LRX/90/2005

LANDS TRIBUNAL ACT 1949

LANDLORD AND TENANT – Administration Charge – Commonhold and Leasehold Reform Act 2002 Section 158 and Schedule 11 – jurisdiction of Leasehold Valuation Tribunal – whether "payable" in Schedule 11 means "due" – whether absence of a formal demand from the landlord for payment (being a demand which complies with paragraph 4 of Schedule 11) deprives LVT of jurisdiction to consider the amount payable.

IN THE MATTER OF AN APPEAL FROM A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

BETWEEN **(1) JOHN ANTHONY DREWETT**
(2) LISALOTTE ANNA DREWETT **Appellants**

and

(1) MS JUSTINE BOLD
(2) MR CHRISTIANO SOSSI **Respondents**

Re: Ground Floor Flat
80 Hanover Road
London NW10 3DR

Before: His Honour Judge Huskinson

Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL
on 25 April 2006

Mr Christopher Heather instructed by Roiter Zucker for the Appellants
Mr Charles King for the Respondents.

The following case is referred to in this decision: *Cutts v. Head [1984] Ch 290*

DECISION

Introduction

1. This is an appeal from the Leasehold Valuation Tribunal for the London Rent Assessment Panel ("the LVT") dated 29 June 2005 whereby the LVT decided a preliminary point regarding its jurisdiction in favour of the present respondents Ms Bold and Mr Sossi (who are hereafter called "the Tenants"). The present appellants Mr and Mrs Drewett (hereinafter called "the Landlords") were granted permission to appeal by the LVT on 3 August 2005.

2. The case raises a question as to the jurisdiction of the LVT under the Commonhold and Leasehold Reform Act 2002 Section 158 and Schedule 11 in connection with administration charges as there defined. By an application form received by the LVT on 31 March 2005 the Tenants applied to the LVT for the determination of their liability to pay an administration charge. The Landlords raised the point that no formal demand for payment of any administration charge had ever been made and that the position at the date of the Tenants' application was merely that there existed an ongoing dispute between the Landlords and the Tenants centering around the Landlords' contention that the Tenants had broken a covenant in their lease by carrying out an unauthorised alteration to their flat. The Landlords argued that in the course of this ongoing dispute their solicitors had written a without prejudice letter proposing a possible way forward (which if adopted could lead to the retrospective grant of a licence for the disputed alteration) and that this without prejudice letter included a statement of the Landlords' position as to what the Landlords required regarding the payment of past and future costs if a way forward was to be found. The Landlords argued that such a letter could not found the basis for an application under Schedule 11 to the LVT for the determination of whether an administration charge is payable and, if it is, as to the matters set forth in paragraph 5(1) of Schedule 11.

3. In consequence of this point being raised as to jurisdiction, the LVT heard this point as a preliminary issue. The LVT concluded that it did have jurisdiction to hear the application and it made directions for the future conduct of the application.

4. The LVT's reasoning can for present purposes be summarised as follows:

    1. The LVT concluded that, by making the application to the LVT on 31 March 2005, the Tenants were making "a qualified or conditional acceptance of the offer to settle this dispute" such that the Tenants had acknowledged they will have to make a payment to resolve the dispute but have asked the LVT to decide the reasonableness of the amounts demanded by the Landlords.

2. The LVT concluded that the Landlords could not seek to oust its jurisdiction by claiming that the sums of money mentioned in the letter of 10 March 2005 were claimed "without prejudice".

3. The LVT noted the provisions of paragraph 4(1) of Schedule 11 and that these had not been complied with (ie there was not a formal demand by the Landlords for payment accompanied by a summary of the rights and obligations of Tenants in relation to administration charges). However the LVT recorded that the point was not taken by the Tenants' counsel and that the regulations have not been produced and that the Tenants had not been prejudiced in any way by the absence of a formal demand under paragraph 4.

4. The LVT rejected the Landlords' argument that there was no jurisdiction to consider, at this stage in the ongoing dispute whether an administration charge was payable and, if so, as to the matters in paragraph 5 of Schedule 11.

Facts

5. The Landlords are the freehold owners of 80 Hanover Road, London NW10 3DR ("the Building"). The Tenants are the leasehold owners of the ground floor flat ("the Flat") in the Building, holding the Flat under a lease dated 30 June 1973. The Landlords themselves occupy the remainder of the Building. The lease contains covenants on the part of the Tenants against making any alterations or additions to the Flat or any part thereof without the previous written consent of the Landlords (Clause 2(20)). Clause 2(4) of the lease contains a covenant on the part of the Tenants:

> *"To pay unto the Lessors all costs charges and expenses (including legal costs and expenses and fees payable to a Surveyor for the time being of the Lessors (hereinafter called 'the Surveyor')) which may be incurred by the Lessors in contemplation of any proceedings under sections 146 and 147 of the Law of Property Act 1925 notwithstanding that forfeiture may be avoided otherwise than by relief granted by the Court".*

The lease also contains a proviso for re-entry in usual form in the event of breach of covenant by the Tenants.

