(2730)

NORTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

MAN/00CM/LSC/2006/0015

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON APPLICATIONS UNDER SECTIONS 20C AND 27A LANDLORD AND TENANT ACT 1985.

Applicant:	Mr Marc Dobson
Respondent:	Usworth Land Ltd
Re:	5 The Pines, Usworth Hall, Washington, Tyne and Wear, NE 37 3JJ
Date of Application:	30 June 2006
Date of Consideration:	12 September 2006
Venue:	The Northern Rent Assessment Panel, 1st Floor, 26 York Street, Manchester M1 4JB

Members of the Leasehold Valuation Tribunal:

Mr. M. Davey (Chairman)
Mrs E. Thornton-Firkin (Valuer Member).

Date of Tribunal's Decision:

14 September 2006

Decision and Order:

1. That recovery by the Landlord of payments for the years 2003 and 2004 for the "services" specified in the lease is not limited by section 20B of the Landlord and Tenant Act 1985.
2. That the recovery of the "insurance rent" for the above years is limited by section 20B of the Landlord and Tenant Act 1985 which provides that the Tenant shall not be liable for that rent in so far as the costs incurred on insurance by the Landlord were incurred more than 18 months before the demand for payment made on 3 February 2006.
3. That an order under section 20C Landlord and Tenant Act 1985 is not necessary because the lease does not permit recovery of the costs of proceedings before the Leasehold Valuation Tribunal through the service charge payable under the lease.

The Application

1. By an application dated 20 June 2006, and received on 30 June 2006, Mr Marc Dobson, Tenant of the above property, applied to the Leasehold Valuation Tribunal for a determination under section 27A Landlord and Tenant Act 1985. He sought a determination in respect of payments to his Landlord, Usworth Land Ltd., for insurance of the building and other services under his lease for the calendar years 2003 and 2004. He also applied under section 20C of the 1985 Act for a declaration that the Landlord's costs in connection with these proceedings should not be treated as relevant costs for the purposes of their recovery by way of any future service charge demand.

2. In his application form Mr Dobson stated that he was content for the matter to be determined on paper without the need for an oral hearing. By Directions dated 13 July 2006 a Procedural Chairman directed, amongst other things, that the matter would be determined in the week beginning August 28 2006 unless the respondent Landlord company signified in writing within 14 days that it wanted an oral hearing. No such request was received. However, late submissions, copied to the applicant, were made by the Landlord, with the Tribunal's permission, on 30 August 2006 and thus the determination was delayed beyond the target date.

The background and terms of the lease

3. The Pines is a purpose built flat development, constructed in 2001, comprising six flats. By a lease dated 18 October 2002, Mr Marc Dobson bought number 5 for a term of 999 years from 12 July 1996. The lease was granted by the freeholder Usworth Land Limited Albion House Spout Lane Washington Tyne and Wear in consideration of a premium. The business of Usworth Land Ltd is conducted by its Director, Mr David Johnson.

4. Clause 2 of Mr Dobson's lease makes provision for the payment of rent and by way of further rent "the insurance rent" in accordance with clause 5 and a service charge in accordance with the Third Schedule. By clause 1.6 of the lease "the rent" is defined as one peppercorn if demanded on 14 May each year. Despite the fact that confusingly clause 1.23 also defines "the rent" as meaning "the rent the insurance rent and the service charge", it seems tolerably clear that the intention and effect is to reserve all three payments as "rent".

5. By clauses 1.8 and 1.9 of the lease the insurance rent is defined as (1) one sixth of the cost to the Landlord from time to time of paying the premium for insuring the building and (2) all of any increased premium payable by reason of any act or omission of the Tenant.

6. The insurance rent is payable *on demand* in accordance with clause 5.3 which provides that "the Tenant shall pay the insurance rent on the date of this lease from the period from the commencement date of the term of (*sic*) the day before the next policy renewal date and subsequently the Tenant shall

pay the insurance rent on demand and (if so demanded) in advance of the policy renewal date." This clearly envisages a proportionate payment from the commencement of the lease until the policy is due for renewal. Thereafter the Tenant's share of the insurance premium is payable on demand and this can be before or on or after the policy renewal date.

