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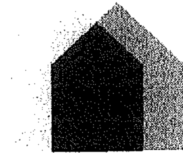

LONDON RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Case Reference: LON/00AC/LSC/2011/0029

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL UNDER SECTION 27A LANDLORD AND TENANT ACT 1985 ON A MATTER TRANSFERRED FROM THE BARNET COUNTY COURT

Applicant/Landlord:	Redendale Limited
Respondent/Leaseholder:	Mr Salim Modi
Premises:	Flat 5 Brentview House, North Circular Road London NW11 9LE
Leasehold Valuation Tribunal:	Ms F Dickie, Barrister, Chairman Mr M Cartwright, FRICS Mr A Ring
Date of Hearing:	16 May 2011
Date of Decision:	21 June 2011

Summary of Decision

The Tribunal has no jurisdiction in relation to the HML service charges 25/12/07 – 24/03/08 of £197.77 as this item was the subject of the Upper Tribunal decision.

Year ending 25 March 2009, the following sums are disallowed:

£460.90	electricity
£389.52	bank charges and interest
£373.67	management fees

Year ending 25 March 2010, the following sums are disallowed:

£1733.90	electricity
£1750.00	consultancy fees

All estimated charges for the year ending 25 March 2011 are reasonable and payable except for consultancy fees £2000 and surveyor's fees £1000.

Preliminary

1. Redendale Ltd. is the freeholder of two blocks of flats, known as Brentview House and Sheila House. It is a company owned entirely, in equal shares, by all of the 16 leaseholders of the flats in those blocks including the Respondent Mr Modi, who purchased flat 5 from his father in July 2007.

2. The landlord issued a claim in the Southend County Court against the tenant in the sum of £3413.58, comprising service charge arrears from 11 September 2007 to 11 August 2010, including ground rent and arrears collection charges. The proceedings were transferred to Barnet County Court and from there to the Leasehold Valuation Tribunal by order of District Judge Karp date 11 January 2011. An oral pre trial review was held on 15 February 2011 at which the Applicant was not represented and the Respondent appeared in person.

3. A decision of the Leasehold Valuation Tribunal on an application by Mr Modi against Redendale Ltd. under s.27A of the Landlord and Tenant Act 1985 in respect of service charges for the period ending 24 March 2008 was appealed to the Upper Tribunal (Lands Chamber). On 5 October 2010 AJ Trott FRICS sitting in the Upper Tribunal (Lands Chamber) determined reasonable service charges for that period, and as a result the amount of £1455.08 had been overpaid by Mr Modi in service charges. That sum was then repaid to him by the landlord, but he has not used it to contribute towards his service charges.

4. At the hearing of the present proceedings on 16 May 2011 Mr Jeremy Kanzen, director of Redendale Ltd., appeared on behalf of the landlord accompanied by Mr Lee, another director. Mr Modi appeared in person. The parties were advised that the Tribunal has no jurisdiction in relation to periods covered by the determination of the Upper Tribunal (Lands Chamber). A charge of £197.77 for service charges for the period 25/12/07 to 24/3/08 which was included in the schedule of costs claimed in the County Court Claim is not a matter which this Tribunal may revisit.

Adjournment Request

5. Mr Modi made an oral request for an adjournment at the commencement of the hearing on the basis that there were a number of documents missing from the bundle prepared by the Applicant. In particular the missing documents were a copy of the lease, some documents in the County Court proceedings (specifically an itemised statement which had been attached to the Particulars of Claim), some missing invoices, the tenant's supporting evidence that accompanied his statement of case and correspondence dated 7 March 2011 with the Tribunal. Mr Modi acknowledged that all of these documents were now before the Tribunal at the hearing and had been seen by both parties but he argued that the Tribunal, having not had sight of them before, would not have time to consider them. In addressing the Tribunal on the question of prejudice to the landlord by a further delay in receiving payment of any service charges, Mr Modi said he felt that he should wait until the decision on the present application before paying anything to his service charge account.