6. It appears that at some date prior to either the Landlords or the Tenants obtaining their respective interests in the Building some previous persons had caused to be removed a length of wall, being a wall shown to exist on the plan annexed to the Tenants' lease. Also a length of wall (said by the Tenants to be no more than a stud partition wall) had been erected, being a wall not shown on the plan to the lease. In or around December 2003 the Tenants removed this partition wall from within the flat. It is accepted that the Tenants did not obtain the prior written consent of the Landlords. There appears to be a potential dispute as to the extent to which the Tenants' proposal to remove a wall was discussed with and/or orally approved by the Landlords before it was removed. After removal of the partition wall the Landlords

became concerned as to whether this may have affected the structure of the building – their concern apparently arising from some vibration in their kitchen floor which they say had not previously been noticeable, when using their spin dryer. As a result the Landlords consulted their solicitors.

7. The initial letter from the Landlords' solicitors (Roiter Zucker) to the Tenants in relation to this matter is dated 21 January 2004. For present purposes the course of the correspondence can be summarised as follows:

1. By their initial letter the Landlords' solicitors complained of the breach of covenant by reason of removing the wall without written consent and indicated the Landlords' desire to instruct a surveyor to advise regarding any remedial steps necessary to be taken if the Landlords were to grant retrospective consent. The Landlords' solicitors also mentioned the prospect of a section 146 notice and forfeiture proceedings. The letter contained the following passage:

   "I would also draw your attention to clause 2(4) of your lease (copy enclosed) which provides that you are responsible for all costs, charges and expenses including legal and surveying fees incurred in respect of this matter. Again the level of fees with which you will find yourself facing will entirely depend upon the steps you now take. If you ignore this letter then my clients will have no hesitation in serving a section 146 notice which will involve you in significant costs".

2. By a letter of 19 February 2004 the Tenants' solicitors asked for retrospective consent to the alterations.

3. By a letter of 8 March 2004 the Landlords solicitors made reference to their fees and to the likely fees of a surveyor and asked for an undertaking that the Tenants would be responsible for the fees.

4. By a letter of 29 April 2004 the Tenants' solicitors expressed surprised at the amount of the fees stating "£1,500 seems an extraordinary amount for a simple licence to carry out alterations to a small domestic property, indeed it is more than the building works themselves".

5. By a letter of 5 May 2005 the Landlords' solicitors indicated that their costs were already £775 and that the writer's fees were charged at £300 per hour plus VAT. The letter again expressly draws attention to clause 2(4) of the lease which is stated to be "extremely clear and a very normal clause". It is further stated that if the matter is not resolved very shortly then a section 146 notice will be served and the Landlords' solicitors' cost will be significantly higher.

6. In due course a copy of the Tenants' surveyor's report (prepared before the works were undertaken) was sent to the Landlords' solicitors.

7. By a letter of 8 July 2004 the Landlords' solicitors write stating that the previously requested undertaking for costs was insufficient and that their costs were already just over £1,100 plus VAT and would at the very least be £1,500

plus VAT. They asked for an undertaking regarding these costs within seven days.

8. By a letter dated 13 July 2004 the Landlords' solicitors reasserted that the Tenants were in breach of the terms of their lease and that the Landlords were entitled to serve a section 146 notice. The letter included the following passage:

> *"Your clients are liable for our costs in terms of the lease. We now enclose our fee note for all work to date. Failure to pay these costs will constitute a further breach of the terms of the lease. We would ask therefore that you arrange immediate payment of these costs and provide us with an undertaking for a further £1,000 plus VAT of our costs plus our clients' reasonable survey fees which we estimate at £750 plus VAT. Unless we receive payment of our costs and the undertaking in the terms specified above within 14 days then we will issue a section 146 notice without further reference to you."*

The letter enclosed a fee note dated 13 July 2004 addressed to the Landlords in the sum of £1,584.63 (including VAT).

