UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – interpretation of lease – legal costs and expenses properly part of charge – section 20C – LVT's exercise of discretion to disallow part of costs – reliance on 'repeated over-budgeting' - challenge succeeds

IN THE MATTER OF AN APPEAL AGAINST THE DECISION OF THE LONDON LEASEHOLD VALUATION TRIBUNAL

PLANTATION WHARF MANAGEMENT COMPANY LTD Appellant

and

MR DENNIS ARTHUR JACKSON
MS PAULINE IRVING Respondents

Re: Flats 16 & 18,
Calico House,
Plantation Wharf,
London
SW11 3TN

Before: His Honour Judge Mole QC

Sitting at 43-45 Bedford Square, London WC1B 3AS
on 5 December 2011

Appellant represented by *Mr Alexander Bastin* Counsel, instructed by Ms Northober of Davenport Lyons, Solicitors.
The Respondents did not appear.

The following cases are referred to in this decision:
Sella House v Mears (1989) 1 EGLR
Tenants of Langford Court v Doren Ltd (2001) 5th of March, unreported
Sella House Ltd v Mears [1989] 1EGLR 65
Iperion Investments Corporation v Broadwalk House Residents Ltd [1995] 2 EGLR 47
Holding & Management Ltd v Property Holding & Investment Trust PLC[1989] 1 WLR 1313
Tenants of Langford Court v Doren Ltd, (2001)

DECISION

1. The appellant, Plantation Wharf Management Ltd, is a limited company owned and run for the benefit of the lessees of an estate known as Plantation Wharf next to the River Thames in Battersea. The estate is large. It covers four and a half acres of mixed residential and commercial uses in 13 large blocks. Calico House has 14 commercial units on the ground, first and second floors and 12 flats on the third and fourth floors. Mr Jackson occupies flat 16 and Ms Irving flat 18.

2. Mr Jackson and Ms Irving withheld their service charge payments for the years 2007 and 2008. The appellant brought County Court proceedings against them to which Mr Jackson and Ms Irving responded by arguing that the charges were unreasonable. These proceedings were transferred to the LVT. The dispute was heard by the LVT over four days in February and October 2010. In a decision dated 20 January 2011 the LVT held that, save for some modest amendments, it was not persuaded that the balances claimed were anything other than reasonable and recoverable. However, the LVT then went on to rule that, firstly the terms of the leases did not entitle the appellant to recover its legal costs by way of service charge and secondly, if it were able to recover any costs, the LVT would exercise its discretion under section 20C to order a reduction of one third in the amount of costs that could be reclaimed as service charge. The Appellant appeals against the LVT's decisions on costs.

The LVT Decision

3. The LVT expressed its conclusions as follows.

> 61. It follows from the foregoing that save for some modest amendments as referred to, the Tribunal has not been persuaded by the Respondents that the balances now, (as reduced), claimed against them, are anything other than reasonable and recoverable. The Tribunal does have an unease about the excessive budgeting in this case, and it is to this it will now turn, in the context of the question of costs.
>
> *Section 20 costs*
>
> 62. The respondents invited the Tribunal to make a direction under section 20C of the Act to the effect that the costs incurred in these proceedings should not be recoverable as a further charge. The Applicants have prepared detailed submissions in this regard, in writing, which the Tribunal has carefully considered. The thrust of the Respondents' application was effectively that it was not until they started to withhold service charge payments, that explanations for the charges made of them began to trickle through, but even then the explanations were partial and, so far as they were concerned, not always intelligible. Some of the explanations only ultimately arrived in the context of these proceedings. Their case is really that even if, as has been the case, the Tribunal upholds all or a large part of the applicant's claim, these proceedings could have been avoided by a better explanation of how the charges were being calculated. Moreover, repeated and excessive budgeting has led to unnecessary complications in trying to unravel complex accounts and accounting documents with which they have been presented.

63. The Applicant says that it is entitled to its costs under a direct recovery covenant in the lease (clause 4.15.3). If so, that is a matter for argument and enforcement before the County Court. The question of whether or not a section 20C order should be made is relevant in relation to service charges and the question of whether or not such costs can be recovered as part of the service charge.

