worded lease. There the claim was for a service charge amount for which no documentation existed at the time the Service Charge notice was given under the lease. The demand arose on the basis of a subsequent invoice. In the case of the IPC demand (the letter and documents of 23 October) all the necessary documentation was included. Clause 4(ii) sets out a contractual route which IPC have followed to permit Mr. Turner to know exactly what was being demanded of him, on what basis, in what amounts and when.

The Tribunal's determination

Certification and format of AMA

We find that IPC have complied with Clause 4(ii). There is no particular definition of 'certify' in the Lease. The reference to 'aforesaid liability' is a reference to the Annual Maintenance Cost (AMC). That is defined in Clause 4 (iv) as including payments on account of AMC or a Reserve Fund. The documentation taken as a whole fully informs Mr Turner of his liability, as demanded by IPC, for the Annual maintenance Account and the period to which it relates. It does not deprive him of information, including certified accounts, so as to prevent him from knowing what is being demanded or challenging it. The comprehensive nature of the applicants Statement of Case (prior to any further disclosure by IPC) is testament to that.
Leanora does not support Mr. Wheelers contentions The information supplied meets the criteria set out in paragraph 22 of the judgement of Tucker J. *Leanora* was a case where a service charge demand for a substantial sum was made completely outwith the procedural terms of the lease. That lease was, in any event in very different terms to this Lease. Most decided cases on service charge issues, apart from a few setting out broad principles or clarifying the Law, are lease- specific.

Secondly the inclusion of £159,447 as a Reserve for future maintenance is challenged. It is challenged on a basis different from that set out in the original

Statement of case which challenged the right of IPC to include any such sums because they were not a Reserve Fund properly so called, but a 'sinking fund' for which the Lease makes no provision.
The basis of challenge at the Hearing was that, whilst a Reserve for future maintenance was permitted, it could only be in respect of specifically identified expenditure. *St Mary's Mansions Ltd. V Limegate Investment Co Ltd [2002] EWCA Civ 1491.*

Response.
The wording of the Lease is clear and authorises '*such sums as ... [IPC's managing agent]....shall reasonably consider desirable to be retained by [IPC] by way of a Reserve Fund as reasonable provision for future expenditure*'. That does not limit the expenditure to only the year next following, or to specifically identified expenditure (subject to reasonableness). In any event the specific categories of expenditure, for which a Reserve is made are identified. The wording of this Lease is very different from that in *St Mary's Mansions.*

The Tribunal's determination

Entitlement to sinking fund/reserve fund. Difference between the two.

We find that, subject to reasonableness, IPC is entitled to provide for a Reserve Fund in the Annual maintenance Account. The Lease is widely drawn to enable provision for reasonable future expenditure. It is not, in fact, limited to the year immediately following the creation of the Reserve (though that may be a consideration when 'reasonableness' is determined). *St Mary's Mansions* is not authority for the proposition put forward by Mr. Wheeler. Even without consideration of the very different wording of the lease in that case, it is authority for what should be done with a Reserve once the anticipated expenditure for which the reserve was made has in fact been expended. The issue was about retention by the landlord of the balance of reserve funds which had not been fully utilised on the projects for which the reserve was made. The nature of a Reserve involves some estimation and lack of certainty as to cost. *St Mary's Mansions [paragraph 39]* deals with the position once that uncertainty has been dispelled by the actual expenditure being known.
In the instant case we are not yet at the point where the cost for which a Reserve is made has been expended. That will be apparent at the next year end. How to deal with a surplus or deficit will depend on the wording of the Lease. We note that the provision in the *St Mary's Mansion* lease is for provisions for 'the year in question' whereas in this Lease the provision is for 'future expenditure'.
To the extent that we consider any of the proposed Reserves to be so generalised as to not be reasonable, then we will give those issues further consideration when dealing with 'reasonableness' in respect of the challenge to those specific items.