9. In July 2004 the Tenants changed solicitors and the new solicitors wrote to the Landlords' solicitors. The Landlords' solicitors replied by letter of 28 July 2004 stating that the new solicitors appeared not to have received a copy of their letter of 13 July with a copy of the fee note, which the Landlords' solicitors therefore enclosed for the benefit of the new solicitors. The Landlords' solicitors stated:

> *"Until those costs are paid we are doing absolutely nothing further."*

10. In due course an argument developed in correspondence regarding whether in fact there had been any breach of covenant by the Tenants in removing what was said to be merely a stud partition wall which was not part of the originally demised premises.

11. By a letter dated 23 August 2004 the Tenants' solicitors asked the Landlords' solicitors to justify their costs.

12. By a letter of 24 August 2004 the Landlords' solicitors suggested that the way forward is if the Tenants' surveyor (who the Landlords indicated they were prepared to allow to advise both parties) reinspected the premises with a structural engineer.

13. In August and September 2004 the Landlords' solicitors wrote indicating that counsel was being instructed and that a section 146 notice was likely.

14. By letter dated 29 September 2004 the Landlords' solicitors wrote that the problem was still capable of being resolved without resort to litigation, but they reminded the Tenants' solicitors that the question of costs needed to be dealt with and that "you know our requirements".

15. By letter of 25 October 2004 the Landlords' solicitors comment upon a proposed way forward but asked the Tenants to bear in mind that the Landlords have

already incurred substantial legal costs and counsel fees which will ultimately be the Tenants responsibility before any retrospective consent is given and that if the Tenants had dealt with the matter properly in the first place then the costs would have been significantly less than they are going to be at the end of the day.

16. In due course an engineer inspected the premises and made certain recommendations for further steps to be taken.

8. By a letter dated 15 February 2005 the Tenants (acting by themselves rather than through solicitors) wrote to the Landlords asking that the matter could be progressed. By a without prejudice letter dated 10 March 2005 the Landlords' solicitors set forth the Landlords' proposal for a way forward, which could lead to the retrospective grant of a licence to carry out the alteration, but the letter made clear that the Tenants would be required to do various things including paying the Landlords' full costs on an indemnity basis. These were stated to total £7,747.52, by way of fees already incurred, and a further £2,000 plus VAT being an estimate of the Landlords' solicitors' fees to completion of a retrospective licence assuming full and immediate cooperation from the Tenants.

9. On 31 March 2005 the Tenants made the present application to the LVT.

The statutory provisions

10. Schedule 11 of the Commonhold and Leasehold Reform Act 2002 (which is made applicable by section 158) provides so far as presently relevant as follows:

> *"1– (1) In this Part of this Schedule 'administration charge' means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly –*
>
> *(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,*
>
> *(b) for or in connection with the provisions of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,*
>
> *(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or*
>
> *(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.*
>
> *(2) ….*
>
> *(3) In this Part of this Schedule 'variable administration charge' means an administration charge payable by a tenant which is neither –*
>
> *(a) specified in his lease, nor*
>
> *(b) calculated in accordance with a formula specified in his lease.*

(4) ….

2. A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

3– (1) Any party to a lease of a dwelling may apply to a leasehold valuation tribunal for an order varying the lease in such manner as is specified in the application on the grounds that –

(a) any administration charge specified in the lease is unreasonable, or

(b) any formula specified in the lease in accordance with which any administration charge is calculated is unreasonable.

(2) …..… to (6) …..…

4– (1) A demand for the payment of an administration charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to administration charges.

(2) The appropriate national authority may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations.

(3) A tenant may withhold payment of an administration charge which has been demanded from him if sub-paragraph (1) is not complied with in relation to the demand.

(4) Where a tenant withholds an administration charge under this paragraph, any provisions of the lease relating to non-payment or late payment of administration charges do not have effect in relation to the period for which he so withholds it.

5– (1) An application may be made to a leasehold valuation tribunal for a determination whether an administration 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.

(2) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) may be made in respect of a matter which –

(a) has been agreed or admitted by the tenant,

(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(c) has been the subject of determination by a court, or

(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination –

(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject matter of an application under sub-paragraph (1)."

11. It is also relevant to note the provisions of section 168 of the 2002 Act which restricts the ability of a landlord under a long lease of a dwelling to serve a section 146 notice. Such a notice may only be served if section 168(2) is satisfied and one way of satisfying this provision is for it to have been finally determined on an application under subsection 168(4) that the alleged breach of covenant by the tenant has occurred. Subsection (4) provides:

> *"A landlord under a long lease of a dwelling may make an application to a Leasehold Valuation Tribunal for a determination that a breach of a covenant or condition in the lease has occurred."*

Thus it is expressly contemplated that a landlord may apply to an LVT to determine whether an alleged breach of covenant has occurred. I was told that this provision came into force on 28 February 2005. The application of this provision to any potential forfeiture proceedings in the present case is not before me, but the significance is that the statute contemplates the LVT can (on a landlord's application) decide whether a breach of covenant has occurred.

