



**Property** : Flat 1, 201 Pall Mall,  
Leigh-on-Sea,  
Essex SS9 1RD

**Applicant** : Focustime Ltd.

**Respondent** : Mrs. B. J. Ilderton

**Date of Application** : 11<sup>th</sup> November 2011

**Type of Application** : To determine reasonableness and  
payability of service charges and administration  
fees

**The Tribunal** : Bruce Edgington (lawyer chair)  
Stephen Moll FRICS

**Date and venue of  
hearing** : 21<sup>st</sup> February 2012  
Southend Magistrates Court, Victoria Avenue,  
Southend-on-Sea, Essex SS2 6EU

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## DECISION

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1. Of the amounts of service charges set out in the application form, the decision of the Tribunal is as follows:-

<u>Detail</u>	<u>Amount(£)</u>	<u>Decision</u>
2009 – Refuse bin	25.00	reasonable and payable
2009 – Prep. of accounts	33.00	reasonable and payable
2009 – Clear rubbish	5.84	reasonable and payable
2009 – Clear weeds etc.	12.50	reasonable and payable
2009 – repair roof	76.66	reasonable and payable
2010 – buildings insurance	215.89	reasonable and payable
2011 – buildings insurance	199.17	reasonable and payable
2011 – electricity	9.62	reasonable and payable
2011 – replace intercom	62.00	reasonable and payable
2011 – cleaning	12.00	reasonable and payable
2011 – management fees	211.50	reasonable and payable
2011 – monthly checks	56.00	reasonable and payable
2011 – asbestos survey	62.40	reasonable and payable

2. Of the claim for administration fees in the sum of £355.02 claimed in the Applicant's statement of case, these are not payable under the terms of the lease.

## **Reasons**

### **Introduction**

3. The Applicant, as freeholder of the building of which the property forms part, claims service charges and administration fees for monies allegedly due from 2009, 2010 and 2011. These are set out in the decision above. It asks the Tribunal to determine that each claim is reasonable and payable. The Tribunal issued a directions order on the 20<sup>th</sup> November 2011. The Respondent was ordered to file and serve a statement setting out whether these claims were being challenged and, if so, why. No such statement was served and filed.
4. The Applicant was ordered to file and serve a statement justifying the claim and it has filed a statement stating that it considers such charges and fees to be reasonable and payable, although there is no indication as to who made the statement. The managing agents, Squibbs Property Ltd ("Squibbs"), filed and served a bundle of documents for the Tribunal. The statement includes an assertion that on the 13<sup>th</sup> May 2011, Squibbs were contacted by the Respondent's son, Brad Ilderton who claimed to have a power of attorney for the Respondent and promised to pay the 'arrears' by standing order. This was confirmed by Squibbs in a letter dated 16<sup>th</sup> May 2011, a copy of which is in the papers.
5. It is said that no further communication was received either from the Respondent or her son.

### **The Inspection**

6. The members of the Tribunal inspected the property and were met by someone who introduced himself as the Respondent's son. He said that he had only just heard about the hearing and was not going to attend. He had nothing to say about the merits of the case. Michelle Williams and Wendy Taylor from Squibbs were also in attendance.
7. The property is a ground floor flat in a block. 201 Pall Mall appears to have been a terraced house built in the 1920's or 1930's. In the 1980's there was a substantial development of this property and 203 Pall Mall. There was an extension upwards into the roof and the first and second floor form a tunnel over a roadway into a small car park at the rear. It is a partially rendered brick construction under an interlocking concrete tiled roof with dormers at the front and a felt flat roof at the rear.
8. The windows have uPVC frames and the property is in reasonably good condition for its age. One or two items could do with attention e.g. the ground floor tiled window cill to the bay window at the front is flaking badly.
9. The front door of 201 leads into a small hallway with stairs to the first and second floors which contain, in total, 5 flats including the subject ground floor flat.

### The Lease

10. The Tribunal was shown a copy of the original stamped lease dated 6<sup>th</sup> February 1987 which is for a term of 99 years from the 1<sup>st</sup> January 1987 with a rising yearly ground rent. There are the usual covenants on the part of the landlord to maintain the structure and common parts of the building known as 201 Pall Mall and for the lessee to pay a proportion of this as a service charge. All the claims for service charges would appear to come within the definition of service charges in the Third Schedule to the lease.
11. Of relevance to the issues in this case, the service charge provisions include the ability of the Applicant landlord to recover "*all other expenses (if any) reasonably incurred by the Landlord in and about the maintenance and proper and convenient management and running of the building*".

### The Law

12. Section 18 of the 1985 Act defines service charges as being an amount payable by a tenant to a landlord as part of or in addition to rent for services, insurance or the landlord's costs of management which varies 'according to the relevant costs'.
13. Section 19 of the 1985 Act states that 'relevant costs', i.e. service charges, are payable 'only to the extent that they are reasonably incurred'. A Leasehold Valuation Tribunal has jurisdiction to make a determination as to whether such a charge is reasonable and, if so, whether it is payable.
14. Schedule 11 of the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act") provides for the same conditions and jurisdiction with regard to administration charges which are defined as including payments demanded in addition to rent "*...in respect of a failure by the tenant to make a payment by the due date to the landlord...*".