Thirdly, the Annual Maintenance Account to September 2009 includes items that were not *'actually expended during the period to which the account relates'.* Specifically £1375 costs paid in the previous period but relating to costs in the period under consideration; £23,350 costs incurred within the period, but for which invoices had not been received before the year end; £26,387 'transfer to reserves'. Clause

4(iv) defines (and therefore limits) the Annual Maintenance Cost as and to '*the total of all sums* ***actually expended*** (Applicant's emphasis) *during the period to which the relevant maintenance Account relates'.* The case of *Capital Counties Freehold Equity Trust Ltd. V B L PLC. 283 EG 563* is cited in support of the Applicant's contentions as to the proper interpretation of the Lease.

Response.
A purposive reading of Clause 4 (iv) is required to make practical sense of the provision. For example it would be impossible to deal effectively with the Insurance provisions in the Lease if 'actually expended' meant that the Annual maintenance Account could only contain items paid out during, and referable only to, the period of the Account. The insurance period was not coterminous with the Service Account year.

The Tribunal's determination

Meaning of "actually expended".

We find that Mr. Wheeler's deconstruction and restriction of the phrase 'actually expended' to lack validity. We do not see how the word 'actually' adds to the meaning of 'expended'. The alternative to actual is imaginary or unreal. It could conceivably be provisional. No one suggests that imaginary or unreal expenditure can be claimed, regardless of the period to which it relates. If work has been completed and the liability incurred, then that is properly regarded as an expenditure, for which provision can and should be made in the Maintenance Account. It cannot be claimed again when the invoice is paid. If a provision is not so made, the expenditure can be claimed when the invoice is paid (subject to, for example, Section 20B considerations).
Expended means that the work has been carried out and a liability incurred, or spent, or disbursed. Mr Wheeler's argument postulates a distinction without a difference.
The practical implications of this are well illustrated by the specific issue taken by the Applicant.
On his analysis the £1375 is lost forever.
The £23,350 liability cannot be claimed as a Service Charge until the invoices are paid. There will be no funds to pay them until they are included in and recovered through the Annual Maintenance Account. Until the funds are generated, by reason of the Applicant and others making payment of the Service Charge, the invoices cannot be paid.
It is an argument that is circular and reminiscent of the old ditty 'There's a hole in my bucket, dear Liza, dear Liza'.
There may be issues with the £26,387 'Transfer to reserves', but not on the basis of this particular matter of interpretation regarding 'actually expended'.*Capital Counties Freehold Equity Trust Ltd. V B L PLC. 283 EG 563* related to a lease that had ended. The issues were whether or not the formertenant was obliged to pay for services that the landlord was no longerobliged to provide, and, further, if the particular clauses in that leases (which are not the same as the clauses in this Lease), including the words 'incurred', 'expended' and 'become payable', permitted the landlord to be paid items for which a contractual obligation had been entered into, but for which no work had been undertaken during the currency of the then expired term.

We find that the £1375 and the £23,350 brought forward from the previous year are properly included (subject to any issues of reasonableness) in the service charge demand for the year in question.
For the reasons later stated, we do not find that the £26,387'Transfer to reserves' should be included, but that arises from the natureof the item in question, not from any issue of the interpretation of Clause 4(iv).

Fourthly the applicant challenged the reasonableness and/or payability of three specific items, namely Managing Agents Charges, Legal and Professional and Accountancy Fees.

(i) Managing Agents Charges. Mr Wheeler produced some previously unadduced examples of what are said to be similar developments, to illustrate a lower level of charges than the £8133 (plus extras for additional work) charged by WPA. He also relied upon the comparable charges for previous years and reminded the tribunal of the guidance as to 'reasonably incurred', set out in *Forcelux v Sweetman.[2001] 2 EGLR 173.*

(ii) Legal and Professional Fees. These are challenged on the twin basis that they are not reasonably incurred and that they are unreasonable in amount. This challenge is, in part, closely related to the ongoing litigation between Mr. Turner and IPC. It is averred by Mr. Wheeler that the defence of those proceedings is not 'in connection with the Management/maintenance of the Buildings' and thus outside the scope of Clause 4 (i) (d).

(iii) Accountancy Fees. The £1210 is challenged as being vastly in excess of previous years, above the market norm and, following *Broadwater Court Management Company Ltd v Jackson-Mann (1997)*, unreasonably incurred.