The Landlords' submissions

12. The basic proposition advanced by Mr Heather was that the LVT has no jurisdiction to assess the reasonableness of something which is merely a possible future administration charge, being something which has not at present been formally demanded and which (as regards anyhow part of the sum in question) has only been estimated and which is in any event a sum which has merely been mentioned in a without prejudice letter written to seek a compromise of a dispute, being a compromise which could lead to a retrospective grant of permission for the alteration. He argued that this without prejudice letter was not a demand for any accommodation charge still less was it a demand which complied with paragraph 4 of schedule 11. Accordingly no accommodation charge was payable. The significance of no accommodation charge being payable he developed in the following submissions.

13. Mr Heather contended that when a question arises as to whether an LVT has jurisdiction to consider questions under paragraph 5 regarding administration charges, the first and crucial question is whether there exists an accommodation charge at all. He referred to the word "payable" in paragraph 1 which states that an "administration charge" means an amount "payable" by a tenant. He argued that the word payable here means due and that unless some money is due there is no accommodation charge and thus nothing to found the jurisdiction of the LVT. A consequence of this would appear to be that the LVT would not have jurisdiction to rule that nothing was payable by way of an administration charge, but Mr Heather did not consider that this was a point weighing against his argument.

14. On the basis of this argument Mr Heather submitted that in the present case there is no accommodation charge at all. All that exists is a without prejudice letter (being properly without prejudice in accordance with *Cutts v. Head [1984] Ch 290*) indicating that the case may be capable of settlement and that there may in the future be some accommodation charge raised against the Tenants. Accordingly there is no jurisdiction in the LVT to make any ruling in relation to an administration charge in the present case.

15. If the foregoing were wrong such that the LVT could have jurisdiction even though nothing is yet payable (in the sense of being due), then Mr Heather argued that the jurisdiction of the LVT in these circumstances is merely a jurisdiction to rule that nothing is payable (ie due). He argued that this follows from the wording of paragraph 5 which contemplates that the LVT can determined "whether an administration charge is payable and, if it is, as to ….". This wording, he argued, indicates that first there must be answered the question of whether an administration charge is payable or not (and payable means due) and it is only if the answer is yes that the matters in paragraph (a) to (e) can be considered.

16. On the basis of the foregoing argument Mr Heather contended that in the present case there was no open demand for payment of anything which could be described as an administration charge, still less was there any formal demand complying with paragraph 4 of Schedule 11, such that no accommodation charge is payable. In the result therefore the entirety of the LVT's jurisdiction is to rule that no administration charge is payable and to decline to do anything further in the case.

17. Mr Heather drew attention to the amendments made to the Landlord and Tenant Act 1985 regarding service charges by the 2002 Act and, in particular, to the introduction of section 27A. This section, so far as concerns subsection (1), is in effectively identical terms to paragraph 5(1) of Schedule 11 of the 2002 Act in relation to administration charges. However, section 27A(3) is a further specific provision dealing with the service charges enabling an application to be made to an LVT for a determination of whether, if costs were incurred for services etc of any specified description, a service charge would be payable for the cost and, if it would, as to the matters in subparagraphs (a) to (e). He argued that there was a marked omission from paragraph 5 of Schedule 11 of any equivalent provision in relation to administration charges, such that the LVT had the ability to make determinations in relation to prospective service charges which had not yet been incurred, but could not do so in relation to prospective administration charges which had not yet been incurred. He argued that this paragraph made clear that the LVT in the present case could not examine the prospective future costs which had not yet been incurred but which might in due course be made the subject of an

administration charge to the Tenants. He argued that the points which I have recorded in the previous paragraphs mean that the LVT had no jurisdiction to consider the question of whether anything (and if so how much) was payable by way of administration charge in respect of costs already incurred by the Landlords.

18. Mr Heather argued that there should no anxiety regarding any lack of protection for the Tenants if they were unable to refer the matter at this stage to the LVT. This was because the Tenants would be protected through any forfeiture proceedings. A section 146 notice would be required and, when considering terms of relief from forfeiture, the court would consider what terms should be imposed regarding the payment of costs and the court could scrutinise the costs for reasonableness. As regards the prospect of any future forfeiture proceedings Mr Heather reserved the Landlords position generally, but recognise that there might in such proceeding be arguments regarding (a) whether there had been any breach and (b) if so, whether the breach had been waived so as to prevent any forfeiture based upon that breach, and (c) the question of relief from forfeiture.

