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**HM COURTS & TRIBUNALS SERVICE  
LEASEHOLD VALUATION TRIBUNAL**

**SERVICE CHARGE DETERMINATIONS IN RESPECT OF  
HERITAGE COURT, 15 WARSTONE LANE, HOCKLEY, BIRMINGHAM, B18 6HP**

PROPERTY	CASE REF.	APPLICANT	RESPONDENT	DATE
2 Heritage Court, Warstone Lane, Hockley, Birmingham, B18 6HP	BIR/00CN/LIS/2011/0046	Anthony Godden and Linda Godden	Linecroft Ltd.	18 November 2011
10 "	BIR/00CN/LIS/2011/0047	David Christopher Marsden	Linecroft Ltd.	9 November 2011
108 "	BIR/00CN/LIS/2011/0048	David Robert Wilson	Linecroft Ltd.	9 November 2011
10 "	BIR/00CN/LIS/2012/0014	Linecroft Ltd.	David Christopher Marsden and Julie Frances Marsden	10 February 2012

**Type of Applications** : (1) Applications for the Leasehold Valuation Tribunal ('LVT') to determine the liability to pay and reasonableness of service charges under s.27A of the Landlord & Tenant Act 1985 and

(2) whether the Lessor's costs in connection with the proceedings should be included in future service charges under Section 20C of the Landlord & Tenant Act 1985.

**Appearances** : Applicants: Mrs & Mrs Godden, Mr Marsden and Mr Wilson appeared in person.  
Respondent: Linecroft were represented by Mr S.Gallagher of Counsel.

**The Tribunal** : I.D. Humphries B.Sc.(Est.Man.) FRICS (chair)  
P.J. Hawksworth (Lawyer)

**Date of Hearing** : 06<sup>th</sup> – 07<sup>th</sup> August 2012

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## DECISION

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### REASONS

#### Introduction

- 1 Heritage Court is a modern block of 116 flats built on an infill site in the historic area of Hockley, about a quarter of a mile from Birmingham city centre. The area flourished as the centre of the jewellery trade in the 19th century but has undergone significant redevelopment over the last 30 years and in stark contrast to the brick and slate buildings of old Hockley, 'Heritage Court' is built with extensive use of modern materials, steel framing, glass, brick and metal sheet cladding. It is a six storey development built by Barratt Homes in 2002.
- 2 The flats were sold to individual leaseholders, many of whom were buy-to-let landlords who subsequently sub-let to Assured Shorthold tenants.
- 3 Over a period of years, problems started to appear with the development. There were problems of water ingress, some leaseholders were not paying their service charges, the management company were left short of funds and unable to provide all the services permitted by the lease and some lessees were dissatisfied with the services provided by the Managing Agents. The Freehold was sold to the present Freeholder, Linecroft Ltd. in 2005 and the Managing Agents changed from County Estates Management Ltd. to Mainstay on 31st March 2011.
- 4 Because of the various problems, three of the Leaseholders applied to the Leasehold Valuation Tribunal (LVT) at the end of 2011 to challenge service charges for the period from 2005 to 2010 and asked the LVT to determine future service charges for 2011-2016. Shortly afterwards, in February 2012, the Freeholder made a separate application to the LVT to determine the service charge for 2009-2010 in respect of Flat 10 in accordance with an Order by District Judge Kirby in the Bury St.Edmunds County Court dated 23rd January 2012, as a precursor to action for forfeiture of the lease of Flat 10 for non-payment of service charges.
- 5 The LVT issued Directions with the aim of Hearing the case in March 2012. The Respondent requested postponement due to Easter holiday arrangements and the earliest dates the case could be heard due to the number of parties involved were 6th and 7th August 2012. The Hearing took place in Birmingham, the Respondent was directed to make further Submissions in respect of s.20B of the Landlord & Tenant Act 1985 that were duly received and the issues were determined by the LVT on 26th November 2012.
- 6 There is one remaining issue, the question of whether costs in the matter should form part of future service charges in respect of s.20C of the Landlord & Tenant Act 1985 and on which the parties are invited to make further written submissions as directed at paragraph 62 below.