### The *Contra Proferentem* Rule

15. It could certainly be argued that the terms of the lease are ambiguous. The general 'sweep up' clause for the collection of fees and expenses for the management of the building could be argued – and it has been so argued in this case – to include administration fees.
16. In order to assist courts (and Tribunals) in these difficult matters of interpretation, the *contra proferentem* rule was devised many years ago. It is not, of course, the only rule of interpretation but it is, perhaps the most relevant to this problem. It translates from the Latin literally to mean "against (*contra*) the one bringing forth (the *proferens*)".
17. The principle derives from the court's inherent dislike of what may be described as 'take it or leave it' contracts such as residential leases which are the product of bargaining between parties in unfair or uneven positions. To mitigate this perceived unfairness, this doctrine was devised to give the benefit of any doubt to the party upon whom the contract was 'foisted'.



18. In the case of **Granada Theatres Ltd v. Freehold Investments (Leytonstone) Ltd** [1958] 1 WLR 845, Mr. Justice Vaisey said, at page 851, that “a lease is normally liable to be construed *contra proferentem*, that is to say, against the lessor by whom it was granted”.
19. The question for this Tribunal, therefore, is whether the general ‘sweep up’ clause referred to would cover administration fees as defined by the legislation. As administration fees are very specifically defined and as no evidence has been produced of any actual expenditure incurred by the landlord, then *contra proferentem* would appear to dictate that a ruling is made in favour of the lessee.

### **Burden of Proof**

20. The other relevant question for determination is what a Tribunal should do in the absence of any case put by or on behalf of the lessee. In **Schilling v Canary Riverside Development PTD Ltd** LRX/26/2005; LRX/31/2005 & LRX/47/2005 His Honour Judge Rich QC had to consider upon whom lay the burden of proof. At paragraph 15 he stated :

*“If the landlord is seeking a declaration that a service charge is payable he must show not only that the cost was incurred but also that it was reasonably incurred to provide services or works of a reasonable standard, and if the tenant seeks a declaration to the opposite effect, he must show that either the cost or the standard was unreasonable. In discharging that burden the observations of Wood J in the **Yorkbrook** case make clear the necessity for the LVT to ensure that the parties know the case which each has to meet and for the evidential burden to require the tenant to provide a prima facie case of unreasonable cost or standard.”*

### **The Hearing**

21. The hearing was attended by Ms. Williams and Ms. Taylor. It was confirmed that Ms. Williams had prepared the statement in the bundle. There was nothing that either of them could usefully add to the documents in the bundle and the Tribunal had no questions.

### **Conclusions**

22. As far as administration fees are concerned, the Applicant argues that the general ‘sweep-up’ clause in the lease as set out above covers these. It does not, particularly when taking the *contra proferentem* rule into account. Administration fees are clearly defined in the 2002 Act and in order that they are payable on a contractual basis, the contract, i.e. the lease, must clearly say that they are payable.
23. The point has recently been mentioned in the Lands Tribunal in the case of **Rettke-Grover v Needleman** [2011] UKUT 283 where there was a similarly worded ‘sweep up’ clause as is relied upon by the Applicant. In that case, there was an obligation on the landlord to have the service charges certified annually and provide a certificate signed by the lessor or its agents. The landlord tried to recover the cost of an accountant who had provided the certificate. The LVT allowed this under the general ‘sweep up’ clause.

24. On appeal, HHJ Huskinson said that as there was no specific provision in the lease for the landlord to recover the cost of an accountant, it was not payable. He said that the wording of the 'sweep up' clause was "*directed towards services that are actually enjoyed by the lessees as the fruits of 'the efficient management of the building...'*...the lessees could not reasonably be expected to accept that the dealing with accounting problems lying on the lessor's desk was such a service". The present claim for administration fees does not, of course, relate to accountancy charges but it does show that the Upper Tribunal (Lands Chamber) is strictly interpreting such lease terms.
25. Turning now to the service charges claimed, the Tribunal uses its members' considerable knowledge and experience in these matters. The service charges are relatively modest in amount. There is in fact a claim for preparing the service charge account in 2009, but it does not say that this is an accountant's charge. There appear to be no other management charges for that year and the Tribunal decides that this is claimable and reasonable.
26. The insurance premiums are within the range of reasonableness. The Tribunal did have cause to consider the management charges claimed for 2011 plus additional charges for checking the lighting and smoke alarms in the sum of £56. The management fee, at £180 plus VAT is within the range of reasonableness and the Tribunal notes the statement that speedy payment would result in a reduction to £150 plus VAT. A managing agent is supposed to inspect the property being managed on a reasonably regular basis within its management fee and no doubt the lighting and alarm checks could have been dealt as part of those duties.
27. A total of £236 plus VAT per flat per annum for management duties is at the very top of the range of reasonableness but in view of the concession for speedy payment, the Tribunal concedes, on this occasion that the total charges are just within the bounds of reasonableness.
28. The Tribunal therefore decides that the service charges claimed are reasonable and payable. It pays particular regard to the fact that neither the Respondent nor anyone on her behalf has presented any evidence or opinion to the Tribunal.

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**Bruce Edgington**  
**Chair**  
**22<sup>nd</sup> February 2012**