19. Mr Heather submitted that the LVT was wrong to view the Tenants' application to the LVT as a conditional acceptance of some offer contained in the without prejudice letter. He also pointed out that if the Tenants had actually formally accepted everything within the without prejudice letter, then the LVT could have had no jurisdiction because the Tenants would have agreed the amount of the administration charge and jurisdiction would be removed by paragraph 5(4)(a) of Schedule 11.

20. I asked Mr Heather whether the LVT would have had jurisdiction if, after the open demand from the Landlords' solicitors for payment of the fee note of £1,584.63, as contained in the Tenants' solicitors letter of 13 July 2004, the Tenants had referred this matter to the LVT. This letter clearly asserts that the Tenants are liable for the claimed costs under the terms of the lease (this must be a reference to clause 2(4) to which earlier correspondence had drawn attention) and demands immediate payment and states that failure to pay the costs will constitute a further breach of the terms of the lease. Mr Heather accepted that there would have been jurisdiction to consider a Tenants' application in relation to this demand, but the case would have come unstuck at the first hurdle (as he put it) because the only conclusion that the LVT could have come to was that nothing was payable by way of an administration charge because no formal demand complying with paragraph 4 of the Schedule had been made. Accordingly the Tribunal could not go on to consider the reasonableness of the amount claimed but would have to content itself with ruling that no administration charge was yet payable.

21. I also asked Mr Heather what would be the position if, on an application to the LVT under paragraph 5, the answer to whether an administration charge was payable and, if so, its amount depended upon the proper construction of the lease and, in particular, whether there had in fact been a breach of covenant. Mr Heather recognised that under section 168(4) the LVT can decide, on a Landlords' application, whether there has been a breach of covenant. However, he submitted that there was no jurisdiction in the LVT to make any such ruling where an administration charge had been referred to the LVT by the Tenants, such that the LVT would have to defer considering the point until a separate application for a declaration had been made to the County Court.

22. On the question of how essential, so far as concerns jurisdiction, the service of a prior demand complying with paragraph 4 was, I asked Mr Heather what the situation would be in the following hypothetical circumstances. Supposing that an application had been made to an LVT for determination of whether an administration charge was payable and as to the reasonableness of the amount claimed and supposing that, after hearing evidence from both sides, the LVT's attention was drawn in closing submissions to the fact that the landlord's demand to the tenant for payment of the administration charge had failed to comply with paragraph 4 (this being a point that no one has previously taken). I asked whether he contended that this would deprive the LVT of jurisdiction to do anything more than merely rule that, there being no paragraph 4 demand, nothing was payable, such that no pronouncement on the reasonableness of the proposed charge could be made. Mr Heather contended that unless both parties agreed otherwise this would indeed be the result. He pointed out that the difficulty could be overcome by the landlord then and there serving a paragraph 4 compliant demand, but this did not deal with the position where the landlord perceived it in his interest not to continue with the present reference and considered it advantageous to contend that the present LVT should take the matter no further. He argued that it would not be open to the tenant to waive the requirement of a formal paragraph 4 compliant demand.

The Tenants' submissions

23. Mr King submitted that the word "payable" in paragraph 1 of Schedule 11 did not mean "due". The word payable is not a term of art. He referred to *Words and Phrases Legally Defined.*

24. He submitted that there clearly is jurisdiction under paragraph 5 for an LVT to find that nothing is payable by way of administration charge. He therefore submitted that an argument that the LVT only had jurisdiction if there was something payable by way of administration charge must be wrong.

25. He also drew attention to the difficulties which could arise if too narrow an interpretation is put on the ambit of paragraph 5 in the following circumstances. Suppose, he suggested that a landlord seeks recovery by way an administration charge of an amount which it is the tenant's contention is totally unreasonable such that £0 should be payable in respect of the claimed charge. If the LVT can only go on to consider the matters in paragraph (a) to (e) of paragraph 5 if <u>something</u> is payable this would pose a problem as to how, having gone on to consider the amount which is payable, the LVT could ultimately rule that nothing was payable.

26. Mr King drew attention to the fact that under paragraph 5 one of the matters which the LVT can determine is "the date at or by which it is payable", which suggests that the LVT may be dealing with sums which are actually to be paid at some future date. He went on to submit that in fact the jurisdiction under paragraph 5 of Schedule 11 of the 2002 Act in relation to administration charges is wider than in relation to service charges under section 27A of the 1985 Act even allowing for subsection 27A(3). He argued that section 27A(3) may be restrictive of the extent to which an LVT can look to a potential future charge, whereas there is nothing restrictive in paragraph 5.