#### The Relevant Law

- 7 Section 27A(1) of the Landlord & Tenant Act 1985 provides that an application may be made to a Leasehold Valuation Tribunal for determination of whether a service charge is payable and if so, the person by whom it is payable, to whom, the amount, the date payable and manner of payment. The subsection applies whether or not payment has been made.
- 8 Section 18 of the Act defines a 'service charge' as an amount payable by a tenant of a dwelling as part of or in addition to rent which is payable directly or indirectly for services, repairs, maintenance, improvements, insurance or the landlord's cost of management, the whole or part of which varies according to the relevant cost.
- 9 Section 19 of the Act provides that relevant costs shall be taken into account in determining the 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 carrying out of works, only if the works are of a reasonable standard and in either case the amount payable is limited accordingly.

10 The parties' attention is particularly drawn to our jurisdiction in this case because as emphasised by the LVT at the Hearing, the LVT gains its powers from Statute and is only empowered to determine whether service charge money should have been spent on items and if so, whether what was spent was a reasonable amount for the work undertaken and whether the work was of a reasonable standard. We are not empowered to determine whether more money should have been spent or instruct the parties to undertake work. We therefore limit our Decision to addressing the reasonableness of the amounts spent based on information provided by the parties.

11 **Lease Provisions**

Despite requests for full documents in our Directions of 27th January, 14th February and 18th May 2012 and Further Directions issued at the Hearing in August, we have not been provided with copies of full executed leases of each of the three flats. We have a copy executed lease for Flat 10 but only copy drafts for Flats 2 and 108. The reservations for service charges were not questioned by the parties at the Hearing and accordingly we assume Flats 2 and 108 are held on the same terms and rely on the Schedule of Leases provided by H.M. Land Registry in the Respondent's Bundle for completion dates.

12 The principle terms are as follows:

<u>Flat</u>	<u>Term yrs.</u>	<u>Lessee</u>	<u>Lease Date</u>	<u>Registration date</u>
2	125 from 25.12.01	Godden	14.5.03	11.6.03
10	125 from 25.12.01	Marsden	11.4.03	24.4.03
108	125 from 25.12.01	Wilson	9.6.03	29.7.03

13 The scheme of the lease is that the Lessor is permitted to provide services to the development identified in Schedule 2 to the lease. The Lessor can request an Interim payment in advance from the Lessees based on percentages of total costs in Schedule 3 and after the end of the Accounting Period the Lessor can issue a Service Charge Certificate requiring the Lessees to pay any shortfall or alternatively their accounts can be credited with any over-payment.

14 In these cases, the LVT requested copies of all service charge demands for the relevant Flats but they have not been provided by the parties. The Respondent advises that they have no records from the previous Managing Agents (County Estate Management Ltd.) and none have been provided by the Lessees. The LVT are therefore limited in the determination we can make. We are unable to determine how much each Lessee should pay for each year and in any case are unable to determine how much has already been paid as none of the parties has provided any certified payment record. These are matters that if disputed may need to be determined by the Court. The LVT are only able to determine whether the total sums spent under each heading for each year are reasonable.

**Preliminary Issue 1 - Counter-claim**

15 The Submission by Mr Godden contained a counter-claim against the landlords for losses due to alleged building defects and disrepair at Heritage Court. This was raised by Mr Gallagher for the landlord who submitted that the LVT only had jurisdiction to determine such a claim provided it comprised equitable set-off per *Continental Properties v White* (Lands Tribunal) [2007] L&TR4, but as Mr & Mrs Godden's arrears amounted to £11,316 and they claimed £109,084, the arrears amounted to only a fraction of the counter claim and the LVT should not entertain any disrepair-based set-off.

16 The LVT adjourned to consider the point. In the "Continental" case referred to above H H Judge Rich QC quoted at some length from his decision in *Canary Riverside Pte Limited v. Schilling* (LRX/65/2005). He stated that in exercising the increased jurisdiction that the LVT has by virtue of Section 27A of the Act of 1985, inserted by Section 155 of the Commonhold and Leasehold Reform Act 2002 the LVT should exercise restraint to ensure that it did not deal with matters that would more properly be dealt with by a County Court. In this case, the issues raised by Mr and Mrs Godden are complex and concern difficult questions of fact and law. Any Court dealing with those issues would need to see detailed pleadings and significant expert evidence. The LVT, therefore, is not the appropriate forum to determine such complex matters, appertaining as some of the allegations do, to the construction of the block; standard of work etc. To quote from the reference to Schilling in the Continental case referred to above:-

“Such matters are better determined under Court procedures and by Judges rather than by specialist tribunals, encouraged to adopt comparatively informal procedures”.

