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LEASEHOLD VALUATION TRIBUNAL for the
EASTERN RENT ASSESSMENT PANEL
Landlord and Tenant Act 1985 – Section 27A
CAM/26UB/2010/0030

Property	:	**Riverpoint, 286 High Street, Waltham Cross EN8 7GA**		
Applicant	:	**Giovanni Iamarino and other lessees as set out in Appendix 1 attached**		
Represented by	:	**Mr G Iamarino**	**Flat 14**	**(Non-resident)**
		Miss R Scott	**Flat 7**	**(Resident)**
		Mr M Norris	**Flat 18**	**(Non-resident)**
Respondent	:	**Longmint Limited**		
Represented by	:	**Ms E Thompson**	**Juliet Bellis & Co**	
		Ms R Perry and Mr J Porter	**South East Property Services Limited**	
Date of Application:		**19 January 2010**		
Date of Hearings	:	**20 May and 19 August 2010**		
Date of Decision	:	**19 October 2010**		
Tribunal	:	**Mr John Hewitt**	**Chairman**	
		Ms Marina Krisko	**BSc (EstMan) FRICS**	
		Mrs Jane Clark	**JP**	

Decision

1. The decision of the Tribunal is that:

   1.1 The service charges payable by the lessees of the Property for the years 2006 to 2009 inclusive and the sum payable on account for 2010 are as follows:

   2006 £20,362.11

2007	£18,396.41	
2008	£18,466.35	
2009	£18,255.20	
2010	£13,159.00	(Budget)

Details as to how these sums are arrived at are set out in the 'LVT Figure' columns of Appendix 2V4 attached to this Decision.

1.2 An order shall be made and is hereby made pursuant to s20C of the Act to the effect that no costs incurred or to be incurred by the Respondent in connection with this application or these proceedings shall be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by any of the Applicants.

1.3 The Respondent shall by 4pm Friday 19 November 2010 reimburse to Mr Giovanni Iamarino (on behalf of the Applicants) the sum of £500 being the fees paid to the Tribunal in respect of this application.

NB Later reference in this Decision to a number in square brackets ([ ]) is a reference to the section number and the page number of the hearing file provided to us for use at the hearing.

Background

The development

2. Riverpoint is a former office building which, in the mid 1990s, was adapted to provide 19 self-contained flats; some are one bed-roomed and some are two bed-roomed. On the morning of 20 May 2010 the Tribunal had the benefit of inspection of the development in the company of representatives of the parties. A number of physical features were drawn to our attention.

3. Riverpoint enjoys a central and convenient location in the High Street, Waltham Cross. It is situated on a corner site with parking facilities to the front and rear.

There was little security to the main entrance door and the ground floor common parts appeared to have been abused, evidently by undesirable persons congregating there.

The entrance hall screed floor was uncovered; there were missing panels in the ceiling; the windows were dirty; the stair carpet was so loose as to constitute a potential hazard.

The walls of the common parts have suffered a good deal of graffiti and other damage.

Further some of the occupiers of some of the flats have taken to storing items and possessions in the common parts.

The one and only lift serving all five floors was out of order.

The combination of these factors gives a very unfavourable impression of the development.

4. A stream runs along the Trinity Lane boundary of the development. The grounds contain some grassed areas and a number of shrubs and trees, many of which are substantially overgrown. Evidently ivy which was growing up the walls of the building in several places was cut back at the roots some while ago but was left on the walls to wither and die leaving unsightly dead growth. In general terms the car parks and amenity areas appeared to be in reasonably good order with the basics having been carried out. The areas were, however, spoiled by discarded furniture and other effects having been left either by fly-tippers unconnected with the development or by lessees or sub-tenants occupying the flats.

5. Overall what could be quite a pleasing development gave the appearance of being rather drab and unkempt.

6. The freehold reversion has been held by the Respondent for a number of years. Over that time it appears to have engaged a number of

different managing agents. In 2005 the managing agents were Haywards Property Services which was based in Croydon. In 2008 the managing agents were Residential Management Group (RMG) based in Hoddesdon. We were told that the RMG contract was terminated as of 31 July 2009. On 1 August 2009 South East Property Services (SEPS), who are based in Shoreham-by-Sea, West Sussex, were appointed as managing agents. Since that time the management of Riverpoint has been the responsibility of Ms Ruth Perry, a senior property manager with SEPS. Ms Perry's witness statement is at [5/1].