6. Mr Kanzen objected to the adjournment, Mr Lee and himself having both taken time off work to attend the hearing. He denied that any available invoices were missing from the bundle and emphasised that they are residents in the block and not professional landlords. He observed that much of the tenant's evidence attached to his statement of case was included in the bundle, though not all of it.

7. The Tribunal took time to consider the application and to have regard to its power under Regulation 15 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003. The request for an adjournment was refused since the Tribunal considered in all the circumstances it was not reasonable to adjourn. All documents on which both parties wish to rely were available at the hearing, and the Tribunal advised it would take care to ensure that it read any documents during the proceedings which a party considered to be relevant and to which its attention was drawn. Mr Modi had not demonstrated that he would suffer any prejudice by proceeding with the hearing and the Tribunal bore in mind the convenience to the parties who have all taken time off work.

Statutory Provisions

8. Sections 18, 19, 20C and 27A of the Landlord and Tenant Act 1985 ("the Act"), not reproduced.

The Hearing

9. As at the date of issue of the County Court claim transferred to the Tribunal, services charges for the years 2009/2010 and 2010/2011 were estimated only. Final accounts now existed for the year 2009/10. Both parties agreed that the Tribunal should reach a determination as to the reasonable actual expenditure for that year.

10. Both blocks have a long history of neglect by the previous landlord. Redendale Ltd. became owner of the freehold 10 years ago. The cost of refurbishment was estimated 9 years ago to be approximately £350,000, and beyond the reach of the leaseholders. For several years thereafter Redendale Ltd. negotiated with developers to secure a deal whereby the blocks would be refurbished without cost to the leaseholders in exchange for the right to build new flats on top of the existing structures. Work began but was suspended a number of times. By the time of the hearing however refurbishment and development of 14 new flats on top of the blocks was underway again and the landlord estimated completion would be in 5 months. As a result of the development each tenant will receive (for no capital contribution) new double glazing and central heating, major external and internal refurbishment, an additional room to each flat, and the benefit of a lift serving each block. Mr Modi was pessimistic that this would be achieved and viewed the contractual arrangements inadequate to ensure its completion on time. He does not participate in shareholder meetings.

The Upper Tribunal (Lands Chamber) Appeal ("The Upper Tribunal appeal")

11. Many of Mr Modi's arguments concerning the payability and reasonableness of his service charges in the present proceedings were based on an application of the reasoning of the Upper Tribunal in its decision dated 5 October 2010. Mr Kanzen explained that from March 2008 (the period being the subject of the present proceedings), Redendale Ltd. followed the same management and accounting practices as commented upon by A J Trott FRICS in his determination, but on receipt of that decision those practices were amended, and in 2009 new managing agents were appointed.

12. The determination records that at the time Redendale Ltd had a savings account that was originally funded from an insurance payout of approximately £60,000 following a subsidence claim. It used this account to make interest free loans to the service charge account, which were then (partially) repaid in subsequent years. Under the lease the financial year means the period 1 July to 30 June in the following year, but the year end date adopted by Redendale Ltd. is 24 March.

13. A J Trott FRICS found that the certified service charge expenditure statements did not contain any detail about anticipated expenditure of a periodically recurring nature for which a reserve fund might be appropriate. Therefore, in light of the wording of the lease, he found any surplus / deficit in the service charges compared with the actual expenditure for the years 2004 to 2008 cannot be properly transferred to/from a reserve fund.

14. Paragraphs 54 and 58 to 60 of that decision are of particular relevance:

"54.... There is no requirement under the lease that the tenants must fund the service charge account to the extent that it has sufficient cash flow to meet all outgoings as they arise. The purpose of the Interim Payment is to provide adequate cash flow to meet the estimated expenditure but it remains the lessor's obligation under the lease to pay for such outgoings initially ... The respondents are responsible for paying the Interim Payment (or such other payment on account as the lessor designates as being a fair estimate of the lessee's proportion of the service expenditure), the Insurance Rent and the Service Charge. But any lack of cash flow is a problem for Redendale and not the tenants.