Accordingly, we find that we have no jurisdiction to deal with Mr and Mrs Goddens' counterclaim which would need to be the subject of separate Court proceedings.

### **Preliminary Issue 2 - Service Charge Demands**

- 17 The LVT have not been provided with copies of service charge demands. It is common ground that the demands issued by Mainstay in December 2011 were validly served and that the notice of tenant rights was printed on the back of the forms. Counsel for Linecroft by way of Further Submission in pursuance of our Further Direction made at the Hearing on 7th August, submitted that this was sufficient to validate Linecroft's claim for all outstanding service charges due. The fact that they were unable to prove that the initial demands issued by County Estates Management had included the notice of rights only allowed the lessees to withhold payment until a valid notice had been served, it did not waive the amount due. Accordingly, all outstanding amounts were due.
- 18 The lessee denied having received some of the demands at all.
- 19 The LVT considered the point but two of Linecroft's witnesses, Mr Forletta and Mr Walker, said in evidence before us that they had received service charge demands albeit sometimes late, and had paid the amounts due. The LVT consider it unlikely that no demands would have been issued since management funds would soon have been exhausted and bearing in mind the above witnesses' evidence that they had received theirs, we find on a balance of probability that the demands would have been issued to all the Applicants.
- 20 On the 7<sup>th</sup> August last, we invited Mr Gallagher for Linecroft to submit a Skeleton Argument relating to issues concerning Section 21B of the 1985 Act, with a full and sufficient opportunity for Mr and Mrs Godden, Mr Marsden and Mr Wilson to respond and put forward their own submissions. Each party thus had an opportunity of considering the other's arguments on this point and putting their case on it to us. We find the arguments of Mr Gallagher persuasive on Section 21B. Having found, as we have, as an issue of fact that, on a balance of probabilities, the earlier demands were issued, we agree with Mr Gallagher that the effect of Section 21B is to impose a moratorium on the payment of a service charge that has been demanded by means of an unaccompanied demand. Liability is not, however, extinguished; the unaccompanied demand is simply unenforceable and any contractual penalties e.g. interest for late payment, cannot be recovered based on such a demand. Section 21B creates, in effect, a statutory right to withhold payment until a compliant demand i.e. one containing the statement of rights is issued. But we find that an unaccompanied demand is, nevertheless “a demand for payment of the service charge”, within the meaning of Section 20B(1). In any event, as Mr Gallagher for the Respondent contends, an unaccompanied demand served within the appropriate period must amount to a notification in writing of costs that have been incurred for the purposes of Section 20B(2).
- 21 The essential issue in our view is this: were earlier demands served within 18 months of the relevant costs being incurred, whether accompanied by a statement of rights or not?
- 22 We find, based on the evidence of Mr Forletta and Mr Walker, both of them whom struck us as credible and independent witnesses, not involved (other than as witnesses) in these Applications, that the probability is that demands were served within the 18 month period. Having made a finding of fact about this, we find that they were demands for payment within the meaning of Section 20B(1) or in the alternative, notifications that costs had been incurred to satisfy Section 20B(2). Thus, the Mainstay demands issued on the 6<sup>th</sup> December 2011 are themselves sufficient to make the earlier years' demands payable within the ambit of Section 20B of the 1985 Act.

### **Facts**

- 23 The Tribunal inspected the development on 6th August 2012 with the parties' representatives.
- 24 It is a six storey modern block of flats built around a central courtyard. The building is steel framed with brick and block cladding, a shallow pitch profile metal sheet roof with balconies to some of the flats. The courtyard is paved and decorated with light bollards, brick and timber planters.