The lease

7. We were told that the leases had been granted in common form. A sample lease; that for flat 14 is at [2/1].

8. The lease grants a term of 125 years from 24 June 1995 at a ground rent of £100 per annum (and rising) and on other terms and conditions therein set out.

9. Clause 4 and the Fourth Schedule impose an obligation on the landlord to insure the development, to carry out repairs and redecorations and to provide other services as set out in the lease.

10. Clause 3 and the Third Schedule impose an obligation on the tenant to contribute to the costs and expenses incurred by the landlord in carrying out its obligations. Evidently the costs are shared equally between the 19 flats even though they are not uniform in size.

11. The service charge regime appears to provide for the calendar year to be the service charge year. The landlord is to prepare a budget for the ensuing year and to estimate the tenant's potential liability. The tenant's liability is payable in two equal sums on 1 January and 1 July in each year.

The landlord is to procure that qualified accountants audit the service charge account and issue a certificate to the tenant showing the amount of service charge payable.

Credit is given for the sums paid on account. Any debit balance is payable within 7 days of demand.

The sums payable in connection with the service charge are reserved as rent.

It was not in dispute that the sums so payable are service charges within the meaning of s18 of the Act.

12. In general the lease terms were not in dispute. There is an issue as to whether the terms of the lease enable the landlord to put through the service charge costs it has incurred or will incur in connection with these proceedings. We shall deal with point later, in the section headed 'The s20C Application'.

The application and the hearings

13. On 19 January 2010 the Applicants made an application [1/1] pursuant to s27A of the Act. The application raised two main issues:

    13.1 The service charges claimed by the Respondent for the years 2006, 2007, 2008 and 2009; and the budget for 2010; and

    13.2 The correct use and application of sums demanded and received on account in respect of proposed major works mentioned in a s20 consultation evidently commenced in 2006.

14. The services charges claimed by the Respondent for the years 2006 to 2009 are set out in the relevant columns of Appendix 2V4 to this Decision. In the event those items tinted in pink were not challenged, but the remaining items were in dispute.

15. Directions were given on 4 March 2010 [1/26].

16. The application came on for hearing on 20 May 2010. The Applicants were represented by Mr Iamarino, Ms Scott and Mr Norris. The

Respondent was represented by Ms Emma Thompson a solicitor with Juliet Bellis & Co, assisted by Ms Perry. It became apparent that there were some additional matters to deal with and that there would not be sufficient time to deal with all of the issues on that occasion. A start was made and the hearing was adjourned part-heard to 19 August 2010.

17. On 22 May 2010 further directions were issued [7/1].

18. On 19 August 2010 the Applicants were represented by Mr Iamarino and Mr Norris. The Respondent was again represented Ms Thompson and Ms Perry.

19. It was not in dispute that a qualifying majority of lessees at Riverpoint had given notice seeking the Right to Manage and that as of 5 July 2010 the management of Riverpoint passed to an RTM company controlled by a group of lessees.

The reserve fund

20. One of the issues raised by the Applicant related to a 2006 major works project in respect of which the Respondent instituted a consultation process under s20 of the Act and in respect of which it collected substantial sums on account from many, if not all, of the lessees. In the event the project did not proceed.

21. The Applicants were led to believe that the sums collected had been paid into and were to be held in a reserve fund. There were concerns as to the utilisation and current whereabouts of these funds.

22. Evidence was given by Mr James Porter, head of Service Charge Accounts for SEPS. His witness statement is at [4/6]. Mr Porter took us through his witness statement and the supporting documents. Mr Porter explained that although SEPS took over management responsibility as of 1 August 2010 it was still awaiting some historical

documentation from RMG. Full papers had not been handed over and evidently this issue is the subject of litigation. From the materials available to him Mr Porter was able to prepare a reconciliation statement for the reserve fund. The statement is at [4/11]. Mr Porter told us that the current balance on the fund stood at £21,470.47. This sum should be held in a separate bank account. It is not. Evidently a number of lessees were and are in substantial arrears of service charges so that the previous managing agents were not in funds to pay bills as they fell due. Accordingly, but wrongly, they transferred funds £9,438.60 on 28.11.06 and £11,833.96 (a total of £21,272.56) from the reserve fund in order to fund current expenditure, on a temporary loan basis.

23. Mr Porter explained and confirmed that once the Tribunal had determined the amount of service charges payable for the years in question and once the lessees had brought their individual accounts up to date the service charge accounts can be further reconciled and the 'temporary loan' of £21,272.56 will be repaid to the reserve fund and the surplus funds handed over to the RTM company together with any other uncommitted funds in accordance with the usual arrangements.