58. I do not consider that these legal fees are recoverable for four reasons. Firstly, they were not incurred in relation to the appellant's obligations under Part 2 of Schedule 3. It may have been desirable and expedient to negotiate the development agreement in view of the long term benefits that it would bring to all of the tenants ... but, in my opinion, it was not necessary since it was not the only way in which those obligations could be discharged. Secondly, I do not consider that legal fees constitute expenditure "in carrying out any other work on the building". The use of the preposition "on" in this context signifies physical, rather than legal, work. Thirdly, I do not consider that the fees were reasonably incurred in respect of professional advice in relation to the building. They were incurred in respect of a major redevelopment and refurbishment proposal which, in my opinion, is too remote from the intention of the parties in this paragraph. Fourthly, the amount claimed, which is apparently significantly less than the total amount incurred on such legal advice, is arbitrary. I therefore disallow these costs.

59. ...I am satisfied from Mr Kanzen's evidence that the appellant took all reasonable steps to effect insurance cover in accordance with its covenants under the lease and in a cost effective manner...

60. The appellant paid the insurance premium each year by monthly instalments, for which a charge was levied by the insurance company. Thus for the year ending March 2006 the premium was £6855.98 but the total of the instalments came to £7335.90, the difference of £479.92 being recorded in the statement of service charge expenditure for that year under "Bank charges and interest". Mr Kanzen said that payment by instalments improved the cash flow but as I have said above such cash flow is a matter of concern to the appellant rather than the respondents. In my opinion it is not reasonable for the appellant to incur, and charge the respondents for, additional finance charges to assist the appellant's ability to pay the premium. It was not necessary to incur such charges and, in my opinion, it was not reasonable to include them as a service charge. I therefore disallow these costs for the three years 2006 to 2008 in which these costs are included as service charge expenditure".

Disputed Service Charges

15. In his statement of case in these proceedings Mr Modi disputed the reasonableness of all service charges claimed for the years 2008/09, 2009/10 and 2010/11, except for the insurance for the year 2009/10. The Tribunal heard evidence from both parties in relation to the items charge for each of those years.

Service Charge Year 2008/09

Electricity £910.90

16. Mr Modi disputed this item because it was higher than the average cost of electricity for the years 2004/05 to 2007/08, which was £342.04. Copies of the 6 bills were in the possession of Mr Modi and seen by the Tribunal. He argued that the tenants should not be charge for electricity used by the developer. Mr Kanzen said the developer had indeed contracted to provide and pay for its own electricity, but Redendale Ltd. had wanted work to start before the developer's supply could be installed and for that period agreement was given for the resident's supply to be used. The landlord's case was that the higher than usual bills reflect new floodlights to the new rear car park and other new lighting to the common areas.

17. This Tribunal considers that it is bound to apply that part of the reasoning of the Upper Tribunal that is analogous in determining the payability and reasonableness of the electricity charges in respect of the development work. It finds by analogy that those charges were not incurred by the landlord in discharge of its functions under Part 2 of Schedule 3 of the lease. As A J Trott FRICS commented in paragraph 58 of the decision, "it may have been desirable and expedient to negotiate the development agreement in view of the long term benefits that it would bring to all of the tenants ... but, in my opinion, it was not necessary since it was not the only way in which those obligations could be discharged." Furthermore, the present Tribunal finds that the charges were not reasonably incurred in

respect of the provision of electricity to the building: "They were incurred in respect of a major redevelopment and refurbishment proposal which, in my opinion, is too remote from the intention of the parties in this paragraph". For these reasons, those electricity costs (and indeed any other costs incurred in relation to the development works, whether they for the refurbishment of the existing block or the development of the new flats in the roof space) do not fall within the definition of a service charge under the lease. Furthermore, in respect of electricity charges there was no evidence before the Tribunal that the landlord was not entitled to recover these from the developer under the terms of the development contract. On the basis of previous expenditure, and allowing for an increase in energy charges, the Tribunal allows as reasonable service charges the sum of £450.00 in respect of normal annual electricity charges, excluding those relating to the development.

Bank Charges and Interest £545.38

18. This sum included £155.86 for bank charges for an overdraft. The landlord relied on the fact that the accountant had audited these. The remainder of £389.52 was a charge for spreading payment of the insurance throughout the year. Mr Modi objected to this charge on the basis that the Upper Tribunal found it was not payable.