Response

(i)The previous management was not good. It may be said that you get what you pay for. The cost of dealing with accumulated issues has to be taken into account. It is not conceded that the present cost is more than would have been reasonably charged if these issues had been addressed historically. What may have been saved in the past by not dealing with the difficulties engendered by the format of the Lease provisions and the form and financial structure of the Tenants' Management Company (IPC).
The arrangement with WPA is not a Long Term Qualifying Agreement. ('LTQA')
Ivy Park Court is a high class development warranting high class management at a commensurate, but reasonable, cost

The information regarding other allegedly comparable developments has been presented so late, in breach of the Tribunals directions, that the Respondent has not had proper time to respond and therefore, whilst an adjournment would be disproportionate, little weight should be attached to the late evidence.

(ii) The Tribunal does not have jurisdiction to address legal fees incurred in another forum. Section 20C makes it clear that the application should be to the court in question.

(iii). Clause 4 (iv) (d) of the Lease is widely drawn and permits the accountancy charges, without them being limited in the way asserted on behalf of the Applicant. The provisions in the lease under consideration in the *Broadwater* case were far less extensive than the clauses in this Lease. The words 'management and/or maintenance' are wide enough to include the costs of administering the Company.

The Tribunal's determination

Managing agents fees.

We considered the evidence lately adduced of allegedly comparable developments, and the agents fees in connection therewith. From the local knowledge of our lay member we are aware that at least one of the three examples quoted was a significantly more modern development with substantially less management input than Ivy Park court. We made our own knowledge and expertise known to the parties at the hearing so that they could challenge it or comment upon it. We canvassed a 'usual' charge based on either a percentage of annual expenditure (in the range of 10% -15%), or a charge of an annual sum per residential unit (in the range of £250-£350 per unit). Whilst it is correct to observe that the proposed level of charge by WPA is considerably greater than that charged by previous agents, it is still within what we would regard as usual parameters, and therefore reasonably incurred. We have not lost sight of the fact that the issue is the reasonableness of IPC incurring these charges, not the reasonableness of the level of charges levied by Mr. Parsons for the work undertaken. There is an element of 'You get what you pay for'. Previous agents have charged less but have been demonstrably less effective and failed to address the major issues with which WPA are now grappling on behalf of IPC. Any previous failures have to be regarded as the failures of IPC, which is ultimately responsible for the work of the agents employed. We found no evidence that the management charges for the year in question have been significantly (to the point of unreasonableness) exacerbated by previous agents' level of work and fees.

The agreement with WPA is not an LTQA (a matter, rightly, not pursued by Mr. Wheeler). There is an element of 'catch up' in the managing agents function for the year in question, and perhaps for a little time to come. Unusual items (variation of the Lease, litigation with Mr. Turner etc.) require attention. In due course IPC may consider some process of competitive tendering to better establish the 'reasonable' level of agents fees. To avoid such a process for the year in question does not render WPA's charges unreasonable.

Legal and Professional Fees.

Mr Turner has made an application to the County Court. He is, so far as we are aware (full details of the litigation were, rightly, not rehearsed before us), challenging

IPC, as the management company, for its handling of the fire risk assessment and consequent car parking arrangements. The litigation is ongoing. There has been an interim Order for costs against Mr. Turner. These appear to have been the subject of a Summary Assessment under the CPR.

These issues are clearly to do with the management and maintenance of Ivy park Court. IPC have incurred legal fees in defending the case.

Section 20C of the Landlord & tenant Act 1985 states:-

"(1) A tenant may make an application for an order that all or any of the costs incurred or to be incurred by the landlord in connection with proceedings before a court [residential property tribunal] or leasehold valuation 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 specified in the application.

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;

(aa) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;

(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

The court proceedings are on management issues in respect of which the Court has accepted jurisdiction, have service charge implications and in respect of which the Court is in a much better position to adjudicate, in due course, as to what costs orders, including a Section 20C Order, are just and equitable.

We accept Mr. Pritchett's contention, to which Mr. Wheeler offered no counter argument, that we lack jurisdiction to deal with that issue. If it remains contentious, an application should be made to the Court before which the proceedings are taking place. In the meantime, in the absence of ant S.20C order, the costs claimed are properly included in the Service Charge.