27. Mr King submitted that if the foregoing argument were right, then the LVT had jurisdiction to consider not merely the monies claimed by way of administration charge which had already been incurred as at the date of the application to the LVT, but could also consider the reasonableness of the proposed future charges. If his foregoing argument were wrong, then he contended that the LVT could, at least, consider the reasonableness of any administration charge payable in respect of costs already incurred prior to the application to the LVT.

28. He argued that if necessary the LVT can decide whether or not there has been a breach of covenant, if such a finding is needed for the purpose of deciding on whether an administration charge is payable or as to the reasonableness of the charge. He pointed to the terms of section 168(4) and also he referred to the wording in paragraph 1(1)(d) of Schedule 11 namely the reference to "alleged breach", which he argued meant that the justification of the allegation might have to be decided by the LVT.

29. Mr King argued that no demand, whether a formal demand complying with paragraph 4 or any other demand, was necessary to found the jurisdiction of the LVT. Taking an extreme case, he argued that an eccentric tenant who feared that some administration charge might be claimed against him (even though the landlord had not made any such suggestion) could apply to the LVT under paragraph 5. The LVT would have jurisdiction to consider the application and, doubtless, to rule that no administration charge was payable. Such an application might well have adverse consequences in costs and be dealt with as being frivolous or vexatious or an abuse of process, see Schedule 12 paragraphs 7 and 10. However on the question of whether the LVT would have jurisdiction to deal with such a pointless application, the answer he submitted was that it would indeed have jurisdiction.

30. Mr King submitted that, *a fortiori*, the LVT must have jurisdiction where a landlord is indicating that substantial sums are already due under a provision in the lease in the form of clause 2(4).

31. As regards the significance of any absence of a formal demand under paragraph 4 of Schedule 11, Mr King submitted that if sums by way of administration charge are otherwise payable, paragraph 4 does not make them not payable for the purposes of schedule 11, but merely entitles the tenant to withhold payment. Accordingly the absence of a formal demand does not limit the LVT into ruling that nothing is payable and declining to go on to consider the reasonableness of the proposed charges. In the alternative he argued that the requirement for a formal demand had been waived in the present case. The Tenants accept that something is payable to the Landlords but they want to know how much.

32. Mr King questioned whether the letter of 10 March 2005 was properly a without prejudice letter rather than merely a recitation of the Landlords' position.

33. Mr King submitted that the LVT is an expert tribunal and that this is just the sort of case which the legislation was introduced to solve, where there is a dispute between landlord and tenant which is being prevented from resolution by a demand from the landlord that certain

sums of money are payable under a provision such as clause 2(4) in the present lease where the tenant contends these sums are unreasonable and the landlord contends they are reasonable.

Conclusions

34. I accept that the letter of 10 March 2005 was properly labelled without prejudice and was written in an attempt to resolve the matter and to lead to the grant of retrospective consent. The fact that the terms of the letter proposed little if any movement by the Landlords away from their stated position did not prevent the letter from being without prejudice – and the letter included the prospect of the grant by them of a retrospective consent which is something the Tenants would have been unable to demand as of right.

35. However in my view the status of this letter of 10 March 2005 is not determinative of the question of whether or not the LVT has jurisdiction to entertain the present application. The position is as follows:

(a) Either there already existed, prior to the letter of 10 March 2005, circumstances in which the Tenants were able to refer to the LVT the question of whether an administration charge was payable and, if so, how much was payable under the lease in respect of costs so far incurred by the Landlords in relation to the breach or alleged breach of covenant – in which case the letter of 10 March 2005 did not give rise to the LVT's jurisdiction because it already existed; or

(b) the position prior to the letter of 10 March 2005 was that the LVT did not have jurisdiction on the facts which had occurred to entertain any application from the Tenants to determine whether an administration charge was payable and, if so, how much was payable in respect of costs so far incurred – in which case the writing of a without prejudice letter seeking to settle the then existing dispute did not give rise to a jurisdiction in the LVT which did not previously exist.

36. Turning to Schedule 11 of the 2002 Act, I am unable to accept Mr Heather's argument that the word "payable" in paragraph 1 means "due" such that unless an administration charge is due there exists no administration charge at all which the LVT has any jurisdiction to deal with. I reach this view for the following reasons:

(1) The administration charge is stated to be an amount payable by a tenant "as part of or in addition to the rent". It is not a misuse of the English language to say that rent is payable under a lease even though, at the date of so stating, no rent is due because the last instalment has been paid and the next instalment has not yet fallen due. Similarly the Tenants' lease is one under which an administration charge is payable (ie payable if certain events occur) even though nothing may yet be due for payment.