19. Mr Kanzen argued that the circumstances here were different from those before the Upper Tribunal. For the period 2006-2008 Redendale Ltd. had money from an insurance payout, which was not then applied to the relevant repairs owing to the forthcoming refurbishment. Its decision to spread payments, and incur an additional charge for that facility, had therefore been a choice. He relied on the finding of A J Trott FRICS that "it was not necessary to incur such charges". By contrast, Mr Kanzen explained that, in light of the express disapproval in the Upper Tribunal of Redendale Ltd. using its insurance payout to make loans to the service charge account, it could not do so in the years that are the subject of this dispute. The landlord, owing to the service charge arrears of Mr Modi, did not have the money to pay the insurance up front. Its only option would have been to pay for the instalment facility or take out a bank loan, with associated charges.

20. The Tribunal is not persuaded on the evidence that there were material distinguishing features between the circumstances of these charges levied in 2008/09 and those determined. It furthermore notes that the insurance in question was invoiced on 15 April 2008, which was a considerable time before the decision of the Upper Tribunal. The Tribunal finds that it is bound by the reasoning in that decision and must for the same reasons as stated within it disallow the cost of £389.52 of spreading the insurance premium throughout the year. The bank charges of £155.86 are allowed in full.

Insurance (Buildings) £6152.64

21. Mr Modi challenged the reasonableness of this charge because, once appointed, the new managing agent Gateway obtained a premium of only £3410.99 for the following year, despite the ongoing refurbishment work. No evidence of a relevant claims history or market testing had been produced. Mr Kanzen explained that terrorism cover had been included in

the 2009 premium, and he thought it had been removed from quotes for subsequent years (though on considering the certificates he acknowledged that it had not). The premium of £3410.99 was for 10 months cover only. The building had been covered for 2 months under another portfolio policy held by HML Hathways who forgot to bill Redendale for it.

22. All related invoices were produced and Mr Kanzen observed that the premiums were generally lower that those found reasonable by the Upper Tribunal. The insurance premiums paid by Redendale Ltd over the years are as follows:

2003	£4756.98
2004	£5463.52
2005	£6515.52
2006	£6855.98
2007	£7994.10
2008	£5862.45
2009	£6152.64
2010	£3410.99 (for approximately 10 months)
2011	£4499.60

23. The Tribunal observed that this insurance policy had been obtained through a broker, Alexander Bonhill, whose responsibility was to obtain a competitive price on the market. There is no implied covenant in the lease that the landlord will obtain the cheapest insurance. The Tribunal is satisfied that, for the reasons expressed by the Upper Tribunal, the landlord has acted reasonably in obtaining insurance cover. As leaseholders themselves the directors would have no interest in doing otherwise. The Tribunal finds the premium, which is well in line with previous premiums, is reasonable and payable. It should be noted that as a result of the development works it will be necessary for the landlord to obtain an independent and accurate valuation of the rebuilding cost for the purpose of obtaining the correct amount of insurance cover.

Management Fees £2491.11

24. Mr Modi objected to these management charges because the decision of the Upper Tribunal was to reduce them for the years ending 2006-08 by 25%, and the management company (HML Mandells) was the same for the year ending 2009. Mr Kanzen explained that HML Mandells had been taken over by HML Hathaways on 17 December 2008 and a new account manager gave an improved service for 2 or 3 months. However, owing to service charge arrears that manager was instructed not to do any work on the account. Redendale Ltd. felt that it could not accept their assurances and that it had to move companies, particularly in an attempt to placate Mr Modi who was very unhappy with the management. Mr Modi acknowledged a momentary increase in the service provided by Hathaways, but said it soon reverted to the standard of Mandells. In July 2009 entirely new agents (Gateways) had been instructed. In subsequent written representations Mr Kanzen has pointed out that the decision of the Upper Tribunal was based on HML Mandells failing to

report financial information on time, but he observed that HML Hathways had not repeated this failure.