So far as the provision of a reserve for ongoing legal fees is concerned, we consider IPC have the right to make such a reasonable provision, regardless of the appropriate tribunal (Court or LVT) which may ultimately make any S.20C determination. It would be imprudent of a management company not to make such a provision for litigation in which it continued to be embroiled. Such a provision does not prejudge the outcome. IPC may recover their costs from Mr. Turner. IPC may have to pay Mr. Turners costs. Each side may have to bear some or all of their own costs.

At this stage the 'Reserve' is a Sections 19 and 27 issue, in respect of which we have jurisdiction. It may become a section 20 issue, in which case application should be made to the appropriate tribunal. At that stage a determination will be made as to the reasonableness of the costs incurred, for which the Reserve has been made. It is possible, indeed in our view, probable, for a reserve to be reasonably made even though subsequently not all of the expenditure for which the reserve has been made is held to be reasonably incurred or, in the case of reserves for costs, are not, wholly or in part, to be regarded as 'relevant costs'.

Accountancy Fees.

The main issue is whether the Lease authorises the inclusion of the charges relating to the Management Company itself (Filing of Accounts, compliance with Company Acts, dealing with HMRC in respect of the Company's affairs etc.) as opposed to work in connection with the service charge. Clause 4 (iv)(d) is wide, but not wide enough. It states:-

4....

(iv) The Annual Maintenance Cost shall be the total of all sums actually expended by the Lessor during the period to which the relevant Maintenance Account relates in connection with the management and maintenance of the Buildings (including the cost of procuring or providing any sums required in connection with the same where they exceed the moneys for the time being held by the Lessor as payments on account of the Annual Maintenance Cost or as a Reserve Fund) and in particular but without limiting the generality of the foregoing shall include the following :

.....

(d) all fees charges and expenses payable to any solicitor accountant surveyor valuer or architect or other professional or competent adviser whom the Lessor may from time to time reasonably employ in connection with the management and/or maintenance of the Buildings (but not in connection with lettings or sales of any of the premises comprised in the Buildings or the collection of ground rents payable by any lessee thereof) and in or in connection with enforcing the performance observance and compliance by the Lessee and all other lessees of flats or flats and garages in the

Buildings of their obligations and liabilities under this clause 4 including the preparation of the Maintenance Account and the collection of Maintenance Charges.

We are guided by the approach set out by Chadwick L J in the *Broadwater* case. We recognise, as is the case with almost all decided cases, that the wording of that lease was very different from the Lease in this case. We cannot import what is patently desirable, having regard to the fact that the tenants and the company membership are the same group of people operating in very different capacities. We must make our determination based on what is in fact in the Lease, not what should be in the lease.

We do not have the material to determine what, if any, of the accountancy charges relate to the service charge calculation and 'management and/or maintenance'. We know from our analysis of the invoices provided by IPC that over £500 is exclusively due to company administration, but we do not know much more than that. We cannot therefore find the £1210 claimed to be reasonable.

Fifthly it was asserted that IPC were in breach of the specific duty in Clause 4(vi) to use its best endeavours to maintain the Annual maintenance Cost to the lowest reasonable figure. Particularly the 'reserve Fund' is excessive, especially as it could and should be spread over a period of years.

The Tribunal's determination.

Whilst we accept that the concept of 'reasonableness' involves, not the determination of a precise figure, but deciding whether or not a particular figure falls within a range of reasonableness, and that such a range must have a lower and upper end, we do not find that Clause 4(vi) adds significantly to the process that we are being asked to undertake. Any service charge that we find to have been reasonably incurred is likely to comply with the Landlords obligation under Clause 4(vi). This is especially so where we are dealing with a service charge that has a substantial element of provisions and reserves. The combination of Clauses 4(vi) and (v) require the determination of the lowest reasonable figure that the managing agent reasonably considers desirable as a reasonable provision.

With such a plethora of 'reasonableness' provisions we cannot say that IPC are in breach of Clause 4(vi)

Sixthly that Mr turner is entitled to credit for payments he has made on behalf of IPC

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The Tribunal's determination.