64. Before questions of discretion under section 20C arise at all, the Applicant has to satisfy the Tribunal that in principle, the legal costs incurred in these proceedings before the Tribunal are recoverable as a service charge under the terms of the lease. The well-established guidelines in deciding whether or not there is any such provision, are as set out by Lord Justice Taylor in *Sella House v Mears* (1989) 1 EGLR. In considering an analogous scenario he said that:

> "Nowhere in clause 5(4)(j) is there any specific mention of lawyers, proceedings or legal costs. The scope of (j)(i) is concerned with management. In (j)(ii) it is maintenance safety and administration. On the Respondent's argument, a tenant, paying his rent and service charges regularly, will be liable via the service charge, to subsidise the landlord's legal costs of suing his co-tenants. 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."

65. In short the provision has to be *clear and unambiguous* in making provision for recovery of such costs as part of the service charge.

66. At paragraph 2.2 of the Applicant's written submissions in relation to section 20, eight separate provisions in the lease are referred to as giving an entitlement to recover such legal costs as part of the service charge. The Tribunal's view is that none of these provisions satisfy the criteria contained within the guideline of Lord Justice Taylor. Clause 1.1.19 talks of management service and "the cost of professional advisers". The other provisions also in the main talk about management services and tangentially refer to professional advisers in the context of those management services and otherwise make no such reference. There is no express reference to the recovery of legal costs, or the costs of legal advisers being a recoverable head of expenditure as part of the service charge. These provisions in the view of the Tribunal stop short of the clear and unambiguous provision required on the authority referred to. The Tribunal therefore finds that this lease does not entitle the Applicant to recover its legal costs as a service charge against the Respondents at all.

67. Even if the Tribunal had found otherwise, it would have been sympathetic to the application by the Respondents that a direction under section 20C should in some form be given. The reason it would so have ordered, will be self-evident from the findings contained within this decision. Although it is correct that the substantial charges have not been significantly reduced, the Tribunal is troubled by the repeated over-budgeting which has occurred in this case and which has resulted in large sums having to be found by leaseholders, which ultimately are not put to the expenditure for which they were initially demanded - but simply disappear on other items of expenditure, which are not well explained. It is correct that the figures appear ultimately in certified accounts, often delivered long after the end of the accounting year, but these accounts themselves are arranged in a complex fashion and are, if not impenetrable, very difficult for a lay leaseholder to understand without some kind of proper explanation.

68. Once again, it is said on behalf all the Applicant that there is no obligation on the Applicant in this regard. Of course that is right, in the sense that there is no such express provision in the lease. However, it seems to the Tribunal a matter which goes to good management, and which the Tribunal is entitled to take into account in the exercise of its discretion on the question of recoverable costs if, as a result of a failure in that regard, or at least partially as a result of a failure in that regard, costly proceedings ensue. The Tribunal is very mindful of the guidance given in the Lands Tribunal in the case of *Tenants of Langford Court v Doren Ltd* (2001) 5th of March, unreported, in which it was said that that those entrusted with a discretion under section 20C should be cautious to ensure that it is not itself turned into an instrument of oppression.

69. The Tribunal has been informed that legal costs approaching £100,000 have been incurred in the pursuit of these proceedings, which on any view is a colossal sum. Of course it is correct as pointed out by the Applicant that the quantum of the costs would in any event be subject to review under sections 19 and a section 27A of the Act. The issue however in this context is whether or not in principle, all of the cost however much that might be, should be recovered, or whether some form of section 20C order should be made.

70. The Tribunal is satisfied that this is an appropriate case for an order under section 20C, and that such an order would not be oppressive. The repeated over-budgeting, sometimes by very substantial sums, the failure properly to communicate with leaseholders, and the failure in some cases properly to demonstrate precisely how excess monies have been allocated to other works, all support the contention that there should be some limitation on the legal costs recoverable by the Applicants as service charge. The Tribunal considers that a reduction of one third would have properly reflected the justice of this case, having taken into account the matters referred to above. The principle finding of the Tribunal however is, that there is no entitlement to these costs as a service charge provided for in these leases at all."

The Leases

4. The LVT had before it the lease of flat number 18, dated 28th of May 1993. The terms of the leases of flats 16 and 18 were agreed to be identical.

5. In clause 2.3 the lessee undertakes to pay the rent to the lessor and, to pay the management company, the "...Service Charge in the manner provided by the Third Schedule hereto and subject to the provisions contained in Part I of the Second Schedule hereto...". Clause 1.1.27 defines "the Service Charge" as "the percentage of the Building Cost specified in paragraph 8 of the Particulars (1.708%) and the percentage of the Car Park Cost specified in Paragraph 10 of the Particulars (0.333%). (Percentages added.) "Building Cost" and "Car Park Cost" are defined as meaning "... the costs and expenses incurred by the Company in carrying out the works and providing the services specified in..." parts III and IV, respectively, of the Second Schedule.