- 25 There is a large underground car park at the development fully lit by fluorescent lighting with a steel mesh security gate entrance.
- 26 We inspected Flat 2 on the ground floor. There were extensive signs of water ingress to skirtings and internal partition walls of the bedrooms and lounge.
- 27 We did not inspect Flat 10 which we were advised was identical to Flat 2.
- 28 We also inspected Flat 108 on the fourth and fifth floors where we found extensive damage caused by water ingress to flooring in one bedroom, the ceiling of another bedroom and internal plasterboard partitions.

### **Submissions**

- 29 The Lessee Applicants sent written submissions supported by oral evidence at the Hearing. Much of the evidence submitted by the Applicants and which they sought to introduce at the Hearing was directed at alleged defects in the construction of the building and as the LVT has no jurisdiction to determine construction disputes it was irrelevant to the service charge dispute. The LVT sympathised with Mr and Mrs Godden, Mr Marsden and Mr Wilson over their experiences of ownership at Heritage Court. But what is under scrutiny before an LVT is whether the actual incurring of service charge costs was reasonable, not what amount of damages would be appropriate in a construction dispute if allegations of defective work were proved. If defective construction or disrepair has the practical effect that service charges are increased, then such a matter may well be a head of claim in separate Court proceedings based on such matters, but as indicated earlier, these are not matters that this LVT is competent to determine or has jurisdiction to determine.
- 30 The lessor in its capacity as respondent to the main applications and as applicant in respect of its own later application for Flat 10, also sent written submissions supporting its case. Linecroft also submitted Witness Statements by seven parties, all of whom attended the Hearing and gave oral evidence. They were:

Hilary Jane Quinn	Property Manager, Estates & Management Ltd.
Sean Doherty	Peverel Property Management Group
Charles Bettinson	Head of Insurance, Estates & Management Ltd.
Carol Dean	Regional Head of Operations, Mainstay Property Management
Matthew Arnold	Chartered Surveyor, previously of Countrywide Property Management
Philip Simon Walker	Resident of Flat 112, Heritage Court and Financial Planner
David Paul Forletta	Resident of Flat 93, Heritage Court and Financial Adviser

### **Determination**

2005-2011

- 31 Having inspected the property, heard the evidence and read the parties' submissions the LVT find in respect of the disputed items as below. Most of the disputed charges related not to whether the amount spent was right for the level of service provided but whether enough had been spent to maintain the building to the standard expected by the lessees.
- 32 The data presented to us was limited as the Respondent was unable to provide copies of all invoices for the development covering the whole period in question, the previous Managing Agent having effectively ceased trading in 2010. However, Counsel for the Respondent submitted that the Accounts had been audited by Chartered Accountants and that their certificates could be relied upon as evidence of expenditure. Furthermore, Respondent Witness Mr Doherty for Peverel at para.6.1.6 referred to the Auditor's certificate provided by Messrs Eden Currie for the years to 2010 where it was stated that the auditors were satisfied that the service charge accounts showed a fair summary of the 'costs expended and outgoings, disbursed, incurred or provided ... being sufficiently supported by accounts, receipts and other documents which have been provided to us', in other words, they were reliable evidence of expenditure.
- 33 The Tribunal noted that the accounts had been audited but disagree that they were conclusive on all points as the certificate from the present Auditors, Messrs John Needham & Co., states 'Our work included examination, on a *test basis* (our italics) ...' i.e., they were not claiming to have checked every invoice.

