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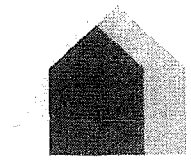


Ref: LON/00AY/LSC/2010/0117

**LEASEHOLD VALUATION TRIBUNAL**

LONDON RENT ASSESSMENT PANEL

DECISION ON AN APPLICATION UNDER SECTION 27A OF THE LANDLORD AND TENANT ACT 1985 (AS AMENDED)

| | |
|---|---|
| Property: | Flats 1-3, 58 Norwood Road, London SE24 9BH |
| Applicant: | Cormorant Limited |
| Respondent: | Mr J Frankel |
| Hearing Date: | 14th July 2010 |
| Appearances: | Mr T Deel (Counsel for the Applicant)<br>Miss W Mathers of Radcliffe Chambers (Counsel for the Respondent) |
| Also present: | Mr C Case of Hampton Wick Estates (managing agents for the Applicant)<br>Miss S Krol (Pupil to Counsel for the Applicant)<br>Mr J Frankel (the Respondent)<br>Mr J Kandler, Bude Nathan Iwanier Solicitors (the Respondent's Solicitor) |

Members of Tribunal

Mr P Korn (chairman)
Mr I Thompson BSc FRICS
Mrs J Dalal

## INTRODUCTION

1. This is an application under Section 27A of the Landlord and Tenant Act 1985 (as amended) ("**the 1985 Act**") for a determination of liability to pay service charges.

2. The Respondent is the leaseholder of the Property and the Applicant is the Respondent's current landlord. The Property is held under three separate leases, and the lease of Flat 1 which has been included in the hearing bundle ("**the Lease**") is dated 6th October 1997 and made between Southern Breweries Leisure Limited (1) and the Respondent (2). The leases of Flats 2 and 3 are understood to be in the same form as the lease for Flat 1 for all purposes relevant to this application.

3. The building of which the Property forms part is a Victorian structure which has been converted into four flats. The Respondent holds three of these flats; the fourth flat, which is in the basement and is known as 58A Norwood Road, is held jointly by a Mr S Gibbon and Ms J Davison. Mr Gibbon and Ms Davison were named as co-Respondents in the original application, but Mr Deel on behalf of the Applicant informed the Tribunal at the hearing that there was in fact no dispute in respect of the basement flat.

4. The dispute relates to specific service charge items in respect of the service charge years 2005 to 2009, the disputed items being as follows:-

| | |
|---|---|
| *2005* | |
| *Buildings Insurance* | *£1,101.66* |
| *Repairs* | *£1,110.38* |
| *Key cutting* | *£5.00* |
| *Cleaning* | *£205.63* |
| *Management* | *£960.00* |
| | |
| *2006* | |
| *Buildings Insurance* | *£1,169.29* |
| *Repairs* | *£170.38* |
| *Electricity* | *£123.62* |
| *Cleaning* | *£999.68* |
| *Management* | *£960.00* |
| | |
| *2007* | |
| *Buildings Insurance* | *£1,054.86* |
| *Electricity* | *£235.61* |
| *Cleaning* | *£922.35* |
| *Accountants fees* | *£1,410.00* |

| | |
|---|---|
| *Management* | *£960.00* |
| | |
| *2008* | |
| *Buildings Insurance* | *£1,010.16* |
| *Electricity* | *£318.17* |
| *Cleaning* | *£851.60* |
| *Repairs* | *£117.50* |
| *Accountants fees* | *£470.00* |
| *Legal fees* | *£7,047.73* |
| *Management* | *£960.00* |
| | |
| *2009* | |
| *Buildings Insurance* | *£939.62* |
| *Electricity* | *£281.98* |
| *Cleaning* | *£938.90* |
| *Repairs* | *£414.00* |
| *Accountants fees* | *£460.00* |
| *Management* | *£960.00* |

**GENERAL OBSERVATION**

5. During the hearing a large number of separate points were made on behalf of each of the parties. These points have all been taken into consideration but only those regarded as the most salient points are recorded in this decision.

**AGREED POINT**

6. In the course of the hearing the Respondent conceded that the 'key cutting' charge of £5.00, incurred in the 2005 service charge year, was properly payable.

**APPLICANT'S CASE**

7. Mr Deel on behalf of the Applicant confirmed that the figures listed in the application were the total amounts charged in respect of the building, and it was common ground between the parties that the Respondent was responsible for paying 84% of the total service charge.