24. Mr Porter was cross-examined on his evidence and the findings made by him on his examination of the accounts.

25. In general the approach adopted by the previous managing agents is not satisfactory, although it is understandable to a limited extent. Mr Porter and Ms Thompson accepted that reserve account funds should not have been utilised to fund routine expenditure. Equally lessees should not have fallen into arrears and the Respondent should have more proactive in collecting the arrears, thus avoiding the temptation to use funds inappropriately.

26. Assuming all goes well the outcome proposed by Mr Porter will ensure that the correct balance on the reserve fund will be handed over to the

RTM company. However this assumes full recovery of historic arrears by the Respondent. It seems to us that if for some reason the Respondent is unsuccessful in recovering the arrears within a reasonable (but short) period of time it should make good the deficit from its own funds while it takes further steps to attempt recovery from the defaulting lessees. In the circumstances which have arisen here we find that the reserve fund and uncommitted funds should be handed over to the RTM company at the first opportunity and sooner rather than later.

The Service Charges in Dispute

Minor repairs

2006 £3,738.52

2007 £4,190.89

2008 £3,406.28

2009 £3,016.00

27. Ms Thompson readily conceded that the Respondent did not have to hand a full set of supporting invoices for the expenditure claimed. There was available a computer printout known as ECS Property Management, a software programme often used in the property management sector. Ms Thompson took us through the printout for each year in question and identified the supporting invoices where these were available.

28. The Applicants' representatives had the opportunity to ask questions about the invoices provided. For the most part neither Ms Thompson nor Ms Perry could add much as mostly the relevant events occurred before their time. They relied upon the invoices and the ECS printout.

29. For the most we were satisfied with the supporting documentation provided and such explanations as were given. These accorded with what members of the Tribunal would expect to see in a development such as Riverpoint. We did however make some adjustments where the documents or evidence were unsatisfactory or there was simply no

evidence to support the sum claimed. In such circumstances we could be satisfied that the sums in question were expended or reasonably incurred or reasonable in amount.

For example in 2008 the invoices and ECS printout shows expenditure of £2,670 against a sum claimed of £3,406.28. We were not satisfied that that the Respondent had incurred or expended £3,406.28 and thus we allowed only £2,670. We adopted a similar test for prior years but in those the difference was less acute.

As to 2009 we heard evidence from Ms Perry on some of the expenditure in dispute. We disallowed the call out cost at [10/192] because we were not satisfied that it was reasonably incurred. We disallowed the sum of £895.85 [10/193] because there was no evidence that the work claimed for had been carried out. The invoice for £1,883.70 at [10/195] was in dispute but we allowed this sum because we were satisfied that that the work had been carried out. We also allowed the invoices at [10/194 and 196] in order to arrive at our figure of £2,406.65.

Electricity

30. These costs were not in dispute.

Insurance

31. These costs were not in dispute.

Miscellaneous

32. These costs were not in dispute

Lift Insurance

2006 £200

2007 £859.76

33. These sums were disallowed because there was no evidence provided to support them and thus we could not be satisfied that they were expended or reasonably incurred or reasonable in amount.

Lift Maintenance

2009 £1,349.02

34. The above was the only year in issue. The gist of the Applicants' case was that by this time the lift had been condemned and taken out of service. Ms Perry took us through the three supporting invoices, [2/83, 2/85 and 10/189].

We disallowed the invoices at [2/85 and 10/189] because we were not persuaded that these sums were reasonably incurred because the repairs alleged to have been carried out seemed to us to be inappropriate. Further the invoice at [10/189] for £356.50 was for a call out only and upon arrival there was nothing for the technician to do. We find that the sum claimed was unreasonable in amount. We have adjusted the amount claimed under invoice [2/83] because this covers six visits in the course of the year for health and safety checks to a lift which is not in service. We accept that H&S checks are required but we find that a frequency of every two months is unreasonable. We have made an adjustment to allow for the cost of two visits during the year. We were satisfied that in such circumstances it was unreasonable to incur the cost of anything more than twice yearly inspections.

Refuse Collection

35. This cost was not challenged.

Insurance Claims

36. These costs were not challenged.

Surveyor's Fees

2006 £421.24

37. We allowed this sum. The supporting invoice is at [2/194]. It is an invoice for the balance of the cost of preparing the specification for the major works. We were satisfied that the work was done and that the balance claimed a reasonable sum.