7. By clauses 1.11, 1.14 and 1.15 the service charge is defined as one sixth of (1) "all costs expenses and outgoings whatever reasonably and properly incurred by the Landlord during a Financial Year (viz; 1 August to 31 July – see clause 1.11) in or incidental to providing all or any of the services" and (2) VAT payable on any such sums costs expenses and outgoings (clause 1.13). The services are listed in schedule 1 and include (1) maintenance and repair of the main structure of the building and common parts, boundary walls and fences (2) decoration of exterior and common parts (3) cleaning and lighting of common parts (7) the keeping of proper accounts and (8) the setting aside of a reserve fund for the replacement maintenance and renewal of those items that the Landlord has covenanted to replace maintain or renew. The list of services does not include insurance of the building which is dealt with in clause 5 of the lease.

8. The service charge provisions are not straightforward. The salient paragraphs of schedule 3 are set out below.

> 2. The Landlord shall as soon as convenient after the end of each financial year prepare an account showing the annual expenditure for the financial year and containing a fair summary of the expenditure referred to in it and upon such account being certified by the agent it shall be conclusive evidence for the purposes of this lease of all matters of fact referred to in the account except in the case of manifest error
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> 3. The Tenant shall pay for the period from the Date of this Lease to the end of the financial year next following the date of this lease the initial provisional service charge the first payment being a proportionate sum in respect of the period from and including the date of this lease to and including the day before the next quarter day to be paid on the date of this lease the subsequent payments to be made in advance on the relevant quarter days in respect of the relevant quarters
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> 4. The Tenant shall pay for the next and each subsequent financial year a provisional sum equal to the service charge payable for the previous financial year (or what the service charge would have been had the previous financial year been a period of 12 months calculated by establishing by apportionment a monthly figure for the previous financial year and multiplying by 12) increased by 10%
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> 5. If the service charge for any financial year exceeds the provisional sum for that financial year the excess shall be due to the Landlord on demand and if the service charge is less than such provisional sum the

over payment shall be credited to the Tenant against the next quarterly payment of the rent and service charge

The facts

9. Under cover of a letter to Mr Dobson, dated 3 February 2006, Mr D.W. Johnson, Director of Usworth Land Limited enclosed three documents, each headed "service charge account", which were stated to be invoices to December 2003, 2004 and 2005 respectively. All invoices are dated by hand 3.2.2006.

The items covered are:

2003

	Annual Charge
Building Insurance	104
Soft landscape Maintenance	121.66
Road and Paving Fund	50
External Redecoration Fund	50
Internal Redecoration	50
Repair Fund	60
Power	68.93
Cleaning	n/a
General Fund	60
Amount Due	564.50

2004

	Annual Charge
Building Insurance	136.37
Soft Landscape Maintenance	98.33
Road and Paving Fund	50
External Redecoration Fund	50
Internal Redecoration	50
Repair Fund	60
Power	63.76
Cleaning	n/a
General Fund	60
Amount Due	568.46

2005

	Annual Charge
Building Insurance	143.66
Soft Landscape Maintenance	81.25
Road and Paving Fund	50
External Redecoration Fund	50
Internal Redecoration	50
Repair Fund	60
Power	64.45
Cleaning	n/a
General Fund	60
Amount Due	559.36

10. By a letter to Mr Johnson dated 6 February 2006 Mr Dobson asked to be provided with the accounts for the Pine Management Fund relating to the invoice years in question plus copies of invoices relating to expenditure incurred in these periods . He also stated that "Under section 21 of the Tenant and Landlord Act 1985 (*sic*) payment will be withheld until this information is provided." He further requested a copy of the insurance policy for the relevant periods together with the schedules detailing the cost of the premiums."

11. Mr Dobson went on to state that "Under section 20 of the Tenant and Landlord Act 1985 a statutory time limit applies for the demands for service charges. The landlord must issue the demand within 18 months of his incurring the cost. If the demand is provided later than this, the landlord cannot recover costs at all, unless a notice is served during the 18 months stating that the costs have been incurred and that the tenant will be required to contribute to them by way of service charge,. As no such notice has been served, any charges relating to costs incurred prior to August 2004 cannot be recovered."