8. Mr Deel said that the Respondent had not made any service charge payments at all for years, despite the fact that clause 3(5) of the Lease contains a clear obligation to pay the service charge. Mr Deel added that clause 7 of the Lease deals with the details and the mechanics of the service charge payment obligations. Specifically in relation to management charges, he conceded that there was no express clause in the Lease obliging the tenant to pay a management charge, but he argued that the definition of "Total Expenditure" in clause 7 was wide enough to include the cost of management. Similarly,

Mr Deel considered that the accountants fees were covered by the definition of "Total Expenditure".

9. It was noted by the Tribunal that the Applicant has chosen not to request advance service charge payments based on an estimate of the relevant year's costs, followed by a balancing adjustment at the end of the service charge year once the actual costs are known, despite the fact that this is the mechanism envisaged by the Lease and that it is standard practice. Instead, the Applicant just invoices for the total amount of the actual cost of services at the end of each service charge year. Mr Deel said that this was because there was a history of disputes in respect of the Property and that the Applicant felt that it was more likely that the Respondent would pay the actual cost of services (which could be verified by looking at copy invoices etc) than agree to pay an estimated amount.

10. Mr Deel said that service charge demands and copy accounts had been provided to the Respondent each year, and yet no payments had been made. He noted that the Respondent's position was that no demands had been sent during the whole of the period 2005 to 2009 but argued that this was simply not credible. It was in the Applicant's interests to demand a service charge in order to be reimbursed for costs incurred.

11. In relation to the 2005 service charges, he conceded that a valid demand was not sent out within 18 months after these costs were incurred. However, he submitted that the letters from Hampton Wick Estates to the Respondent dated 3rd February 2006 requesting payment of the 2005 service charge constituted notifications for the purposes of Section 20B(2) and that therefore the Applicant had not fallen foul of Section 20B.

12. As regards compliance by the Applicant with its service charge obligations under clause 7 of the Lease, Mr Deel maintained that whilst clause 7(f) required an accountant to certify the accounts, it did not require the accounts to be delivered within 6 months. As regards the list of items in clause 7(1) to be delivered to the tenant, clause 7(1) did not actually contain a time limit. As regards compliance with the requirements of clause 7(2), there were no 'on account' payments and so the 'balance' payable each year was the whole of the actual cost for that year.

13. As regards the payability of each disputed head of charge, the Applicant's position was that the insurance premiums had been properly incurred each year; the Respondent had raised a point about the enlargement or alteration of the building and its effect on the premiums, but the Applicant simply did not understand what point was being made. It was considered reasonable to have a managing agent and the fixed fee management charge was reasonable both as to amount and conceptually (i.e. it was normal to charge on a fixed fee basis). The cleaning costs were believed to be reasonable.

14. As regards the 2008 legal fees, Mr Deel said that these related to proceedings for the recovery of previous service charge arrears. When asked whether, therefore, they were properly characterised as a service charge item at all or whether they were in fact an administration charge, Mr Deel argued in the alternative that they were either a service charge item caught by the sweeper definition of "Total Expenditure" or an administration charge and covered by clause 3(11) of the Lease. In relation to a possible argument that they were irrecoverable because the demand fell foul of Section 20B of the 1985 Act, Mr Deel said that the fees were not 'incurred' for the purposes of Section 20B until they were paid by the Applicant on 29th February 2008 and that they were demanded within 18 months after that date.

**MR CASE'S EVIDENCE**

15. In his evidence, Mr Case for the Applicant said that it would have been pointless to send out interim estimated service charge demands, because the Respondent would not have paid, so he simply sent out full demands each year based on the actual service charge, including any amounts not paid the previous year, and had sent these out by ordinary second class post. He conceded that he had at no stage sent the Respondent any reminders that payment had not been made, but equally he had not received any specific complaints or queries from the Respondent.