25. Mr Modi relied entirely on the decision to award 75% of HML Mandell's costs as being of application to their charges in 2008/09. He gave no specific oral evidence about their failures during this year, though the Tribunal understands from the documentation that he continued to be dissatisfied. It does appear their service was unsatisfactory at least to the extent that the accountant Mr Morris appears to have needed to expend additional time in obtaining financial information from them. It is not persuaded that the service of HML Hathaways was similarly poor. The accounts for this year were produced on time, and their late production was indeed a significant factor which affected the decision of the Upper Tribunal. This Tribunal determines that management fees should be reduced in the sum of 15% to reflect the period of management of HML Mandells only. The sum of £2117.44 is therefore found to be reasonable

Accountancy and Professional Fees £1375.00

26. Mr Kantzen gave a breakdown of this figure as £575 for the annual accounts and an £800 charge for accountancy services including responding to Mr Modi's request for a breakdown of various years' service charges for the Upper Tribunal hearing. Mr Modi was concerned that a fee of £400 included in the service charge accounts for 2007/08 appeared again in 2008/09 under a separate invoice number. He pointed out that the invoice of Mr Morris the accountant also refers to filing the form CT 204 with Companies House, and that company expenditure is not recoverable as a service charge. He considered the accountant's fees for preparing figures relating to 2003 – 2008 to be unreasonable when audit fees had in addition been included in the accounts of each of those years. An invoice for £310 for a "special report" regarding the application for permission to appeal the LVT decision was considered unnecessary.

27. The Tribunal finds that all of the accountancy fees are reasonable and payable as service charges. The totality of the invoices exceeds the amount of £1375.00 actually charged and the Tribunal is satisfied on the balance of probabilities that the company expenditure in filing form CT 204 was not charged as a service charge. The landlord company is tenant run and whilst the exact services provided may not have been fully explained, they have had the benefit of precious little professional advice. It was not improper of the directors to have sought such advice about accounting matters, in addition to auditing services, particularly when faced with Mr Modi's enquiries and legal proceedings. The Tribunal was not persuaded that the evidence demonstrated that a £400 invoice had been charged twice. The total claimed is reasonable and recoverable under Paragraph 2, 2.2 of Part 1 to the Third Schedule, which defines Service Expenditure to include "management administration audit professional advice and assistance...".

2009/10

Electricity £3487.15

28. The tenant repeated his comment that the electricity costs were unreasonably high compared to previous average consumption –and claimed that much of them must have related to the development and refurbishment work on the flats. Some exterior lighting had been left on 24/7 during works carried out in this year, but had since been replaced with sensor controlled lighting. Mr Modi considered the electricity a development cost completely covered by the developer. Mr Kanzen stated that the amount also included £1253.25 for an unusually high electricity bill brought forward from an earlier year which the managing agent had been investigating. It had been found to have been correctly billed and to be the result of previously incorrect meter readings. The invoice had been audited in preparation of the accounts. In addition, annual electricity charges of £2233.90 were incurred in this year, the unusual increase being largely due to consumption relating to the refurbishment works.

29. For the reasons set out above the Tribunal finds that electricity charges relating to the development and refurbishment are not recoverable as a service charge. Allowing an increase in charges for rising electricity costs and extra communal lighting it is understood was installed this year, the Tribunal allows a total of £500 as a reasonable figure for electricity, together with the historic adjustment figure of £1253.25. A total of £1753.25 is therefore allowed.

Bank Charges and Interest £25.44

30. Mr Kanzen said these were simply normal bank charges for running the account. Mr Modi agreed this charge at the hearing.

Cleaning, Repairs and Maintenance £2117.60

31. The tenant agreed this charge was reasonable during the course of the hearing.

Management Fees - £2658.56

32. Mr Modi argued that the contract with the managing agent was a qualifying long term agreement on which no statutory consultation had been carried out. Mr Kanzen said alternative quotes had been obtained and Gateway was the cheapest. Upon the Tribunal issuing directions, the landlord after the hearing provided to the tenant and the Tribunal a copy of the management contract, in spite of which Mr Modi persists in his view that it was intended to be in place for more than 12 months and is a qualifying long term agreement within the spirit of section 20 of the Act. However, the Tribunal is clear that Mr Modi's argument is wholly without foundation. The contract is not for a period of more than 12 months and therefore does not fall within the definition of a qualifying long term agreement for the purposes of section 20 of the 1985 Act. At £150 plus VAT per unit the fees charged were lower than HML Hathaways and the Tribunal considered they were reasonable in amount and for the quality of service now being provided.