- 34 Nevertheless, we are persuaded on the balance of probability and in the absence of evidence to the contrary that the Auditors' certificates can be relied on as evidence of expenditure and assume the amounts claimed in the service charge summary at Tab 3 of Respondent Bundle D, correctly represent the amount spent.
- 35 The main points raised at the Hearing and our Decisions in respect of each are as follows:
- 36 Insurance  
The insurance premium had fluctuated significantly between 2006 and 2010 from a low of £26,815 in 2009 to a high of £50,610 in 2010 with premiums for the other years varying between the extremes.
- 37 The point made by the Applicants was that the premium was high.
- 38 Mr Bettinson, Head of Insurance Services at Estates & Management Ltd. who acts as agent to the Respondent gave evidence that the block had been insured by Axa from 2006 to 2009 and that it was currently insured by Zurich. There had been a re-marketing campaign in 2010 when quotes were sought from Allianz, Aviva, Axa, Ecclesiastical, NIG and Zurich as all these companies had specialist Property Owners divisions and extensive experience insuring residential property but due to the poor claims record of the development, the only company willing to offer cover was Zurich who only offered cover to retain the landlord's other business. Mr Bettinson explained that over the period in question the total premium paid had been £250,795 against a claims history of £775,505.
- 39 LVT Decision  
The lease required the landlord to insure the development (clause 5.4) and they had used Brokers. The Tribunal agree that at first sight the premium appeared high but with only one of the companies approached by the Respondent's agent willing to offer cover due to the poor claims record, there was little choice. The Applicants had provided no alternative quotes to challenge the existing premium. Consequently the Tribunal find the premiums payable to be reasonably incurred and a reasonable amount. We refer to *Forcelux v. Sweetman* [2001]2EGLR where it was stated that what is required is consideration of the decision-making process, which in this case, for the reasons set out above, had been as thorough as was practicable in the circumstances, we find.
- 40 Electricity  
The annual cost of electricity ranged from £17,197 in 2006 (covering a 15 month period from August 2005), to £65,665 in 2008.
- 41 The Applicants considered this to be a major expense.
- 42 In response, Hilary Quinn for the Respondent attributed the differences to (1) the timing of meter readings and the dates the supplier rendered invoices and (2) varying lead times between the receipt of an invoice and its payment (on occasions delayed due to lack of funds).
- 43 LVT Decision  
During the Hearing it was noted that the Managing Agents had paid some invoices based on estimated rather than actual meter readings which we found unusual for a development of this size where the cost of electricity was clearly a major expense. However, while this reflected on the competence of the Managing Agents at the time, the cost will have been incurred and the bills need to be paid. Over the course of time the meter readings and invoices will have balanced out. Furthermore, the Applicants produced no evidence to show that an alternative supplier would have been cheaper or that the appliances and lighting could have been used more efficiently. Accordingly, we find the expense reasonably incurred and of a reasonable sum.
- 44 Security  
The Applicants criticised the quality and amount spent on security, £23,909 in 2008 compared to £102,673 in 2006.
- 45 Respondent witness Mrs Quinn rebutted this claim and said the present concierge Mr Abbas had been employed since 2005 and that she had received no complaints or negative comments about him from lessees. Furthermore, Respondent witness Mr Walker who occupied Flat 112, said he 'liked the 24/7 service and in terms of standard it was satisfactory'.

46 LVT Decision

It was apparent that some lessees were not satisfied with the level of service provided but there was no specific evidence of dates or times of failings or anything specific to warrant upholding a claim that the amount spent had not been reasonably incurred. The concierge was on site when we inspected the property and we had no reason to assume he was not providing an efficient service. Mr Walker was a resident and aware of the security on a daily basis. Furthermore, the Applicants had adduced no evidence to show that alternative companies could have provided a better or cheaper service. We therefore find the amounts reasonably incurred and of a reasonable sum.

47 Management Fees

The cost per annum has been as follows:

Year	Total	£/Flat inc. VAT
2006	£25,766	£222.00
2007	£23,647	£203.85
2008	£27,847	£240.06
2009	£29,266	£252.29
2010	£24,986	£215.89

48 The Applicants complained at the standard of management and difficulties they had experienced with accounts being sent late and as claimed, non-receipt of service charge demands. They submitted that the manager's fees should be reduced by 33%.

49 Counsel for the Respondent admitted that the management had not been to acceptable standards but suggested the fee should be reduced by 5% or 10%.

50 LVT Decision

We find the standard of management has not been to the required level for all of the service charge years in question, particularly the period covered by County Estates Management Ltd. Service charge accounts appear to have been sent out ad hoc, there has been poor record-keeping and specific evidence that electricity bills have been paid based on estimated accounts. This has resulted in complaints from lessees and the standard of service has been less than expected. On the other hand, services have been provided and contracts managed for which fees need to be paid.