Entryphone

38. These costs were not challenged.

Water

39. In essence these costs were not challenged. We have adjusted the cost payable in 2008 in order to reflect an agreed credit so as to reduce the net cost to £3,752.72. This was not disputed by Ms Thompson.

Accountant's Fees

2009 £705

40. The fees for the years 2006 to 2008 were not challenged.
The cost for 2009 was challenged as to the amount. Ms Perry explained that when SEPS took over in August 2009 the books and accounts were in a mess and it took a deal of time for the accountants to help sort them out. A detailed break of the fees is at [10/169]. The evidence of Ms Perry on this point echoed that of Mr Porter and we accept it. Ms Perry said that the costs of between £200 and £230 paid in prior years were no longer tenable.

41. Although we accept that the books and accounts were in a mess when handed over to SEPS it seems to us to be unreasonable that the Applicants should incur the costs of sorting out a mess caused by the Respondent's incompetent managing agents. It is for the Respondent to engage managing agents and if it employs incompetent agents it must bear the consequences.

42. We also accept the evidence of Ms Perry that accountancy fees in the region of £230 are unrealistically low because this evidence strikes a chord with the experience and expertise of the members of the Tribunal. We consider that a reasonable fee in respect of a development such as Riverpoint should be no more than £450 and so we have adjusted the claim to allow £450.

Cleaning and Gardening

2006 £3,315

2007 £3,440

2008 £4,111

2009 £4,522

43. This was a hotly contested item. The evidence of Mr Iamarino, Ms Scott and Mr Norris was to the effect that in each of the years in question a very, very poor level of service was provided. They gave to us examples of needles from Christmas trees lying on the floor covering on the ground floor for weeks and weeks and illustrated other complaints with photographs. They asserted that the cleaning and gardening were not very effective and overall a poor service was delivered for the costs claimed.

Ms Perry was not able to give evidence on the circumstances which occurred prior to September 2009 when she made her first visit to Riverpoint. Ms Perry said that the cleaning and gardening were undertaken by the same contractor. She said that on average the cleaner visited once per week for about 2/3 hours. The gardener visited once per fortnight for about 2/3 hours. Sometime additional visits were made if there was fly tipping or other tasks to undertake. The contractors provided all the necessary equipment and materials. Ms Perry maintained that the cleaning standards were reasonable and in line with other developments managed by her.

44. We accept and prefer the evidence given on behalf of the Applicants as regards the years 2006 to 2009. The Respondent had no evidence to gainsay that of the Applicants for any period prior to September 2009. At our inspection in May 2010 we were not overly impressed with the quality of cleanliness of the common parts which were not in good order. We were also able to see that some quite crude gardening had been undertaken. In these circumstances we have made adjustments to the claims for each of the years in question in order to reduce them to a level which we find to be consistent with a reasonable amount for the service level provided.

Management Fees

2006 £3,796

2007 £3,906

2008 £4,063

2009 £4,063

45. These fees were also hotly contested and the evidence of Mr Iamarino, Ms Scott and Mr Norris was scathing as to the level of service provided. The Applicants were not minded to put forward figures that they would consider to be reasonable to pay for the level of service provided and preferred to leave this to the Tribunal to determine.

46. Ms Thompson conceded that the previous managing agents, RMG, were not brilliant and were lacking. She submitted that Riverpoint was a difficult development to manage because it suffered a good deal of vandalism and that there was a high proportion of unlawful subletting to a transient population. As regards 2009 of the total of £4,063, RMG charged a fee of £2,356 (58%) for the period 1 January to 31 July and SEPS charged a fee of £1,706 (42%) for the period 1 August to 31 December.

47. We accept and prefer the evidence of the Applicants on the (poor) level of service that was provided. We are reinforced in this finding by the evidence of Mr Porter and Ms Perry as to the inadequate books, records and files made available to SEPS on handover. We find that some improvement in the level of management took place from September 2009 onwards when Ms Perry took over, but this was relatively short lived when it became apparent that lessees sought the Right to Manage when projects and initiatives were put on hold.

48. We find that Riverpoint is a difficult development to manage and is one that requires firm and proactive management. Given the level of the fees claimed the lessees were entitled to such a management service but this was not provided. In these circumstances we have made adjustments to the claims for each of the years in question in order to

reduce them to a level which we find to be consistent with a reasonable amount for the service level provided.

Professional Fees

2008 £3,131

49. The two supporting invoices are at [8/137 and 138]. The invoice at [8/137] is for £881.25 and evidently relates to a report on a damp survey. The evidence for the Applicants was that they had never seen such a report. Ms Thompson was unable to provide a copy of the report. We disallowed this sum because in the absence of the report we could not satisfied that the fee was reasonably incurred or that it was reasonable in amount.