Consultancy Fees - £1750.00

33. The directors of Redendale Ltd. had been required to input much time and effort into progressing the refurbishment and development scheme for the benefit of the property. Whilst historically such fees had been paid by Redendale Ltd., in this year it had been charged to the tenants as a service charge. The landlord's case was that it was entitled to remunerate the directors under Schedule 3, Part 1, section 2 of the lease which provided:

"Service Expenditure means such sum as the Lessor may reasonably expend or desire to expend in relation to the Building or any part thereof on:

2.1 carrying out its obligations under Part 2 of this schedule or carrying out any other work on the Building in relation thereto which it may reasonably deem necessary and desirable;

2.2 management administration audit professional advice and assistance (including if such may be the case a reasonable fee charged by the Lessor its servants for the time spent on administration)."

34. Redendale Ltd. paid a consultancy fee to the directors in relation to the ongoing £3m development, reapproved at the 2009 AGM and increased at the 2010 AGM, and considered it reasonable. The consultancy services involved negotiating the refurbishment and Mr Kanzen said they the fees were nominal and for the benefit of the tenants. He argued that the fees were expenditure in relation to the building, and distinguished them from the legal fees considered by the Upper Tribunal which had been for advice, including upon the tax implications of the development.

35. For the reasons set out above (in relation to electricity) and in the decision of AJ Trott FRICS, the Tribunal finds that the directors' consultancy fees, being costs incurred in relation to the development and refurbishment programme, do not fall within the definition of service expenditure in the contemplation of the parties to the lease. They are not recoverable as service charges and must be considered as company expenditure.

Accountancy and Professional Fees £658.00

36. Mr Modi considered there had been an unreasonable increase from the average figure for accountancy services between 2005 and 2008. Referring to the invoice, Mr Kanzen said that it demonstrated additional costs had been incurred in obtaining the files from HML Hathaways after the change of managing agent. Mr Morris, the accountant, had given evidence in the appeal to the Upper Tribunal, and AJ Trott FRICS was complimentary about the contribution Mr Morris had made, in finding that "Both Mr Kanzen and Mr Morris impressed me as honest witnesses who had done their best to deal fairly and pragmatically with the service charge issues in difficult circumstances".

37. The Tribunal is satisfied that Mr Morris's additional services were reasonably required in these difficult circumstances in order to obtain relevant documentation from the former managing agent and prepare the accounts for this block with a chequered management history. It allows the sum claimed in full as reasonable and payable.

2010/11 – Estimated charges

Buildings Insurance £3965.00

38. Mr Modi objected to this item because the insurance certificate was now available and showed an actual premium of £4490.60. Both this and the initial estimate represented too high a percentage increase on the previous year, he said. Mr Kanzen believed the cover was competitive and observed it was less than the historic average. The Tribunal notes that the premium for the previous year related only to a period of 10 months so a direct comparison was misleading. Even after allowing for that, it was still clear that a substantial saving was made in changing insurance arrangements in 2009/10, demonstrating an intention on the part of the landlord to obtain good value for the tenants. It is not persuaded that either the initial estimate or the premium actually secured for 2010/11 was unreasonable, and the amount claimed is allowed in full.

Electricity £800.00

39. Mr Modi disputed this was a reasonable estimate for electricity based on his arguments about previous years' reasonable expenditure. The landlord pointed out that the estimate included the cost of the new exterior lighting and increased voltage of the new lighting in the common areas, though Mr Modi observed that all the new lighting was sensor operated. The Tribunal finds the estimate is reasonable and payable taking into account recent consumption and the improved lighting to the common parts of the block.