16. Regarding the copy service charge accounts contained in the hearing bundle, the Tribunal noted that it was not clear on the face of these accounts when or whether they had been sent out. Mr Case said that he had been told by his accountants that the accounts for the year ending December 2005 and 2006 were both sent out 20th December 2007 (although he could not explain why the 2005 accounts were sent out so late). The accounts for the year ending December 2007 were sent out on 26th June 2008, and the demand dated 26th May 2008 was accompanied by a summary of tenants' rights and obligations (although Mr Case could not explain why the letter of 26th May 2008 did not **refer** to the summary being enclosed, nor could he explain why this summary – if indeed it existed – had not been included in the hearing bundle). The accounts for the year ending December 2008 were sent out on 26th June 2009, and the demand dated 22nd June 2009 was accompanied by a summary of tenants' rights and obligations (although again it did not refer to the summary being enclosed). The accounts and demand for the year ending December 2009 were sent out on or around 12th February 2010. Everything was sent to the Respondent at 166a Granville Road.

17. The building insurance for 2005 was invoiced by the brokers on 17th October 2005 and the repair costs for 2005 (which related to a blocked drain) were invoiced by the building contractor on 13th June 2005.

18. Regarding insurance, Mr Case said that the Applicant's brokers were independent and periodically tested the market, but he confirmed that the Applicant had not in practice switched insurers within the last few years. However, he did confirm that no commission was paid on the insurance premium.

19. Regarding cleaning, Hoberton Ltd invoiced an amount of £205.63 (£175 + VAT) on 1st December 2005 for an 'initial' clean of the common parts. In explaining why this was described as an 'initial' clean, Mr Case conceded that not much cleaning had been carried out up until that point. When asked how much cleaning took place on this occasion or on subsequent visits, Mr Case was unable to state how many hours of cleaning took place or what the cleaners' duties were or what the hourly rate was or should be. Mr Case did comment that the common parts seemed clean when he last inspected, but he conceded that they had not previously been cleaned to an acceptable standard and that the previous cleaners had been sacked. However, there had been no tendering process. Mr Case understood the common parts to include an external area that needed to be swept clean periodically, although the Respondent disputed that this was a common part.

20. As to why there were no electricity charges in 2005, Mr Case said that this was probably because it was not actually invoiced until 2006.

21. Mr Case was asked some questions about the management charges. It seemed that Hampton Wick did not take over until May 2005, yet he could not explain why it seemed that they had invoiced the Applicant for the whole of that year other than to comment that he did not think that the previous agent had charged for the first part of 2005. He also conceded that of the managing agents' duties set out in his witness statement Hampton Wick were not actually carrying out all of these.

22. The legal fees (charged in the 2008 service charge year) were paid on 29th February 2008, although it was accepted that the invoice from the relevant firm of solicitors (George Ide, Phillips) was dated 27th June 2006. Mr Case said that the fees related to the recovery of unpaid service charge for 2003 and unpaid interim service charge for 2004.

23. Mr Case conceded that the repairs invoice dated 24th January 2006 for £170.38 was addressed to Ashbourne Estates Ltd – the previous managing agent – but he said that this was simply an error.

24. Mr Case accepted that the Applicant had failed in respect of each service charge year in dispute to comply with the requirements under clause 7 of each of the Leases to supply certain service charge information within 6 months after the end of the relevant financial year. He also accepted that the

Applicant had provided no substantive response to questions raised in May 2010 by the Respondent's solicitor regarding the accounts.

**RESPONDENT'S RESPONSE**

25. Miss Mathers for the Respondent, noting that no estimated service charges had been demanded by the Applicant in respect of any of the years in dispute, referred the Tribunal to clause 7(d) of the Lease, which begins:-

*"The Landlord shall at the commencement of the Financial Year estimate the Total Expenditure for that Financial Year ..."*

and submitted that this was not optional and that therefore the Applicant was in breach of an obligation under the Lease. The Applicant had also failed to comply with its obligation under clause 7(f) of the Lease to provide certain service charge information within 6 months after the end of each financial year. In her submission, a consequence of the failure by the Applicant to comply with these obligations was that the service charge for the relevant years was not payable.

26. In relation to the legal costs, if the Applicant was relying on clause 3(11) of the Lease then it was conceding that these costs did not qualify as service charges. In any event, they related to arrears which were the subject of a court action and the court had not made a costs order against the Respondent.

27. As regards Mr Deel's argument that the definition of "Total Expenditure" in the Lease was sufficiently wide to enable the Applicant to recover the legal fees, Miss Mathers submitted that this was not the case and relied on the case of *Sella House v Mears (1989) 21 HLR 147* in arguing that such fees are not recoverable as a matter of construction of the terms of a lease unless the lease contains much clearer, express language than is contained in this Lease.