We are without jurisdiction to deal with these issues.
We note that Mr. Turner was clearly authorised, at the meeting of 10th July 2007, to incur solicitors' fees of up to £4000 plus vat. Subject to evidence as to payment we accept Mr Parsons' evidence that that agreement will be honoured.
In any event we find that it is more likely than not that credit has been given for the TV satellite expenditure and the £1110 paid to Edmund Winder Watts.
There is no provision in the Lease for Mr. Turner to carry out fire stopping works because of alleged default by the landlord. Issues as to alleged breach of covenant by IPC and the appropriate response by Mr Turner, are for the County Court.

Seventhly, the reasonableness of items of reserve for future expenditure, as set out in the Schedule attached to Mr. Wheeler's Skeleton argument was challenged. The Schedule was more extensive than had been indicated by the Applicant's previous statement of Case and Response to the Respondents written evidence.

The Tribunal's determination.

We start by repeating our observations when dealing with the provisions and reserves re Legal fees. It is possible, indeed in our view, probable, for a reserve to be reasonably made even though subsequently not all of the expenditure for which the reserve has been made is held to be reasonably incurred. The making of a reasonable reserve does not preclude a subsequent challenge when the expenditure is included in the service charge account. A determination that a reserve is reasonable, having regard to what is known at the time the reserve is made, does not exclude or prejudice a challenge under S.19 & S.27 when the work, for which the reserve has been made, is undertaken.

We accept that it would not be reasonable to compensate for the inadequate (especially so far as cash flow and the financing of ongoing services is concerned) Lease, by merely choosing as many items of reserves as can be imagined so as to generate generalised cash flow. A reserve that is focussed is more likely to be reasonably incurred.

It is helpful, but not exclusively determinative, to look at historical expenditure, when considering a provision/reserve in respect of that or similar items. The Tribunal especially takes into account the level of previous expenditure upon which it has made a determination (such as Management fees and Accountancy fees) and also items upon which it can form a first hand opinion (such as arises from the inspection of the flat roof).

Considering each item on the Schedule in the light of the above general comments we determined as follows:-

Cleaning and window cleaning.

Not so inconsistent, at £12500, with previous years of £9329 and £10375 as to be unreasonable.

Gardens.

We accepted Mr. Parsons' evidence that the major difference compared with previous years is a provision for tree pollarding in respect of which an application in a form provisionally agreed by the Local authority had been submitted. The provision represents the reasonable view of the managing agent. The eventual amount, which may well be determined by obtaining competitive quotes, will indicate the accuracy of that view.

Electricity.
Not challenged.

Insurance.

We accept Mr. Parsons' evidence that the insurance had been updated and re tendered through reputable brokers, and that Directors indemnity had previously been included. We are satisfied that Clause 5(viii)

... and also against Third Party liability and against such other risks as the Lessor from time to time in its absolute discretion consider it desirable to insure in such sums as shall be considered by the Lessor's Surveyor to be appropriate...

allows this element to be included.

Water.
Not challenged.

Minor repairs.
Not challenged

Electrical repairs

We agree that, in addition to the £15000 for Electrical Repairs (Major) & General Minor repairs of £5000, this £2500 is an over provision.

Accountants fees
Whilst we disallowed Accountants fees for the year in question on the basis that we had insufficient evidence to distinguish, in final terms, between allowable and non-allowable fees, following *Broadwater* principles, we are able to determine that a provision of £750 would be reasonable for that work that the Accountant may be employed to carry out in connection with preparation and certification of the Annual Management Account proper, as opposed to the company accounts etc. of IPC.

Clause 4(iv)(d) states ..... in particular but without limiting the generality of the foregoing shall include the following :

(d) all fees charges and expenses payable to any solicitor accountant surveyor valuer or architect or other professional or competent adviser whom the Lessor may from time to time reasonably employ in connection with the management and/or maintenance of the Buildings (but not in connection with lettings or sales of any of the premises comprised in the Buildings or the collection of ground rents payable by any lessee thereof) and in or in connection with enforcing the performance observance and compliance by the Lessee and all other lessees of flats or flats and garages in the Buildings of their obligations and liabilities under this clause 4 including the preparation of the Maintenance Account and the collection of Maintenance Charges

Management fees
For the same reasons as previously stated we find this to be a reasonable provision.