Cleaning, repairs and renewals £4105.00

40. The estimated cleaning cost of £1805 was not disputed. Mr Modi said that repair costs of £2300 were an unreasonable estimate for a newly refurbished block. Mr Kanzen explained there had been recent trouble with the drains, and that the estimate was based on the managing agent's projection of repairs required to doors, unblocking drains, and work to the bin store which people use to dump items. The Tribunal considered the managing agent had set a reasonable budget for expenditure on the repairs identified which would not be addressed during the redevelopment.

TV Satellite £1750.00

41. Mr Modi disputed this estimated charge as there is no satellite TV system. Mr Kanzen said that once the flats are complete a communal satellite dish will be installed, but that actual expenditure this year will be nil as the refurbishment work has been delayed. The Tribunal considered this estimate when set was reasonable and allows it in full. The appropriate adjustment will be made after the year end.

Fire Alarm £200.00

42. Mr Modi argued that this estimated charge is a health and safety requirement of the development and should be covered by the contractor. Mr Kanzen said this estimate was for

the cost of servicing the fire alarm that was to be installed during the refurbishment. Again, delay to the works had meant there would in fact be no actual charge under this head during this year. The Tribunal finds the estimated cost is reasonable and payable pending adjustment in the end of year accounts.

Management Fees £2820.00

43. Mr Modi repeated his arguments relating to the management fees for 2010 and, for the reasons given above, the Tribunal rejects them. The estimated cost is reasonable and payable.

Consultancy Fees £2000.00

44. The parties relied on their arguments in relation to consultancy fees in 2009/10. For the reasons given above the Tribunal finds this estimate is not payable as a service charge.

Accountancy Fees £588.00

45. Mr Modi considered this was unreasonably high compared to average costs from 2005-2008. Given the additional accountancy costs incurred in recent years, the Tribunal finds it is not unreasonable to estimate this figure, which will be adjusted based on actual expenditure.

Surveyor's Fees £1000.00

46. Mr Kanzen explained this estimate was for the cost of a surveyor to monitor the development work. The Tribunal finds that the reasoning above regarding electricity and consultancy costs applies, in that these surveyor's costs are a development costs and not recoverable as a service charge under the terms of the lease. Accordingly they are disallowed.

Health and Safety £350.00

47. It was explained by Mr Kanzen that the managing agent had advised that this item be included in the budget, but that it would be another item of nil expenditure this year. Whilst Mr Modi was unclear to what this item related, and considered such costs should be covered by the developer whilst work was ongoing, the Tribunal is aware that applicable Regulations require landlords to carry out periodic health and safety inspections on common parts of buildings. This estimate is reasonable and payable.

Bank Charges £60.00

48. Mr Modi pointed out that for normal bank charges for running the account this estimate was a large increase on the actual costs incurred last year. The Tribunal however considers this is a reasonable estimated charge and allows it in full.

Administration Fees / Court Fees / Interest

49. Such charges that form part of County Court claim are £615.05

Interest at 8% charged since 12 January 2010	£64.55
HML administration fee for late payment 2 June 2009	£80.50
Gateway arrears recovery charge	(1) £250 plus Vat (£293.75)
Gateway arrears charge	(2) £150 plus VAT (£176.25)

50. By Clause 5.30 of the lease the lessee covenants:

"to pay and indemnify the Lessor against all liability and all proper costs fees charges disbursements and expenses connected with incidental to consequent upon and (where appropriate) in contemplation of:

5.30.3 the recovery of arrears of Rent or other sums payable under the Lease;"

And by Clause 5.32:

"without prejudice to any other right or remedy of the Lessor to pay to the Lessor interest at the Interest Rate on the Rents or any part thereof and other monies payable under any of the provisions of this Lease and VAT thereon (if applicable) which are not paid to the Lessor on the date due (in cases where the amount due is known by the Lessee whether payment is formally demanded or not) and interest on any sum which is not paid to the Lessor shall be calculated from the later of the date it is due and the date 14 days after demand for payment;"

Clause 1.16 provides:

"**Interest Rate** means four per cent per annum above the base lending rate from time to time of Barclays Bank PLC or in the event of such base rate ceasing to exist such other comparable rate selected by the Lessor as shall from time to time serve as an alternative or replacement thereof for the time being in force;"

51. The interest of £64.55 is sought in addition to interest pursuant to section 69 of the County Court Act 1984, in respect of which the Tribunal has no jurisdiction. To the extent that interest is sought as an administration charge in respect of which the Tribunal has jurisdiction it may only be sought at the rate specified in Clause 1.6, and not at 8% as calculated. The Tribunal has no evidence as to the correct rate of interest and has not recalculated it, but the landlord should be aware that it must do.