51 Having reviewed the evidence and parties' submissions, we determine the reasonable management fees as follows:

Year	Total inc VAT	
2006	£20,000	
2007	£21,000	
2008	£22,000	
2009	£23,000	
2010	£24,000	
2011	£25,000	(Completed Accounts for 2011 were provided at the Hearing).

52 Cleaning

The cost of the cleaning had varied from £20,817 in 2008 to £14,394 in 2009.

53 The Applicants' main complaint was not the cost but the quality of cleaning carried out. In evidence before us, Mrs Godden said that the landlord's records for 2006 were poor as there had been no record of any cleaning in February or August. The standard had generally been poor and they considered the work had not been properly undertaken.

54 Mr Forletta for the Respondent gave evidence at the Hearing that prior to 2008 the standard had been poor and eventually the cleaning contractors withdrew their services having not been paid. He took over responsibility for cleaning at that point and received no payment for the first four or five months since when he had been paid when funds permitted. However, while agreeing that the previous contractors had been poor, he said they had not been overpaid for the work carried out.

55 LVT Decision

It is clear from both parties' evidence that the standard of cleaning in the early years had been less than expected for a new development of this type. However, we accept Mr Forletta's evidence that this was due to a lack of funds which is emphasised by the previous contractors having terminated their contract and his own experience of receiving late payment, rather than overpayment for work carried out. We therefore find the payments made reasonable for the work carried out in accordance with the accounts at Bundle D tab 3 of the Respondent's bundle.

56 Repairs and Maintenance

The cost per the accounts had been £29,225 covering the period from August 2005 to December 2006, reducing to £15,514 in 2008.

57 The Applicants questioned whether the amount had been spent as the Respondent's records were incomplete. Mr Wilson said that £29,000 spent on repairs would be fair if the work had been carried out.

58 Mr Arnold for the Respondent said he was a Chartered Surveyor who had been employed by the original Managing Agents for the scheme, Countrywide Property Management, from 2004 to 2005 with responsibility for Heritage Court and although no longer employed by Countrywide, he recalled that many of the problems with the development were due to 'what appeared to be latent defects and generally poor finishing by the developer's contractors. Examples of this were a collapsed drain beneath the slab of the car park which caused the entire area to flood with effluent and waste; and roof defects which caused flats on upper floors to flood; and electric security gates constantly failing.' Mr Arnold said at the Hearing that in his experience, £29,000 would be a fair annual sum for repairs and that this would include repair and maintenance of the roof.

59 LVT Decision

The Respondent's records are incomplete. They are unable to provide invoices to verify all the costs claimed but the accounts have been audited which we accept as evidence of payment. During the Hearing it was found that not all of the Applicants had been resident at Heritage Court throughout the whole period in dispute and were not in a position to comment on whether all of the repairs had been undertaken. Mr Arnold commented that the security gate to the car park had been out of action for months which confirmed a claim made by the Applicants. However, we have been provided with no evidence to show that the amount spent had not been value for the repairs carried out and accept Mr Arnold's evidence that this is the general level of expense he would have expected for repairs at Heritage Court. We therefore find the amounts spent reasonable.

60 2012-20

The accounts for the present year will not be available until 2013 and money for future years has yet to be spent. Accordingly, the LVT decline to determine amounts for these years in this application although the parties are at liberty to apply to the LVT in future years.

**Section 20C**

61 The Applicants' have made an application under s.20C of the Landlord & Tenant Act 1985 for an Order that costs incurred in these proceedings are not to be regarded as relevant costs in determining the amount of any service charge.

62 The Tribunal reserves its Decision on the point but orders that any submissions the parties wish to make must be made in writing within 21 days of publication of this Decision. The Tribunal requires four copies of any Submission and will send one copy on receipt to the other party, requesting any counter-submissions to be received in writing at the Tribunal office within 14 days of the date of posting. The Tribunal will then consider the Submissions and Counter-Submissions before reaching its Decision on s.20C.

.../9



**Right of Appeal**

- 63 Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal, an application must be made in writing to this Tribunal for permission to appeal within 21 days of the date of issue of this decision which is given below, stating the grounds on which it is intended to rely.

I.D. Humphries B.Sc.(Est.Man.) FRICS  
Chairman

Date **20 DEC 2012**