Sundries/contingency, Other &.Reserve.

We considered these three items together in view of their similarity. Given the comprehensive nature and extent of the specific provisions we determine that a further £27,500 is not fully justified. A total of £7500 is reasonable. Pragmatically we therefore allow the £7500 contingencies but disallow the £20,000 'Other' and 'Reserve'. We also bear in mind that we are halfway through the service charge year without any obvious signs or evidence of the need for such expenditure.

'Transfer to Reserves' £26,387'.

It became apparent from our questioning of the parties at the hearing (as to how it was possible for a company structured in the manner of IPC to incur unfunded deficits) that it is very likely that this issue is closely connected with the £1500 refund of loan claimed by Mr. Turner (and returned to other tenants/company members). The issue warrants further investigation. It is likely that the deficit was caused by litigation with a former tenant and was funded by an informal 'levy by way of loan' of £1500 from each of the 16 or 17 tenants.
If this is dealt with via the service charge it could raise many problems. There may be Section 20B issues for example. It is cumbersome to charge each tenant an extra £1500 by way of service charge when the liability is simply to repay to each tenant the £1500. The better way is for each tenant, in their capacity as member of the Company and lender, to waive the loan.
If any party is not willing to do so (which is patently not the case – all have paid the service charge demanded except Mr.Turner, who does not demur from the charge but wants credit for the £1500 loaned), we would still be without jurisdiction to deal with a claim by way of set off, for the reasons set out above.

Fire safety.

This is an issue which apparently impinges on the sensibilities of all parties, being closely linked to the ongoing litigation. Mr. Turner wants the work to be undertaken sooner rather than later, but challenges the provision for the cost on the basis that he does not accept that IPC, in the guise of Mr. Parsons, intends to carry out the work.

Mr. Parsons expresses significant misgivings as to the need, or at least extent of the need, for the work to be carried out but considers it desirable to make a reserve.

If, as is apparently the case, IPC are being taken to court by Mr. Turner to enforce his view of the need for this work, it cannot be unreasonable for a provision to be made against the probability of an outcome which requires all or some of the work to be carried out.

Electrical

Having disallowed £2500 for electrical repairs, we find that, having regard to the age and state of the development, this £15000 provision is reasonable.

Roof.

Our inspection of the roof leads us to conclude that Mr. Parsons' assessment of the need for some repairs soon and longer term major repairs/replacement is justified. The provision of £12000 to cover both aspects is justified. We remind ourselves that this is an issue to which the provision in Clause 4(v) as to 'future expenditure' without specific limitation in time to, for example, the next year, is particularly germane.

Solicitor and Barrister.

This issue engenders the same sentiments as the issue of Fire Safety, only more so.

Whether or not we have jurisdiction to ultimately deal with this issue, either as a S19 &S27 issue, or, as is not likely to be the case as a S20C issue, we are able to determine the reasonableness of the provision.
It may well irritate Mr. Turner that he is required to finance the defence of the very action that he is pursuing through the courts, but that does not make the provision of a reserve, in a reasonable sum, unreasonable. The managing agents and IPC are well aware of the potential costs if ,from their point of view the case goes wrong. Even if they win they are not guaranteed to recover all their costs. The amount of those costs can be challenged both as to reasonableness and as to whether they should be 'relevant' costs.
To fail to make a provision would be a dereliction of duty on the part of IPC and its agent.
We do not pass any opinion on the merits of the litigation. The provision, which we determine to be reasonably incurred, is obviously without prejudice to each parties right to litigate with vigour, if they are so minded.

Eighthly the issue of Statutory Consultation was not pursued as it is accepted that none of the contractual arrangements, for which charges are made, are within the definition of Long Term Qualifying Agreements. To the extent that any of the Reserves/Provisions presage large items of expenditure, then those items may have to be the subject of Consultation as Qualifying Works under Section 20.

Costs S20C.