28. Specifically in relation to the management charges, Miss Mathers also referred the Tribunal to the case of *Embassy Court Residents Association v Lipman (1974) 2 EGLR 60* and a passage in the textbook *Woodfall (Volume 1, paragraph 7.170)* as authorities for the proposition that these charges are not payable unless there is an express authorisation in the Lease.

29. On the issue of Section 20(B) of the 1985 Act, Miss Mathers argued, based on the case of *Westminster City Council v Hammond (1995) December LAG 19*, that the legal fees were 'incurred' for the purposes of Section 20B when the obligation to pay them first arose. Therefore they had been demanded more than 18 months after they were 'incurred' and so they were not payable by virtue of the provisions of Section 20B. Miss Mathers also submitted that Section 20B applied to all other charges and expenses incurred before 5th November 2008, on the ground that no demands or invoices had been seen by

the Respondent until 5th May 2010 (18 months later) and therefore the Applicant was out of time for the purposes of Section 20B.

30. In relation to the cleaning charges, Miss Mathers argued that the Property was in a small block and that the Applicant's cleaning responsibilities amounted to vacuum cleaning the carpet and cleaning a window. In the circumstances, an initial cleaning cost of £175 + VAT and monthly charges of £68.25 + VAT were too high. She said that a rate of £10 per hour would be reasonable and that a maximum of 2 hours' cleaning would be required, although she conceded that this submission was not based on any specific comparable evidence.

31. As regards the accountants fees, the service charge accounts for the years ended December 2004, 2005 and 2006 were all prepared and provided in 2007. In respect of the 2004 and 2005 years, this rendered them worthless and therefore the Respondent should not have to pay the accountants' fees.

32. In relation to insurance, Miss Mathers raised a point about possible previous changes to the building and their possible effect on the rebuild value, but her exchange with Mr Case on this point was somewhat inconclusive.

33. Regarding the service charge demands which Mr Case maintained had been sent out on the dates referred to in his evidence but which the Respondent claimed not to have received, Miss Mathers said that there was no reference to Section 196 of the Law of Property Act 1925 in the Lease and Mr Case had not asserted that demands had been sent by registered post (or recorded delivery). Therefore the common law applied, there was no deemed service and proof of service was needed.

**MR FRANKEL'S EVIDENCE**

34. Mr Frankel said that he had received almost no correspondence from the Applicant over the last few years, and no correspondence at all in respect of the service charge. In 2008 he made contact with the Applicant because he needed to obtain a copy of the insurance details, but he had not received any service charge demands or accounts at all for the period of dispute (2005 to 2009) until seen in the bundle of documents prepared for the Tribunal hearing.

35. Mr Frankel accepted that he had paid no service charges since the beginning of 2005 and that it was puzzling not to receive any service charge demands for 5 years. However, he was not worried about the risk of being hit with a very large service charge bill later because it was quite a small building, particularly in the context of the fact that the Property was part of a portfolio of about 200 units held by him.

36. When asked about the dates on the various invoices that Mr Case had told the Tribunal had been sent to Mr Frankel, Mr Frankel said that the invoices had effectively been backdated as he had not seen them on the dates on which it is alleged they were delivered. He maintained that he had not received any of these service charge demands at any time prior to seeing them in the hearing bundle.

**NO INSPECTION**

37. The Tribunal members did not inspect the Property. Neither party requested an inspection, and the Tribunal's view was that an inspection was not necessary in order for it to make a determination in the circumstances of the particular issues in dispute.

**THE LAW**

38. Section 19(1) of the 1985 Act provides:

*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 shall be limited accordingly.*

39. "Relevant costs" are defined in Section 18(2) of the 1985 Act as:

*the costs or estimated costs incurred or to be incurred by or on behalf of the landlord...in connection with the matters for which the service charge is payable.*

and "service charge" is defined in Section 18(1) of the 1985 Act as:

*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, improvements, or insurance or the landlord's cost of management, and (b) the whole or part of which varies or may vary according to the relevant costs.*

40. Section 20(B) of the 1985 Act provides as follows:

*(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.*

41. Section 27A of the 1985 Act gives a leasehold valuation tribunal jurisdiction to determine (on an application made to it):

*whether a service charge is payable and, if it is, as to...the amount which is payable... .*

## APPLICATION OF LAW TO FACTS

### Delivery of service charge demands

42. Mr Case has stated that service charge demands were sent to the Respondent each year to an address which Mr Frankel has confirmed is the correct address. Mr Frankel has stated that no demands whatsoever were received between 2005 and 2009. It is theoretically possible that demands were sent out each year to the correct address and that each year they were neither received nor returned to sender, but in the Tribunal's view the likelihood of this happening in relation to all of the service charge demands is extremely remote. Therefore either the demands were sent and received, or they were not sent.