12. In a letter to all residents at The Pines, dated 22 February 2006, Mr Johnson referred to an earlier letter to residents dated 20 February 2006 in which he had advised that service charge accounts could be viewed by appointment. Mr Johnson also enclosed with his letter of 22 February a copy of the schedule covering the service charges from the first occupancy to date. He also enclosed details of the insurance cover which had been in force covering the period of the service charge, as well as copies of the accounts for electricity and grass maintenance for the same period. By a further letter to Mr Johnson, dated 24 April 2006, Mr Dobson reiterated his contention that his only liability for 2004 was for the period 3 August to 31 December 2004 and he requested a revised invoice for that year. However, he did pay the 2005 invoice in full whilst stating that he was still not satisfied that the concerns of residents, including himself, with regard to the accounts provided and in particular the damage to Flat 2 and Flat 6 and the costs of the gardening had

not been addressed. He specifically stated that his payment did not prejudice his right if necessary to refer the matter to the Leasehold Valuation Tribunal.

The applicant's case and the respondent's response

13. As noted above, in his letter to the Landlord dated 24 April 2006, Mr Dobson stated that he was concerned that the costs for soft landscape maintenance at the Pines had been charged at the same rate as the Manor despite the area requiring maintenance being significantly larger at the Manor. Furthermore, whilst he had made payment of the service charge demand for 2005 he said that this was without prejudice to his right to refer the matter if necessary to the Leasehold Valuation Tribunal. However, in his application to the Tribunal Mr Dobson stated that he only sought a determination in respect of his liability for the years 2003 and 2004 in so far as that liability might be affected by section 20B Landlord and Tenant Act 1985. Thus the reasonableness, as opposed to the payability, of the service charges for 2003 and 2004 was not challenged on this occasion before the Tribunal.

14. In his respondent's statement to the Tribunal, Mr Johnson stated that Mr Dobson had paid the apportioned service charge sum of £98.90 for the period from 18 October to 31 December 2002 based on actual costs for insurance, landlord's electricity and grass cutting of the lawn surrounding the building and a sum for the reserve fund. The invoice was dated 17 January 2003 and was paid on 14 February 2003.

15. Mr Johnson also explained that, whilst the lease provides for a Financial Year of 1 August to 31 July, in practice the calendar year has been adopted from the outset and accepted by the tenants as a sensible time for invoicing service charges. He says that this echoes the insurance renewal and gives a clear year by year view of the costs. (In fact the insurance period is 14 December to 13 December).

16. The essence of Mr Johnson's response, based on advice (copied to the Tribunal) from the Landlord's solicitor, with regard to section 20B Landlord and Tenant Act 1985 is that the purpose of this provision is to safeguard tenants from late demands in respect of service charge costs of which the tenants were hitherto unaware. He says that this is not the case here. This was because, from the time he contracted to buy Flat 5, Mr Dobson was aware that there was an annual service charge and he knew from the outset, from the terms of the lease and the initial service charge demand for the proportionate part of 2002, what items he would be expected to pay for each year. Mr Johnson says that Mr Dobson would have expected the property to have been insured by the landlord each year; he was aware that gardening services and lighting was being provided and he knew that the landlord was building up a reserve fund for non recurrent expenses.

17. Mr Johnson put in evidence (1) the Landlord's solicitor's replies to the pre- contract enquiries made by Mr Dobson's solicitor, disclosing the service charge and the initial provisional charge of £500; (2) a letter dated 12 September 2002 from the Landlord's solicitor to the Tenant's solicitor which

referred to the enclosure of the latest insurance schedule for The Pines (2002) and an initial provisional charge of £600 (3) the apportioned service charge invoice for 2002 which Mr Dobson had paid. Mr Johnson argues that Mr Dobson knew what the charge would be for 2003 because he was advised in writing by Frederick Walker (the Landlord's solicitors) on 12 September 2002 that the anticipated service charge for the first year would be £600. It follows says the Landlord that Mr Dobson also knew from the terms of the leases the financial basis on which 2004 would follow.

The Law

18. Section 18 of the Landlord and Tenant Act 1985 provides that

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a [dwelling] as part of or in addition to the rent-

(a) which is payable, directly or indirectly, for services, repairs, maintenance or improvement or insurance or the landlord's costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose-

(a) "costs" includes overheads, and

(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

19. It should be noted at this point that this part of the Act applies to a "service charge" as defined in section 18 and not as defined in a particular lease. Thus the fact that the insurance rent is not treated as part of the service charge by this lease does not prevent it being treated for the purposes of the regulatory provisions contained in this Part of the Act as being part of a "service charge."