We have regard to the guidance afforded to us , as to the exercise of our discretion in respect of the S20C issues, by the cases of *The Tenants of Langford Court (El Sherbani) v Doren Ltd* (LRX/37/2000), and *Ibrahim v Dovecorn Reversions Ltd* [2001] 30 EG 118. This is not a case where we are minded to make an order that it would be unjust and inequitable to categorise IPC's costs as anything other than relevant costs for the purposes of the service charge account.

The application started on the basis that no reserves at all could be provided for. The case has latterly proceeded on the basis of the reasonableness of the Reserve provisions. Very little of the Applicant's challenges can be said to have been sustained. Most were matters of interpretation, which were not dependent on further disclosure from the Respondent. Both parties have prepared their cases thoroughly. There has been no lack of cooperation on the Respondent's part.

Some of the Applicant's points appeared to have about them a distinct element of tactics in the Court litigation. To the extent that the application was a rerun of that litigation then it would be particularly unreasonable to deny IPC the right to include then costs of this application as relevant costs in the Service Charge Account.

The Section19 protection remains for all tenants as to the amount of the costs. So far as the managing agents' likely costs are concerned we have already held that the terms set out in the correspondence are not unreasonable as to rates of charge. The employment of Counsel is to be expected where, as has been the case with this application, many technical and legal points are raised by or on behalf of the Applicant. The overall cost is still, however a S19 issue.

The underlying problem, apart from the corrosive nature of the ongoing litigation, is that the Lease is inadequate and especially so since the freehold and landlord's functions were transferred to a tenants' management company (IPC). Mr Turner was a willing participant in that change and played a prominent part in the administration and management of IPC until 5 years ago. We have made various determinations on the Lease as it is, not as it might be, or should be. The need for this Tribunal's determination does not primarily arise from the conduct of IPC, its managing agent or the members of IPC, who are also tenants who are required to pay the Maintenance Charge

The Respondent Company would be left, once again, carrying a potential permanent deficit if the costs of this application were not relevant costs. We accept that the fact that a party has paid the service charge does not prevent them from challenging it. The fact is that all others have paid and not taken up the opportunity to join with Mr. Turner in challenging the Annual Maintenance Charge for 2009.

The exercise of our discretion is guided by the above. We decline the applicant's request for a S20C. Order for all or any of the Respondents' costs

Martin J Simpson.
Chairman

Schedule of Statutory Provisions.

Landlord & Tenant Act 1985

19 Limitation of service charges: reasonableness

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

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

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

and the amount payable shall be limited accordingly.

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

20 Limitation of service charges: consultation requirements

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—

(a) complied with in relation to the works or agreement, or

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

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

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

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or

(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—

(a) an amount prescribed by, or determined in accordance with, the regulations, and

(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.

20ZA. Consultation requirements: supplementary

(1) Where an application is made to a leasehold valuation tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

(2) In section 20 and this section—

"qualifying works" means works on a building or any other premises, and

"qualifying long term agreement" means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

(3) The Secretary of State may by regulations provide that an agreement is not a qualifying long term agreement—

(a) if it is an agreement of a description prescribed by the regulations, or

(b) in any circumstances so prescribed.

(4) In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.

(5) Regulations under subsection (4) may in particular include provision requiring the landlord—

(a) to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,

(b) to obtain estimates for proposed works or agreements,

(c) to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,

(d) to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and

(e) to give reasons in prescribed circumstances for carrying out works or entering into agreements.

(6) Regulations under section 20 or this section—

(a) may make provision generally or only in relation to specific cases, and

(b) may make different provision for different purposes.

(7) Regulations under section 20 or this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

20B Limitation of service charges: time limit on making demands

(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.

20C Limitation of service charges: costs of proceedings

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation tribunal, or the Lands Tribunal, or in connection with arbitration proceedings, 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.

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;

(aa) In the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;

(b) In the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

27A Liability to pay service charges: jurisdiction

(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to—

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—

(a) the person by whom it would be payable,

(b) the person to whom it would be payable,

(c) the amount which would be payable,

(d) the date at or by which it would be payable, and

(e) the manner in which it would be payable.