43. The Applicant does not claim that demands were sent otherwise than by ordinary (second class) post, and therefore there is no question of deemed service. However, this does not in and of itself force the Tribunal to conclude that the demands were not delivered, and the issue (as these are civil proceedings) is whether on the balance of probabilities the demands were or were not delivered.

44. The difficulty here is that neither conclusion is especially appealing. On the one hand it is hard to understand why the Applicant would have failed to send out any demands over a 5 year period only then later to seek to claim payment via the Tribunal. On the other hand, it is also hard to understand why the Respondent's non-payment of service charge was not queried by the Applicant at any point during that whole period.

45. In relation to the demands themselves, the Tribunal notes that as between the 2007 and 2008 demands Hampton Wick's telephone number changed and as between the 2008 and 2009 demands its registered office address changed. It

is of course possible that the demands were all prepared in 2010 and that they were made to look slightly different solely in order to pretend they had been prepared and sent out in different years. However, this level of guile or subtlety has not been apparent from responses to questions and other evidence given on behalf of the Applicant at the hearing.

46. The Tribunal considers it plausible that the demands were delivered each year and that they were simply not treated very seriously by or on behalf of the Respondent, particularly after the first year when non-payment did not seem to lead to any adverse consequences. Clearly it constitutes very poor management to send out annual demands and never to follow them up, but based on the evidence of management failings heard by the Tribunal and Mr Case's inability to answer a number of significant questions the Tribunal considers it plausible in the context of the other evidence seen and heard by it that this is what happened. The Tribunal therefore concludes on the balance of probabilities that a service charge demand was delivered to the Respondent in each of the years 2005 to 2009 and that these demands were later followed by the relevant supporting documentation.

**Compliance with Lease**

47. Clause 7(f) of the Lease and the provisions that follow it have not been well drafted, leading to certain ambiguities in interpretation. These provisions read as follows:-

*"(f) As soon as practicable after and in any event within six months of the end of the Financial Year and shall have it certified by an independent accountant*
*(1) The Landlord will cause the following to be delivered to the Tenant:*
*(a) A copy of the Accountants' Certificate (called "the Certificate")*
*(b) Schedules in support of the Certificate giving a breakdown of the Total Expenditure between different categories of expenses (called "the Schedules")*
*(c) A statement showing the Service Charges less the instalments already paid*
*(d) Copy receipts (if required) in respect of all expenditure".*

In the Tribunal's view, whilst the drafting is problematic, the better interpretation is that the wording in clause 7(f) governs the whole of (1) (a) to (d) and that therefore the landlord must within 6 months after the end of the relevant financial year deliver to the tenant a copy of the accountants' certificate, schedules in support of the certificate giving a breakdown of Total Expenditure, a statement showing the service charges less the instalments already paid and copy receipts if required. The Tribunal disagrees with Mr Deel's submission that the Lease does not require the certificate to be delivered within a particular timescale.

48. However, whilst the Applicant seems not to have complied with its obligations under clause 7(f)(1) in respect of at least two of the service charge years, it does not necessarily follow that the service charge is not payable as a result. There is no express linkage in the Lease between the payability or otherwise of the service charge and compliance with these provisions, and it is common for leases to make one party's obligations conditional on compliance by the other party with its own obligations if this is what is intended. That is not to suggest that any such breaches of the landlord's obligations are without remedy; merely that the Tribunal is not persuaded that the remedy is a permanent loss of the right to recover any service charges in respect of the relevant year.

**Section 20B**

49. Mr Deel concedes that the 2005 service charge demand was not valid as it was not accompanied by the statutorily required information and that the required additional information was supplied more than 18 months after the costs were incurred. His argument is that whilst the 2005 demand would have fallen foul of Section 20(B)(1), that subsection did not apply because the (invalid) demand constituted a notification that the costs had been incurred for the purposes of Section 20(B)(2).