52. Pursuant to directions, the landlord submitted written representations after the hearing to the effect that Gateway's arrears charges were standard for (1) contacting the mortgage lender and corresponding with the lender chasing the arrears and (2) applying to the County Court for judgment and all related correspondence with the court. By virtue of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 administration charges are only payable to the extent that they are reasonable. Mr Modi submitted in his written representations that it was unreasonable for the landlord to contact his mortgage lender and issue fresh

proceedings before the decision of the Upper Tribunal was received. He said he believed that decision could well have left his service charge account in credit. However, the suggestion that this was the reason he did not pay any service charges for the years that are the subject of this dispute is not borne out by the fact that, once in receipt of the landlord's refund, he paid none of it back in service charges. Of course the landlord, in appealing the LVT decision, did not hold the view that Mr Modi's account might end up in credit. The landlord's view was in fact proved to be correct, since the overpayment of £1445.08 was not sufficient to cover all of the arrears up to the time Gateway applied charges for following debt recovery procedures. The Tribunal considers that Gateway's administration charges for arrears recovery are payable under Clause 5.30.3 and, notwithstanding Mr Modi's representations, that they are reasonable in amount. The HML charge of £80.50 applied on 2 June 2009 is disallowed. Mr Modi's service charge overpayment would have covered his arrears to this point.

Costs and Fees

53. The tenant applied for an order under s20C of the Landlord and Tenant Act 1985 preventing the landlord from adding the costs of these proceedings to the service charge account. He considered the County Court claim had been premature since it had been brought before the determination of the Upper Tribunal had been received. Mr Modi explained that he had decided to withhold his service charges entirely because he thought he was entitled to do this under the new s.21 and s.21A of the Landlord and Tenant Act 1985. He had not appreciated, as the Tribunal pointed out, that these amendments to the Act were not yet in force.

54. The Tribunal has the power to make an order for costs against a party under Paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 in the sum of up to £500 in specified circumstances which include where that party has acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings. Mr Kanzen pointed out that Mr Modi had settled no service charge invoice since 2007, and that the County Court proceedings had been a last desperate measure. He applied for an order for costs against Mr Modi limited to £500 on the grounds of his unreasonable behaviour. Mr Modi denied he had acted in such a way, and asserted he had only ever requested information to which he was entitled. He too applied for costs limited to £500 on the same ground against Redendale Ltd. since it had failed to apply the principles laid out by the decision of the Upper Tribunal.

55. The Tribunal finds some merit in the arguments of both parties on this issue. Mr Modi was correct in his analysis that the landlord was improperly charging development costs as service charges. However, the Tribunal does not consider he had adequate justification to insist on disputing virtually every item on the service charge account and withhold all payment. TheTribunal considers that his incorrect view that he was entitled to withhold service charges as a matter of law cannot have been robustly held, since he admitted at the hearing it had not been based on any legal advice. The Tribunal has jurisdiction to determine the reasonableness of service charges whether paid or unpaid. Mr Modi will be

liable to pay the landlord's expenditure either as a leaseholder or as a shareholder. His intransigence would clearly cause the landlord difficulties. However, the landlord has failed to understand or apply the decision of the Upper Tribunal, and this caused frustration. The Tribunal hopes that both parties will attempt to deal with each other on a new footing henceforth. After careful consideration the Tribunal finds that the conduct of neither party in connection with the proceedings and at the hearing was unreasonable and the Tribunal declines both applications for costs. In light of Mr Modi's failure to make any payment at all, however, and the landlord's substantial success in these proceedings, it also declines to make an order under s.20C. The landlord's costs may therefore be added to the service charges, subject to the lease permitting this.

Chairman:

MS F DICKIE, Barrister

Date: 21 June 2011