20. Section 27A provides that

(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 date at or by which it is payable, and

(d) the manner in which it is payable.

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

21. Section 20B provides that

(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.

22. Section 20C provides that

(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 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.

.....

(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 Tribunal's determination

23. The Tribunal is asked to decide whether the Landlord is precluded from recovering the service charge and insurance rent in respect of 5 The Pines for the calendar year 2003 and for the period from 1 January 2004 to August 2004 both periods being more than 18 months prior to the Landlord sending an invoice to the Tenant on 3 February 2006 demanding payment of the service charge for the years 2003, 2004 and 2005. The Tribunal is also asked to make an order under section 20C disallowing the landlord's costs of the present proceedings as relevant costs to be taken into account when determining any future service charge payable by the Tenant.

24. The Tribunal first notes that the service charge and insurance rent provisions of the lease are for practical reasons being operated in a way different from that provided for by the Lease which is not aptly worded to deal with the way in which the Landlord wishes to operate the services and the charge at this development. For the most part this arrangement appears to be acceptable to the applicant Tenant and to other residents.

Thus

(1) The Financial Year is now being treated as 1 January to 31 December and not 1 August to 31 July as provided for in clause 1.11 of the lease.

(2) The insurance rent is being treated as part of the service charge despite the fact that the lease makes separate provision for these payments in clause 5 and schedule 3 respectively. Thus although the lease provides for the insurance rent to be payable annually on demand it has not been so demanded but has been treated in practice as part of the service charge.

(3) As to services (as defined in the lease) the lease provides for (1) advance payment (in quarterly instalments) of an initial provisional service charge of £500 per annum and (2) in subsequent years the payment of a provisional sum equal to *the service charge payable for the previous financial year* uplifted by 10% with balancing adjustments at the end of those years. (Italics provided. It is not clear whether the italicised words refer to the provisional charge for the previous financial year or the actual adjusted charge. A literal meaning indicates the latter). If the actual costs in any year exceed the provisional sum the excess becomes payable on demand. In practice however, no provisional sums were paid and the demands made in February 2003 (for the calendar year 2002) and in February 2006 (for the calendar years 2003, 2004 and 2005) were made in arrears and based on actual costs.

(4) By a letter to residents dated 20 February 2006 the Landlord seeks, as from February 2006, to impose advance payment by monthly direct debit of what it calls the "core service charge items" (including for this purpose insurance) with a balancing invoice at the end of the year. Any Tenant who does not agree is required to "settle a demand for payment to cover, in advance, the full year's outlay as anticipated by Usworth Land payable in fourteen days." (Letter to Mr M.J. Willis 1 The Pines dated 27 February 2006). It is not clear from the evidence provided what the core service charge elements are nor whether the reference to "the full year's outlay" refers to the core elements only or the whole service charge. The new arrangement also seems to be an attempt by the Landlord to change the terms of the lease unilaterally with regard to payment dates.

25. The Tribunal's decision in this case turns on the interpretation of section 20B as applied to the facts. On a literal reading of the provision, because a demand has been made for service charge costs some of which were incurred more than eighteen months before the demand was made those elements of the service charge for the period in question are, as Mr Dobson argues, irrecoverable. Section 20B(2) is not engaged because there was no written notice given during that period stating that the costs had been incurred and the payment would be required in the future.

26. No authority was cited by either party. However, the Tribunal is aware of the decision of the High Court in *Clive v Charlegrove Securities Ltd* [2003] EWHC 1284 (Ch). In that case the lease provided for advance quarterly

payments of service charge (based on the landlord's notified budgetary estimate) with any excess costs being recoverable on demand. The tenant made advance payments for the years ending March 25 1999 and March 25 2000. The actual service charge accounts for these years were not drawn up until October 2001. The tenant's claim that the Landlord was thereby precluded from recovering any of the costs for the years in question failed. It was held that section 20B LTA 1985 has no application where (a) payments on account are made to the lessor in respect of service charges and (b) the actual expenditure of the lessor does not exceed the payments on account and (c) no request by the lessor for any further payment by the tenant needs to be or is in fact made. The service charge account drawn up in October 2001 was not a demand for payment because the actual costs were less than the interim payments for the years in question.