50. The invoice at [8/138] was in the sum of £2,250.13. From the little information given it appears to relate to the major works project and covers work such as preparing a draft specification, issuing invitations to tender, receiving and checking tenders and reporting thereon. The fee was calculated at 5% of the lowest tender submitted - £36,515, plus VAT.

51. Again the tender report was not made available to us. The major works project appears to have been in hand for a number of years with little progress being made. Evidently s20 notices were given in 2006, 2008 and 2009. There was no evidence before as to why it was not taken forward. We find that there was duplication in the work drafting the specification and we find that earlier drafts and work should have been utilised and called upon so as to keep professional fees to a reasonable level in 2008. We accept that there was some value to the work undertaken and drawing on our expertise in these matters and doing the best we can with the imperfect materials before us we find that an adjustment to £1,000 is reasonable.

H&S Assessments

52. These costs were not challenged.

Budget 2010

53. In the light of the exercise of the right to manage there was no dispute as to the budget for 2010.

The section 20C Application – limitation of landlord's costs of the proceedings

54. An application was made under s20C of the Act with regard to the landlord's costs incurred or to be incurred in connection with these proceedings. An order was sought that those costs ought not to be regarded as relevant costs in determining the amount of any service charge payable by the Applicants.

55. The application was opposed by Ms Thompson. Ms Thompson submitted that clause 5(a) of the lease enables the landlord to recover costs of proceedings such as these through the service charge.

Clause 5 [2/5] reads as follows:

> *"5. FOR the sake of clarity the parties acknowledge that notwithstanding anything herein contained or implied:-*
>
> *(a) in the management of the Block and the performance of the obligations of the Lessor hereinafter set out the Lessor shall be entitled to employ or retain the services of any employee agent consultant service company contractor engineer or other advisers of whatever nature as the Lessor may require and the expenses incurred by the Lessor in connection therewith shall be deemed to be an expense incurred by the Lessor in respect of which the Lessee shall be liable to make an appropriate contribution under the provisions set out in the Fifth Schedule hereto*
>
> *(b) ...*
>
> *(c) ..."*

In essence the Fifth Schedule [2/12] to the lease states that the landlord will undertake the maintenance duties of the building as set out in the Fourth Schedule [2/10] and it states that the landlord may

employ managing agents. The Fourth Schedule sets out a number of obligations including the obligation to manage and keep in repair the Building, to redecorate the building and common parts, to pay for electricity for servicing the common parts, to pay the costs of the managing agents, to employ a qualified accountant to audit the accounts, to set the amount of the reserve fund and, in paragraph 15, *"To carry out any other services or incur any other expenditure which the Lessor deems necessary to enable the Lessor to manage the Building and carry out its obligation contained hereunder".*

56. There is no express reference in the lease as to the costs of collecting rent and service charges.

57. We have to construe the lease in accordance with the relevant rules and we have to have regard to the factual matrix as it was understood by the parties in 1996 when the lease was granted.

58. The costs incurred by the Respondent in these proceedings were incurred in resisting an application by the Applicants for a determination of the service charges payable by them for the years in question. The question arises as to whether such an activity is a maintenance duty within the meaning of the Fourth Schedule and/or an expense of managing the Block.

59. The Tribunal determines that the lease, as properly construed, does not impose an obligation on the landlord to collect the service charges or to oppose applications for the determination of service charges. It is a matter for the landlord to decide whether or not to collect service charges. Whilst it makes business sense for the landlord to do so (and most investor landlords will do so), the lease does not oblige him to do so.

60. Further we find that collection of the service charges is not a maintenance duty of the Building, which we find refers to physical acts affecting the repair and redecoration of the Building.

61. We also find that collection of service charges is not an activity concerned with the *"...the management of the Block and the performance of the obligations of the Lessor..."*.

62. We therefore decide that the lease, properly construed, does not make it clear and unambiguous that the tenant will be obliged to contribute through the service charge to the costs incurred by the landlord in resisting an application for the determination of service charges payable by the tenants. In these circumstances the landlord is not in any event entitled to put its costs of these proceedings through the service charge.