50. The Tribunal does not accept Mr Deel's argument. The scenario envisaged by Section 20(B)(2) is one where a tenant is notified that certain costs have been incurred and that he will *subsequently* be required to contribute towards them. The demand dated 3rd February 2006 by contrast is simply a demand for immediate payment and is clearly intended as a demand rather than a notification as to future liability to pay. Therefore, in the Tribunal's view the Applicant did not serve a valid demand or a valid notification within 18 months after the relevant costs were incurred and therefore by virtue of Section 20B none of the 2005 service charge is payable (apart from the cost of key cutting, as this was specifically conceded by the Respondent in the course of the hearing).

51. In relation to 2006, although Mr Case's evidence was weak in many respects the Tribunal accepts on the balance of probabilities that a demand was sent out and that the necessary supporting information was sent out on 20th December 2007 and that, therefore, aggregating the two a valid demand was sent out within 18 months of the 2006 service charges (taken as a whole) having been incurred. Therefore the 2006 service charge demand did not fall foul of Section 20B.

52. In relation to 2007, the Tribunal accepts on the balance of probabilities that the component parts of a valid demand were sent out on 26th May and 26th June 2008 and therefore within 18 months of the 2007 service charges having

been incurred. Therefore the 2007 service charge demand also did not fall foul of Section 20B.

53. In relation to 2008, the Tribunal accepts on the balance of probabilities that the component parts of a valid demand were sent out on 22nd and 26th June 2009 and therefore within 18 months of the 2008 service charges having been incurred. Therefore the 2008 service charge demand also did not fall foul of Section 20B.

54. In the alternative, if it were to transpire that the Tribunal has misdirected itself on the question of whether a demand that is not accompanied by the requisite statutory information can be validated by the *subsequent* provision of that information, the Tribunal's view is that the information subsequently provided could serve as a notification that costs had been incurred within Section 20(B)(2) and that therefore it would still be open to the Applicant to serve a fresh demand in respect of the 2006 to 2008 service charge years, subject to the Tribunal's other findings as to the payability of individual service charge items.

55. In relation to 2009, the Tribunal accepts on the balance of probabilities that a valid demand was sent out on 12th February 2010 and therefore within 18 months of the 2009 service charges having been incurred. Therefore the 2009 service charge demand also did not fall foul of Section 20B.

**Insurance premiums**

56. No substantive arguments were advanced on behalf of the Respondent as to why the insurance premiums should not be payable in full in respect of each service charge year (other than as part of a wider argument as to payability of service charges for a particular year or at all). The 2005 service charge is being disallowed in its entirety by the Tribunal but the insurance premiums for the years 2006 to 2009 are payable in full.

**Electricity**

57. The electricity charges have not been challenged (other than as part of a wider argument as to payability of service charges for a particular year or at all) and so again are payable in full for the years 2006 to 2009.

**Cleaning**

58. There has been no challenge to the standard of the cleaning; instead the challenge has been to the cost in the context of the amount of cleaning needed. There was some dispute as to how much cleaning was needed, the Applicant asserting that there is an external common area that needs sweeping. As regards the cost itself, the Respondent by its own admission brought no

comparable evidence and sought to rely on its understanding as to how many hours would be required and how much a private cleaner would charge per hour.

59. Mr Case's evidence on cleaning was unimpressive; he had very little knowledge of what cleaning was carried out and how much it should cost. However, the Respondent's analysis as to how much it should cost glossed over the fact that the Applicant might need to factor into the cost of materials and insurance. Taking all the evidence into account and in the absence of any comparative or better quality evidence from the Respondent, the Tribunal is of the view that the Respondent has failed to demonstrate that the cleaning costs were not reasonably incurred and therefore they are payable in full for the years 2006 to 2009.

**Repairs**

60. There has been no specific, detailed challenge to the cost of repairs and therefore the Tribunal considers that the cost of repairs for the years 2006, 2008 and 2009 is payable in full (there being no repair costs in 2007).

**Accountants fees**

61. Mr Deel argued that the definition of "Total Expenditure" in the Lease is wide enough to cover the accountants' fees, and the Tribunal agrees with this as the definition contains a specific reference to "the cost of any accountant employed to determine the total expenditure and the amount payable by the Tenant hereunder".

62. The accountants fees for 2007 relate to the preparation of accounts for the years 2004, 2005 and 2006. In the Tribunal's view the accounts for these years were provided to leaseholders so late that they were practically worthless. It is arguable that they do at least provide some useful background information and therefore the Tribunal considers (using a broad-brush approach) that one-third of the cost is properly payable.