(2) It may be noted that paragraph 3 of the Schedule enables a party to a lease to apply to an LVT for an order varying the lease on the grounds that any administration charge specified is unreasonable or the formula specified is unreasonable. This contemplates the ability to make such an application in

advance of some dispute arising and in advance of there therefore being some administration charge which is actually payable in the sense of being due.

(3) Also it cannot be right that there is no jurisdiction at all under paragraph 11 unless some administration charge is actually payable in the sense of being due, because paragraph 5 expressly recognises that one answer the LVT may give when determining whether an administration charge is payable is that the answer is no and that nothing is payable.

37. The position prior to the without prejudice letter of 10 March 2005 was that, in open correspondence:

(1) the Landlords had alleged a breach of covenant by the Tenants;

(2) the Landlords had stated that they had incurred substantial sums as costs in relation to this breach;

(3) the Landlords had asserted that the Tenants were liable to pay these costs under clause 2(4) of the lease;

(4) the Landlords had already sent a bill of costs in the sum of £1,584.63 to the Tenants and had demanded payment of this sum and had notified the Tenants that they would be in breach of the terms of their lease if they did not pay it;

(5) the Landlords' solicitors had stated that all their fees must be paid and that these fees would be charged at £300 per hour plus VAT; and

(6) the Landlords through their solicitors had made clear that the costs were escalating and that they had, by March 2005, become substantially greater than the previously demanded amount of £1,584.63.

38. In these circumstances it would at first sight appear to be an appropriate case for the LVT to consider whether or not an administration charge was payable and, if so, what was the amount payable having regard to the restriction on recoverability in paragraph 2 of Schedule 11 based on reasonableness.

39. It is however necessary to consider Mr Heather's argument that the lack of a formal demand complying with paragraph 4 means that nothing was actually due by way of administration charge from the Tenants such that the entire extent of the LVT's jurisdiction would be merely to rule that nothing is payable and to do no more.

40. I cannot accept Mr Heather's argument on this point for the following reasons:

(1) Schedule 11 does not say that, unless and until a demand complying with paragraph 4 is served, nothing by way of administration charge is payable for the purposes of Schedule 11 or that no application can be made under paragraph 5. Schedule 11 could easily have said this if this was intended. Instead paragraph 4 gives the tenant a right, namely to withhold payment of an

administration charge. This to my mind suggests that an administration charge is still payable for the purposes of Schedule 11 (such that consideration can be given to its reasonableness) even though no money is actually due and owing from the tenant. If the intention of paragraph 4 was that the lack of a formal demand complying with paragraph 4 meant that the sum in question was not "payable" by the tenant, then there will be no need to give the tenant the express right to withhold payment.

(2) Paragraph 5(1)(d) contemplates that one of the matters which the LVT can rule upon is the date at or by which an administration charge is payable. The language indicates that this may be a future rather than a past date – and if it is a future date then the sum in question is "payable" even though it is not yet due.

(3) Interpreting the opening words of paragraph 5(1) as limiting the LVT to deciding whether an administration charge was payable in the sense of being due, and (if nothing was due) preventing the LVT from going on to consider the matters in paragraph (a) to (e) would indeed give rise to the problem identified by Mr King. The problem is this, namely if a demand had been made for something which was ostensibly payable as an administration charge but which, on examination, was totally unreasonable such that £0 should be paid, then there is a problem if there is only jurisdiction to consider "the amount which is payable" under paragraph (c) if the LVT concludes that an administration charge is payable in the sense of something being due, because the finding that £0 was the amount of the charge which was due would automatically destroy the jurisdiction to make that finding.

(4) Even if the foregoing is wrong such that there is no jurisdiction to decide on the reasonableness of an accommodation charge unless something is payable in the sense of being due (rather than prospectively payable), then in the present case the only reason as at the date of the application to the LVT that nothing was due by way of administration charge was the absence of a formal demand complying with paragraph 4. However this is a provision inserted for the sole protection of the Tenants which Mr King states (and I accept) the Tenants have waived by deciding to refer the matter to the LVT, see paragraph 26 of the LVT's decision and also the closing part of paragraph 22.