6. Part I of the Second Schedule deals with "General Service Charge Provisions". Paragraph (5) of Part I reads as follows:

> "the fees charges salaries and expenses of the managing agents and all other contractors agents consultants professional advisers and others performing and carrying out the matters specified in each Category of Services shall be added to and form part of the aggregate expenditure on such Category of Services...".

Paragraph (1) of Part I declares that:

> "In this Schedule reference to "Categories of Services" means the Building Cost and/or... the Car Park Cost as the case may be and "Category of Service" shall be construed accordingly".

Part III defines "The Building Cost", including in paragraph (7) –

> " The enforcement whenever and as often as the Lessor or the Company shall think fit of any covenants or conditions contained in the lease under lease licence or agreement relating to any Unit or Units within the Building and any part thereof where in the opinion of the Lessor and/or the Company such enforcement will be in the interest of good estate management".

In Part IV, "The Car Park Cost" contains exactly the same provision in paragraph (8).

Submissions

7. Mr Bastin submitted that the LVT was wrong to come to the conclusion it did and that the leases ought to be construed as allowing recovery of legal costs through the service charge. After an examination of the provisions of the leases he submitted that the leases permit the appellant to recover the fees of professional advisers enforcing covenants, the appellant's legal costs are fees paid by the appellant to professional advisers for the purpose of enforcing covenants, while solicitors and counsel are the professional advisers almost inevitably engaged when covenants need to be enforced.

8. As for the exercise of discretion under section 20C, the LVT only had jurisdiction to consider the three years, 2006/7, 2007/8 and 2008/9. Mr Bastin pointed out that there was an error in his skeleton at paragraph 14.1, which repeated an earlier error in the application to the LVT for leave to appeal. I deal with this error below, but broadly for 2006/7 it was mistakenly said that there had been an over-budgeting in the sense that the LVT had used that phrase. In fact there had not. For the first two years there had been no over budgeting. In the third year there had been, but it was explicable. It was partly due to managing to find a cheaper solution for repairs to the archway beneath Calico House and partly due to receiving a very competitive quote for external redecoration, although two of the three quotes received demonstrate that the figure that was budgeted for was entirely reasonable. Those facts were not disputed by the respondents or subject to any adverse finding by the LVT. The 30% "over-budget" resulted from prudent management, which saved the lessees considerable expense.

9. With regard to the alleged "failure properly to communicate with leaseholders" the submission was that Mr John had taken a great deal of time and effort in corresponding with and meeting the respondents in an attempt to answer their queries. I was taken through the evidence

in some detail. The LVT appears to have accepted Mr John's evidence on this point. Furthermore it should not be forgotten that the respondents failed on all but one of their 63 or more allegations. The LVT failed to take into account that no amount of explanation would satisfy the respondents and that the appellant's obligation could only be to do what was reasonable to explain the accounts. Insofar as Mr John was criticised for not being able to explain precisely where diverted sums had gone it was not fair or realistic to expect him to be able to explain that with little notice. It was also submitted that the LVT had failed to take into account the likely effect of the order on the appellant, which is a limited company owned by the lessees. It was submitted that the LVT had, apparently, taken into account the figure of £100,000 costs, about which there was no evidence. The LVT was wrong to do so. Finally it was submitted that the discretion given by section 20C should not be used except where a landlord has abused his rights or used them oppressively, neither of which applied in this case.

Law

10. The Landlord and Tenant Act 1985, section 20C provides that:-

> "(1) 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 court, residential property tribunal or leasehold valuation tribunal, or the Upper Tribunal, or in connection with arbitration proceedings, 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.
>
> (2).....
>
> (3) the court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances."

11. The LVT make reference to the case of *Sella House Ltd v Mears* [1989] 1EGLR 65. In that case Dillon LJ had to consider whether or not the legal expenses said to have been incurred in recovering rent and service charge from other tenants were recoverable under the terms of the lease. There were two clauses that were said to justify such charges under clause 5 (4) (j) -

> "(i) to employ at the Lessor's discretion a firm of Managing Agents and Chartered Accountants to manage the Building and discharge all proper fees salaries charges and expenses payable to such agents or such other person who may be managing the Building including the cost of computing and collecting the rents and service charges in respect of the Building or any parts thereof
>
> (ii) to employ all such surveyors builders architects engineers tradesmen accountants or other professional persons as may be necessary or desirable for the proper maintenance and safety and Administration of the Building."