27. The present case is clearly distinguishable in one sense because no budget had been prepared and no demand for payment on account had been made for any of the years claimed (the provision of the certified accounts not being a demand for payment) whilst the letter of 13 February 2006 was undoubtedly a demand for payment. On the other hand, as Mr Johnson argues, the lease does provide a mechanism for calculating the provisional payment each year. The provisional service charge payment is not (unlike the insurance rent) payable on demand. Thus these sums became payable at the appropriate times even if not expressly notified to the tenant. As Etherton J observed in *Gilje*, "...the provisions of s.20B fit extremely uncomfortably with the application of that section to payments on account. Such payments must necessarily, by virtue of s.19(2) of the Act, be related to particular contemplated costs of which the tenant is notified in advance." The judge also said that "the fact that the draftsman appears to make no allowance in s. 20B(2) for the situation (expressly anticipated in s.19(2)) where the expenditure has been notified in advance and payments on account have been made, indicates that he did not have such a situation in mind as falling within the ambit of s.20B(1)."

28. In the present case payments on account have not been made. However, because the Tenant was aware, by virtue of the provisions in the lease with regard to provisional service charge payments (which did not need a demand to become payable) of the nature of the service charge costs that would be incurred, the Tribunal considers that the reasoning in *Gilje* is also applicable in this case. In *Gilje* Etherton J said that "as far as discernible, the policy behind s.20B of the Act is that the tenant should not be faced with a bill for expenditure of which he or she was not sufficiently warned to set aside provision. It is not directed at preventing the lessor from recovering any expenditure on matters, and to the extent of which, there was adequate prior notice."

29. As noted above, in the present case the tenant did have advance warning that costs were being incurred and in the years in question the actual costs incurred were less than the provisional sums deemed to be payable (without demand) under the lease. Thus had the provisional sums been paid each year no further demand would have been necessary and the

landlord would have had to credit the tenant's account with any excess payment. The Tribunal has therefore determined that with regard to the sums payable in respect of the services listed in the lease section 20B has no application to prevent recovery.

30. However, as noted above, the terms of the lease relating to the provisional service charge do not extend to the insurance rent which is dealt with in another part of the lease. Nevertheless, the definition of services for the purposes of the regulatory code in the Landlord and Tenant Act 1985 extends to payments in respect of insurance. Thus because by the terms of the lease the insurance rent is payable only on demand it falls foul of section 20B and because a demand for the years 2003, 2004 and 2005 was not made until 3 February 2006 the amount recoverable is thus accordingly limited to the costs that were incurred in the 18 months prior to that demand.

31. The tenant seeks an order under section 20C Landlord and Tenant Act 1985 that the costs incurred by the landlord in connection with the LVT 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 lessee. By section 20C (3) the Tribunal may make such order on the application as it considers just and equitable in the circumstances.

32. Such an order is of course only necessary if the landlord would be otherwise entitled by the terms of the lease to add such an item to the service charge. As noted in paragraph 7 above, by clauses 1.13, 1.14 and 1.15 the service charge is defined as one sixth of (1) "all costs expenses and outgoings whatever reasonably and properly incurred by the Landlord during a Financial Year in or incidental to providing all or any of the services." This definition is the only possible provision on which a claim by the Landlord to recover the costs of defending the present application before the LVT might be based. However, it is quite clear that only a clear and unambiguous clause would permit such an argument to succeed. See *Sella House v Mears* (1989) 21 HLR 147 CA. *and St Mary's Mansions Ltd v Limegate Investment Co. Ltd & Sarruf* [2002] EWCA Civ.1095, [2003] HLR 29. Furthermore, it would mean that if this were the case the costs would be borne by all the service charge payers in accordance with the terms of the lease. Thus very clear words would be required if such costs were to be recoverable by way of the service charge. The Tribunal determines that in the present case the lease does not unambiguously permit the recovery of such costs. It follows that a section 20C determination disallowing any such costs is unnecessary because they are not recoverable in any event under the terms of the lease.

Martin Davey
Chairman

14 September 2006