63. If we are wrong about this and if the terms of the lease do entitle the Respondent to put its costs of these proceedings through the service charge we would and do make an order under s20C to prevent it doing so because it would be just and equitable for us to do so. The real problems that arose here occurred because the Respondent engaged incompetent managing agents. The Applicants raised proper and genuine issues, many of which the Respondent was unable to resist successfully. It seems to us that it would be wholly unjust and inequitable for the Respondent to pass the costs of its unsuccessful case to the Applicants via the service charge. Thus for the avoidance of any doubt we have made an order under s20C.

Reimbursement of Fees

64. An application was made for the reimbursement of fees of £500 paid by the Applicants in connection with these proceedings.

65. The Tribunal determines that it is just and equitable to require the Respondent to reimburse those fees. The Respondent was unable or

unwilling to address the Applicants' issues and, in effect, forced the Applicants to come to the Tribunal. They have done so and in doing so they have incurred fees. The Applicants have achieved a large degree of success and we find that it only right that the Respondent should reimburse to them the fees incurred.

The Law

66. Relevant law we have taken into account in arriving at our decision is set out in the Schedule to this Decision.

The Schedule
The Relevant Law
Landlord and Tenant Act 1985

Section 18(1) of the Act provides that, for the purposes of relevant parts of the Act 'service charges' 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, improvements 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.

Section 19(1) of the Act provides that 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 are of a reasonable standard;

and the amount payable shall be limited accordingly.

Section 19(2) of the Act provides that where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable

is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 20C(1) of the Act provides that 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 leasehold valuation tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

Section 20C(3) of the Act provides that the tribunal may make such order on the application as it considers just and equitable in the circumstances.

Section 27A of the Act provides that an application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to-

(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable.
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

Section 27A(3) of the Act provides that an application may be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance, or management of any specified description, a service charge would be payable for the costs and, if it would, as to

(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable.
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

Leasehold Valuation Tribunals (Fees) (England) Regulations 2003

Regulation 9(1) provides that subject to paragraph (2) a Tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or any part of any fees paid by him in respect of the proceedings.

The Construction of Leases

1. The general legal principles.

   Lord Diplock said in *Antaios Compania Naviera SA v. Salen Rederierna AB* [1985] AC 191, 201E, that

   '...if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.'

2. The definitive modern approach came from Lord Hoffman in *Investors' Compensation Scheme Limited v. West Bromwich Building Society* [1998] 1 WLR 896, 912H - 913F when he set out the modern rules of interpretation.

   '***The principles may be summarised as follows:***

   (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and subject to the exception to be mentioned next, includes absolutely anything which could have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their subjective intent. They are inadmissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: See Mannai Investments Co. Ltd v. Eagle Star Life Assurance Co. Ltd. [1997] A C 749.

(5) The rule that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes,

particularly in formal documents. ON the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had...'

3. Lord Hoffman added a slight qualification to these principles when in *Jumbo King Ltd v. Faithful Properties* Unreported 2 December 1999, Hong Kong Court of Final Appeal, he said,

'The overriding objective in construction is to give effect to what a reasonable person rather than a pedantic lawyer would have understood the parties to mean. Therefore, if in spite of linguistic problems the meaning is clear, it is that meaning which must prevail.'

4. Emphasis was made on the correct approach and the importance of the background in *Holdings and Barnes plc v. Hill House Hammond Ltd (No.1)* [2001] EWCA Civ 1334 when Clarke LJ said, about the above authorities,

'Those cases are to my mind of particular assistance here because they show that the question is what a reasonable person would understand the parties to mean by the words of the contract to be construed. It is important to note that the reasonable person must be taken to have knowledge of the surrounding circumstances or factual matrix. As appears below, that knowledge is of particular importance on the facts of the instant case.'

5. Lord Bingham in *BCCI (SA) v. Ali* [2002] 1 AC 251; [2001] 2 WLR 735 said,

'In construing this provision, as any other contractual provision, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties the court reads the

terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties subjective states of mind but makes an objective judgment based on the materials already identified. The general principles summarised by Lord Hoffman in Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 WLR 896, 912-913 apply in a case such as this.'

6. Regard may be had to the general background as part of the factual matrix in order to help construe words in a document – see *Partridge & others v Lawrence & others* [2003] EWCA Civ 1121

7. Sometimes as part of the process of construction of a document it is necessary to imply a term or terms into it. In order for a term to be implied the following conditions must be fulfilled:

    1. the term must be reasonable;
    2. the term must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it;
    3. the term must be so obvious that it goes without saying;
    4. the term must be capable of clear expression;
    5. the term must not contradict any express term of the contract.