12. Dillon LJ examined the provisions of the lease and concluded:

> "I have had certain hesitation on this point, in the light of the argument in relation to the position where solicitors are instructed by the managing agents. It does not appear from the evidence whether that was actually the case. On the whole, however, I have come to the conclusion that the judge was right in his view that the fees of solicitors and counsel are outside the contemplation of either limb of clause 5(4) (j) of the lease."

13. Taylor LJ said:

> "I add only a few words on the issue whether legal fees can be included in the service charge under this lease. Nowhere in clause 5(4) (j) is there any specific mention of lawyers, proceedings or legal costs. The scope of (j) (i) is concerned with management. In (j) (ii) it is with maintenance, safety and Administration. On the respondent's argument a tenant, paying his rent and service charge regularly, would be liable via the service charge to subsidise the landlord's legal costs of suing his co-tenants, if they were all defaulters. 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."

Taylor LJ agreed with Dillon LJ that the terms of the lease did not extend to legal costs.

14. In the case of *Iperion Investments Corporation v Broadwalk House Residents Ltd* [1995] 2 EGLR 47, the Court of Appeal considered the judgment in *Sella*. In *Iperion* the Court of Appeal had to consider the words in recital (1)(K) -

> "all costs... properly incurred by the Landlord in carrying out its obligations... under the covenants and conditions contained in the Head Lease... and in the proper and reasonable management of in and about" (Broadwalk House, the property in question.)

15. Giving the first judgment, Peter Gibson LJ quoted what was said by Dillon LJ and Taylor LJ in *Sella* and continued:

> "I am not able to derive any assistance from that case. The language of the relevant provision is very different from that in the present case. The definition in recital (1) (K) of the landlord's costs, seems to me to be broader. Indeed the judge himself held that some legal costs did come within the cost of management of the property."

Peter Gibson LJ went on to explain why, in his opinion all costs properly incurred in the proper and reasonable management of the property were included, including the cost of both successful and unsuccessful legal proceedings properly brought in managing the property.

16. The court in *Iperion* then turned to consider the exercise of discretion under section 20C. Peter Gibson LJ said that –

> "to my mind, it is unattractive that a tenant who has been substantially successful in litigation against his landlord and who has been told by the court that not merely need he pay no part of the landlord' s costs, but he has had an award of costs in his favour should find himself having to pay any part of the landlord's costs through the service charge. In general, in my judgment, the landlord should not "get through the backdoor what has

been refused by the front". *Holding & Management Ltd v Property Holding & Investment Trust PLC*[1989] 1 WLR 1313 at 1324. *per* Nicholls LJ."

17. The applicant particularly drew my attention to some words of Staughton LJ, who said:

> "We were not asked to make any similar order under section 20C of the Landlord and Tenant Act 1985 in relation to the other tenants and do not do so. Indeed it would be a disaster for the defendant, a company owned by residents of Broadwalk House, if such an order were made; the company would presumably be insolvent unless it could raise further capital."

18. I asked Counsel about the reality of the fear that a management company would become insolvent, rather than simply raise extra funds. As a result of his submissions I was persuaded that the possibility that the deprivation of costs might be a disaster cannot be dismissed out of hand. It does deserve to be given weight in the balance but how much weight will be a matter for the LVT, in the first instance.

19. The appellant drew attention to the words of HHJ Rich QC in *Tenants of Langford Court v Doren Ltd*, (2001) 5th March, Lands Tribunal, unreported but quoted by the LVT at paragraph 68. HHJ Rich said:

> "Section 20C is a power to deprive a landlord of a property right. If the landlord has abused his rights or used them oppressively that is a salutary power which may be used with justice and equity; but those entrusted with the discretion given by Section 20C should be cautious to ensure that it is not itself turned into an instrument of oppression."

20. Mr Bastin submitted that there was no suggestion that the landlord in this case had abused his rights. Neither could the matters the LVT said it had taken into account could be said to amount to an oppressive use of those rights. I agree that this authority is a useful reminder of the care with which the actions which are said to justify the removal of costs need to be examined. There is no question in the present case of the landlord 'getting through the backdoor what has been refused at the front". On the contrary, the charges have been found to be reasonable in amount and reasonably incurred.