63. The accounts for subsequent years were supplied much more promptly (based on the Tribunal's finding that, on the balance of probabilities, they were delivered to the Respondent) and the accountants' fees for 2008 and 2009 are therefore payable in full.

**Management fees**

64. In the Tribunal's view, based on the evidence seen and heard, the standard of management has been extremely poor. Even by the Applicant's own admission there has been very little communication or response to legitimate queries raised on behalf of the Respondent. No service charge estimates have

been provided at any stage to help the Respondent with budgeting. The managing agents have by their own admission not fully complied with their own list of duties, there has been no evidence of any serious tendering for services or of any knowledge of the cleaners' duties or how much they should be paid. A full year's management charge has been levied for the year in which they took over the management, even though they took over in May.

65. As regards the charges themselves, in the Tribunal's view, based on its expert knowledge of the market, these charges would be on the high side even if the managing agents were doing a good job.

66. Taking all of the above into account, the Tribunal considers that no more than 40% of the management charges for each year would be payable **even if** the management charges are properly payable as a matter of construction of the terms of the Lease.

67. The next question is whether the management charges are indeed recoverable as a matter of construction of the Lease. Mr Deel relies on the definition of "Total Expenditure", the relevant part of which reads:-

*"the total expenditure incurred by the Landlord in any financial year in carrying out his obligations ... and any other costs and expenses reasonably and properly incurred in connection with the Building ...".*

In other words, Mr Deel is relying on this provision as a 'sweeper' provision. However, the Tribunal does not accept that this 'sweeper' provision is wide enough to cover management charges. The textbook *Woodfall* states that the cost of recovering managing agent's fees will not be recoverable by way of service charge unless the lease expressly so provides, and Miss Mathers has also referred the Tribunal to the *Embassy Court* case.

Whilst the facts of the *Embassy Court* case are quite complicated and various provisions of the lease and other documents were considered by the Court of Appeal, it seems that the main provision being relied upon by the landlord in that case to support the proposition that the service charge included the cost of employing managing agents was a definition of 'maintenance contribution' as being *"the proportion of the cost and expense incurred or to be incurred by the Lessor in carrying out [certain works and organising insurance] ... and of providing any other services herinafter mentioned ...".* The conclusion reached by Cumming-Bruce LJ (in giving the main judgment) was that *"it is perfectly clear that if an individual landlord wants to do that [i.e. employ managing agents] and to recover the costs from the lessee, he must include explicit provisions in his lease"* and that the lease in that case did not contain any such explicit provisions.

68. In our case, whilst it is arguable that the reference to *"any other costs and expenses reasonably and properly incurred in connection with the Building"* could be construed as impliedly including the cost of employing managing agents, there is clearly no explicit reference either to the cost of employing managing agents or the cost of management. The Applicant has brought no cases or other authority in support of its contention that the wording of the Lease is sufficiently wide to include the cost of employing managing agents, and in the Tribunal's view, the management charges are irrecoverable as a matter of construction of the terms of the Lease.

**Legal fees**

69. As with the management charges, the question has been raised as to whether legal fees are recoverable as part of the service charge as a matter of construction of the terms of the Lease. Mr Deel for the Applicant has relied on the same wording as for the management charges, namely the definition of "Total Expenditure" quoted above. Miss Mathers has referred the Tribunal to the case of *Sella House v Mears*.

70. The relevant provision relied on in the *Sella House* case is a landlord's covenant to employ (and, by extension, a tenant's obligation to pay for) *"all such surveyors builders architects engineers tradesmen accountants or other professional persons as may be necessary or desirable for the proper maintenance safety and administration of the Building"*. The Court of Appeal in that case came to the conclusion (albeit with varying degrees of enthusiasm) that this provision was not wide enough to include legal fees connected with recovery of arrears of rent and service charges, Taylor LJ commenting *"For my part, I should require to see a clause in clear and unambiguous terms before being persuaded that the result was intended by the parties"*.

71. In the Tribunal's view, if the relevant provision in the *Sella House* case – with its reference to "other professional persons" and "maintenance ... and administration of the Building" – was insufficient, then all the more so the definition of "Total Expenditure" in the Lease in our case is insufficient. Again, the Applicant has brought no alternative cases or other authority for its position. Therefore, the legal fees are irrecoverable as a matter of construction of the terms of the Lease.