A clear statement of the criteria was set out in *B.P. Refinery (Westernport) Pty Ltd v Shire of Hastings* [1978] 52 ALJR 20.

However, in the context of residential leases a more restrictive approach is generally taken. See *Woodtrek v Jezek* [1982] 1 EGLR 45. Similarly sweeping up clauses tend to be restrictively construed. See *Jacob Isbicki & Co Ltd v Goulding & Bird Ltd* [1989] 1 EGLR 236. An

entitlement to recover interest on money borrowed to fund the cost of services will not be implied. See *Boldmark Limited v Cohen* [1986] 1 EGLR 47.

8. Similarly obvious mistakes can be corrected by construction in order to give effect to the written intention of the parties. Once corrected, the lease is interpreted in and has effect in its corrected form. See for examples *St Edmundsbury v Clark (No.2)* [1975] WLR 468 and *Littman v Aspen Oil (Broking) Limited* [2005] EWCA Civ 1579; [2006] 2 P & CR 2

9. In the context of the construction of service charges provisions in a residential lease, we believe that it is trite law that a lease has to be construed in the same way as any other instrument or commercial contract. Words used must be given the ordinary natural meaning in the context. It is also trite law that a tenant is only obliged to pay what the lease provides for him to pay. See *Riverplate Properties Ltd v Paul* [1975] Ch 133.

10. In *Sella House Ltd v Mears* [1989] 12 EG 67 the service charge provisions in the lease provided for the recovery of expenditure incurred by the lessor in carrying out its obligations. Those obligations included:

> *'(i) to employ at the lessor's discretion a firm of managing agents to manage the building and discharge all proper fees salaries charges and expenses payable to such agents or such other persons who might be managing the building including the cost of computing and collecting the rents and service charges in respect of the building, and*
>
> *(ii) to employ all such surveyors builders architects engineers tradesmen accountants or other professional persons as might be necessary or desirable for the*

proper maintenance safety and administration of the building.

The Court of Appeal held that legal expenses incurred in recovering rent and service charges from defaulting tenants were not recoverable.

In the context of discussion on the terms of the lease relating to legal expenses, Taylor LJ made the following comment:

'For my part, I should require to see a clause in clear and unambiguous terms before being persuaded that that result was intended by the parties.'

11. In *St Mary's Mansions Limited v Limegate Gate Investment Company Co Limited* [2002] EWCA Civ 149 the lease provided as part of the service charge:

'The reasonable and proper fees of the Lessor's Auditors and the reasonable and proper fees of the Lessor's managing agents for the collection of the rents of the flats in the said Buildings and for the general management thereof .

The Court of Appeal held that such provision did not permit recovery of:

- proceedings to recover service charges;
- proceedings to recover ground rent; and
- obtaining general legal advice in relation to obligation under the leases

12. The approach to construction of a service charge provision in a residential lease was reviewed in *Gilje v Charlesgrove Securities Ltd* [2001] EWCA 1777, where ambiguous provisions were looked at in respect of a notional rent on the caretaker's accommodation. Laws LJ said:

'On ordinary principles there must be clear terms in the contractual provisions said to entitle him to do so. The lease, moreover, was drafted or proffered by the landlord. It falls to be construed contra proferentum.'

In the same case Mummery LJ said:

'First, I note what is stated in paragraph 55 on page 71 of the 5th Edn of the Encyclopaedia of Forms and Precedents Vol 23 on Landlord and Tenant in the section relating to the drafting of provisions in leases for services charges. It is stated as follows:

'The draftsman should bear in mind that the courts tend to construe the service charge provision restrictively and are unlikely to allow recovery for items which are not clearly included.'

He went on to say:

'The proposition is obvious. Indeed the proposition reflects a particular application of the general principle of construction in the contra proferentum rule.'

13. The contra proferentum rule is one to be applied only where the court is unable on the material before it to reach a sure conclusion on the question of construction. See *St Edmundsbury v Clark (No.2)* [1975] WLR 468.

.....