41. If Mr Heather's argument were correct that it is a pre-requisite that there is first made a formal demand for an administration charge (being a demand complying with paragraph 4) before an LVT has any jurisdiction to consider whether an administration charge is payable (and if so how much), then substantial difficulties would arise which cannot have been the intention of Parliament. There is the example already discussed above of it being noted towards the end of a hearing before the LVT that, contrary to what has previously been thought or noticed, there was no proper paragraph 4 demand. It would be strange if this deprived the LVT of jurisdiction to deal with the point it was otherwise about to rule upon, namely whether the amount of the proposed administration charge was reasonable. Also the following circumstances could occur, namely a landlord made clear to a tenant that a large sum of money was payable by way of an administration charge, but the landlord was not prepared yet to demand this sum despite the fact that the tenant wanted the matter resolved. It would be strange if a tenant was unable to obtain resolution of whether the large sum (which the landlord

might have indicated to the tenant) was a reasonable charge and had instead to sit back with the prospect of this charge hanging over his head until such date as the landlord should choose to serve a formal demand complying with paragraph 4. The provisions of Schedule 11 regarding administration charges were inserted at least as much (if not more) for the benefit of tenants as for landlords. It can scarcely have been intended that a landlord has the power, by his own unilateral action (i.e. the service or non-service of a formal paragraph 4 compliant demand), to decide whether and when a tenant has the ability to utilise the provisions of Schedule 11 by seeking a decision as to the amount of any administration charge which is payable (including in particular the question of the extent to which the charge is reasonable).

42. I see no difficulty in an LVT deciding whether or not there has been a breach of covenant if it is necessary to do this for the purpose of deciding whether an administration charge is payable and, if so, what is the reasonable amount payable having regard to paragraph 2 of Schedule 11. Section 168(4) of the Act makes clear that this is a matter which Parliament is happy to leave to an LVT (in the case of section 168(4) on an application by the landlord in relation to a proposed section 146 notice). This cannot be taken as some exhaustive declaration of the LVT's jurisdiction to consider the question of whether or not there has been a breach of covenant, such that there is no jurisdiction to make such a finding on application by a tenant in relation to an administration charge. I reject the suggestion that if the question arises as to whether or not there has been a breach of covenant this matter has to be referred to the County Court. To do so would be contrary to the intention in the 2002 Act to extend the jurisdiction of the LVT.

43. I am conscious of the fact that the question of what is reasonably payable to the Landlords by way of an administration charge is being raised part way through an ongoing dispute. I do not accept Mr King's submission that under paragraph 5 there is an equivalent (or even greater) jurisdiction to consider possible future administration charges as compared with the jurisdiction under section 27A(3) of the Landlord and Tenant Act 1985 to consider possible future service charges. Accordingly, the LVT does not in my view have jurisdiction on the present application to consider for the future how much administration charge will eventually be payable. But the LVT can reach a conclusion regarding the extent of any administration charge payable so far (which I consider to mean up to the date of the application to the LVT). Theoretical difficulties which might arise in a hypothetical case if there were an excessive number of partial applications regarding administration charges being made every few months throughout an on going dispute could (as counsel accepted) be dealt with by case management procedures by the LVT and/or by a costs sanction. The fact that there is a dispute between the Landlords and the Tenants which has not yet been concluded does not in my judgment deprive the LVT of jurisdiction to consider the questions in paragraph 5 of Schedule 11 regarding the extent to which such administration charge as the Landlords propose to charge the Tenants in respect of costs incurred up to the date of the application to the LVT is reasonable. It did not need the without prejudice letter of 10 March 2005 to crystallise the amount of what the Landlords were claiming. The Landlords had already made a specific and clear demand for a payment on account (in July 2004) and had made clear their position which was that a large sum by way of costs (which was continuing at £300 per hour plus VAT so far as concern solicitors' fees) was payable by the Tenants under the terms of clause 2(4) of their lease. I conclude the LVT has jurisdiction on the Tenants' application to consider what had so far become payable as an administration charge even without the Landlords having made a further formal and open demand for any specific sum.

44. It is clear that it is greatly in the interest of the parties that this matter be resolved, if it can be, on agreed basis with the minimum further expenditure of costs. It seems however that such a resolution may be impossible without a decision from the LVT as to whether the Landlords or the Tenants are correct in their assertions regarding the reasonableness of the Landlords' claimed costs.

45. In the result therefore I dismiss the Landlords' appeal.

Costs

46. At the end of the hearing each party made an application for costs against the other party in the sum of £500 (the maximum possible sum), but neither counsel developed any argument by way of submission that the other party had acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the appeal. I am satisfied that neither party has so acted. Accordingly I make no order for costs.

Dated 4 May 2006

His Honour Judge Huskinson