72. In any event, it is questionable whether the recovery of legal costs incurred in enforcement or attempted enforcement of a specific tenant's payment obligations can properly be characterised as 'service charge' at all, and in the Tribunal's view it more properly falls to be described as an 'administration charge' as defined in Schedule 11 to the Commonhold and Leasehold Reform Act 2002. As such, the application should be for a determination as to the payability of an administration charge, not a service charge.

73. The Applicant has argued in the alternative that these legal fees fall to be payable under clause 3(11) of the Lease, under which the tenant covenants *"To pay all expenses including Solicitors' costs ... incurred by the Landlord for and incidental to the preparation and service of a Notice under Section 146 of the Law of Property Act 1925 ..."*. First of all, this argument reinforces the point that this is an administration charge, not a service charge, but secondly the sub-clause clearly only relates to legal costs in connection with the preparation and service of a Section 146 notice, and the legal costs in question did not relate to Section 146 proceedings.

74. On the Section 20B point, the Respondent argues that the fees were incurred when invoiced to the Applicant in June 2006 but not demanded from the Respondent until June 2009. In *Westminster City Council v Hammond*, Reynolds J held that service charge costs are 'incurred' for the purposes of Section 20(B)(1) at the time when the landlord first becomes obliged to pay them. This is consistent with the Tribunal's understanding of the position and the Applicant has cited no sources for the opposite viewpoint, and therefore in the Tribunal's view – as the fees were demanded more than 18 months after they were incurred and there was no notification within that 18 month period in compliance with Section 20(B)(2) – the legal fees are not payable in any event by virtue of Section 20(B).

75. In addition, it is possible that the legal fees are not properly payable for other reasons, for example because it appears that no cost order was made by the County Court.

76. In conclusion, for a number of different reasons the legal costs are not properly payable.

**DETERMINATION**

77. The 2005 service is disallowed in its entirety (save for the key cutting cost as this was specifically conceded). All of the management fees and the legal fees are also disallowed. Only one-third of the accountants' fees for 2007 are payable.

78. Therefore only the following amounts are properly payable (these being the total figure for the building and the Respondent's share being 84% of these amounts):-

| | |
|---|---|
| *2005* | |
| *Key cutting* | *£5.00* |
| | |
| *2006* | |
| *Buildings Insurance* | *£1,169.29* |

| | |
|---|---|
| *Repairs* | *£170.38* |
| *Electricity* | *£123.62* |
| *Cleaning* | *£999.68* |
| | |
| *2007* | |
| *Buildings Insurance* | *£1,054.86* |
| *Electricity* | *£235.61* |
| *Cleaning* | *£922.35* |
| *Accountants fees* | *£470.00* |
| | |
| *2008* | |
| *Buildings Insurance* | *£1,010.16* |
| *Electricity* | *£318.17* |
| *Cleaning* | *£851.60* |
| *Repairs* | *£117.50* |
| *Accountants fees* | *£470.00* |
| | |
| *2009* | |
| *Buildings Insurance* | *£939.62* |
| *Electricity* | *£281.98* |
| *Cleaning* | *£938.90* |
| *Repairs* | *£414.00* |
| *Accountants fees* | *£460.00* |

79. The Respondent has applied for an order under Section 20C of the 1985 Act that none of the costs incurred by the Applicant in connection with these proceedings should be recoverable as service charge. The Tribunal accepts that there have been significant failings by and on behalf of the Applicant. On the other hand, the Tribunal has found in favour of the Applicant on a significant number of points and the Respondent has made no service charge payments at all between 2005 and 2009 despite (in the Tribunal's view, on the balance of probabilities) having received regular service charge demands, and therefore taking all the circumstances into consideration the Tribunal **declines to make an order under Section 20C**. However, for the same reasons as have already been referred to in respect of the disputed legal fees, the Tribunal considers that the Applicant's legal costs in connection with these proceedings are not recoverable as a matter of construction of the terms of the Lease.

80. The Respondent also made an application for the Tribunal to order the Applicant to contribute towards the Respondent's own costs under paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002. Such a determination can be made where a party to proceedings has acted "frivolously, vexatiously or otherwise unreasonably in connection with the proceedings". Based on the analysis already given in the preceding paragraph the Tribunal declines to make such an order.

81. No other cost applications were made by either party.

CHAIRMAN.....
Mr P Korn

6th September 2010