John Hewitt
Chairman
19 October 2010

Appendix 1

Other Applicants for Riverpoint LVT

Mr & Mrs P. Scozzaro	27 Albury Ride, Cheshunt, Herts EN8 8XE
Mr & Mrs M. Khan	2 Riverpoint, High St, Waltham Cross, Herts, EN8 7GA
Mr D. Arthur	3 Riverpoint, High St, Waltham Cross, Herts, EN8 7GA
Mr P. Gyoury	c/o 40 Station Road, Waltham Abbey, Essex, EN9 1AA
Mr C. Ali	4 Herrongate Road, Cheshunt, Herts, EN8 0TY
Mr T. Kyriacou	26 Doveridge Gardens, Palmers Green, London, N13 5BL
Ms R. Scott	7 Riverpoint, High St, Waltham Cross, Herts, EN8 7GA
Mr M. Kelly	20 Parsonage Close, Oakley, Bedford, Beds, MK43 7RU
Dr N. Wignaraja	33 Crooks Barn Lane, Norton, Stockton on Tees, TS20 1LR
Mr S. Bloom	39 Mylne Close, Cheshunt, Herts, EN8 0PS
Mr Y. Olayomi	6 Newlyn Close, Bricket Wood, St Albans, Herts, AL2 3UP
Mr S. Inzalaco	114 Shooters Drive, Nazeing, Essex, EN9 2PX
Dr I. Khan	86 Forres Avenue, Glasgow G46 6LE
Ms C. Binney	15 Riverpoint, High St, Waltham Cross, Herts, EN8 7GA
Mr D. Barnard	Flat 7, St Hilders Court, 10 Belle Vue Terrace, Whitby, North Yorkshire, YO21 3EY
Ms C. Keyes	c/o Northfield, Seven Devils Lane, Saffron Walden, Essex, CB11 4BB
Mr M. Norris	60 Glen Luce, Turners Hill, Cheshunt, Herts, EN8 8NW
Mr H. Olivier	55 Presdales Drive, Ware, Herts, SG12 9NN

Expense	2006 Claim	2006 LVT Figure	2007 Claim	2007 LVT Figure	2008 Claim	2008 LVT Figure	2009 Claim	2009 LVT Figure		
Cleaning & Gardening	£ 3,315.00	£ 2,000.00	£ 3,440.00	£ 2,000.00	£ 4,111.60	£ 2,250.00	£ 4,522.00	£ 2,250.00	£ 3,060.00	£ 3,060.00
Electricity	£ 882.94	£ 882.94	£ 1,080.72	£ 1,080.72	£ 1,058.95	£ 1,058.95	£ 1,041.00	£ 1,041.00		
Insurance	£ 3,387.48	£ 3,387.48	£ 3,556.85	£ 3,556.85	£ 3,922.91	£ 3,922.91	£ 4,180.82	£ 4,180.82		
Miscellaneous	£ -		£ 241.03	£ 241.03	£ 105.75	£ 105.75	£ 157.81	£ 157.81		
Lift Insurance	£ 200.00	£ -	859.76	£ -	£ -					
Lift Maintenance	£ 2,209.12	£ 2,209.12	£ -		£ 600.77	£ 600.77	£ 1,349.02	£ 293.99	£ 588.00	£ 588.00
Refuse Collection	£ 829.08	£ 829.08	£ -							
Insurance Claim	£ 223.25	£ 223.25	£ 1,017.00	£ 1,017.00	£ -					
Surveyor's Fee	£ 421.24	£ 421.24	£ -		£ -					
Minor Repairs	£ 3,738.52	£ 3,667.76	£ 4,190.89	£ 3,697.00	£ 3,406.28	£ 2,670.00	£ 3,016.00	£ 2,404.65	£ 4,000.00	£ 4,000.00
Entryphone	£ 193.65	£ 193.65	£ 251.22	£ 251.22	£ -				£ 250.00	£ 250.00
Water	£ 3,339.81	£ 3,536.96	£ 3,536.96	£ 3,536.96	£ 5,375.92	£ 3,725.72	£ 3,696.88	£ 3,696.88		
Accountant's Fee	£ 220.00	£ 220.00	£ 225.00	£ 225.00	£ 230.00	£ 230.00	£ 705.00	£ 450.00		
Management Fee	£ 3,796.00	£ 2,790.63	£ 3,906.96	£ 2,790.63	£ 4,063.00	£ 2,902.25	£ 4,063.00	£ 3,277.50	£ 4,261.00	£ 4,261.00
Professional Fees	£ -		£ -		£ 3,131.38	£ 1,000.00				
H&S Assessments							£ 502.55	£ 502.55		
Reserve	£ -		£ -		£ -				£ 1,000.00	1000
Totals	**£ 22,756.09**	**£ 20,362.11**	**£ 22,306.39**	**£ 18,396.41**	**£ 26,006.56**	**£ 18,466.35**	**£ 23,234.08**	**£ 18,255.20**	**£ 13,159.00**	**£ 13,159.00**
Items not challenged										

John Lovett

19/10/2010