Consideration and Conclusions

1. The Construction of the Leases

21. The first task is to consider whether as a matter of construction the leases include the legal costs of enforcing a covenant to pay service charges against a tenant. This is an issue of law.

22. The lessee is obliged to pay the service charge, subject to the provisions of part I of the Second Schedule. The 'service charge' is the specified percentage of the Building Cost and the Car Park Cost. The "Category of Service" means the Building Cost or Car Park Cost. Building

Cost and Car Park Cost are defined (parts III and IV in the Second Schedule) in a way that includes (in paragraphs (7) and (8)) "the enforcement... of any covenants... contained in the lease…relating to any unit within the building...where... such enforcement will be in the interests of good estate management. "The" General Service Charge Provisions" (in part I of the Second Schedule and to which the payment of the service charge is made subject by virtue of clause 2.3) state, in effect, that there shall be added as part of the expenditure on Building Cost or Car Park Cost, "the fees and charges ... and expenses of... all other... professional advisers and others performing and carrying out the matters specified in each Category of Services."

23. Therefore, to put it all together, the lease says that the service charge includes "the fees charges…and expenses...of professional advisers" engaged in "the enforcement...of any covenants... relating to any unit... in the interests of good estate management." Clearly the enforced collection of the covenanted service charges from tenants who are refusing to pay them may be "in the interests of good estate management" because otherwise there will not be enough money to manage the estate properly. A primary, if not the only, proper method of the enforcement of covenants against a tenant is by bringing legal proceedings. It is extremely difficult to contemplate the bringing of legal proceedings, in most circumstances, without also contemplating the employment of lawyers, whether solicitors or counsel and whether advising, drafting, or acting as advocates. Although it is true that the words 'legal costs' or 'the costs of legal advisers' do not appear in the lease, it seems to me to be overwhelmingly clear that such costs are indeed included, on any fair construction. I find the provisions of the lease "clear and unambiguous" (to borrow Taylor LJ's words in *Sella*) that a tenant is liable, via the service charge, to subsidise the landlord's costs of suing defaulter tenants. (Certainly, in my view, those words are clearer than the provision that the Court of Appeal considered sufficient to include legal costs in the case of *Iperion*.)

24. I therefore conclude that the LVT has erred in law on what it described as its principal finding.

2. The Exercise of Discretion under Section 20C

25. The appellant challenges the exercise by the LVT of its discretion under section 20C. The LVT identified 3 factors that it felt supported a limitation of the costs recoverable:

1. ‘The repeated over-budgeting, sometimes by very substantial sums’,
2. ‘The failure properly to communicate with leaseholders’, and
3. ‘The failure in some cases properly to demonstrate precisely how excess monies have been allocated to other works’.

26. The starting point must be that on an appeal by review the Upper Tribunal will only interfere with the decision of the LVT if it has taken into account something that it should not, failed to take into account something that it should, or reached a decision that was not properly open to it on the facts it found. In the absence of some such factor the possibility that the Upper Tribunal might not have exercised its discretion in the same way is not a proper ground for interference. In the present case I have well in mind that the LVT conducted the hearing over a total of four

days and had an unparalleled opportunity to consider all the circumstances that might bear on the exercise of their discretion. It is not my function to re-decide the facts, as I had occasion to remark in the course of the hearing.

27. The main weight of the appellant's attack on the decision fell upon the first point; the finding that there had been repeated over-budgeting. It became clear that care was needed in the references to over-budgeting. The LVT plainly meant "asking for more money by way of service charge than was really needed in the event". But an account is also said to be 'over-budget' when more is actually spent than has been budgeted for; the budget-maker has 'under-budgeted'.

28. As the appellant pointed out and conceded this had created some confusion in its submissions. In the application to the LVT for leave, dated 10th of February 2011, considered by the LVT in refusing permission on 28th February, the appellant concentrated on the LVT's complaint of 'over budgeting'. It submitted that the figures for each of the three years were 2006/7- "10.3% over-budget", 2007/8 -"0.4% over budget" and 2008/9 "30% over budget for Calico house…"(Paragraph 1.1) This was wrong and misleading. In 2006/7 10.3% more had been spent than had been budgeted for. It was 'over budget' in one sense but it was not an example of 'over-budgeting' in the sense used by the LVT; just the opposite.

29. In evidence before the LVT it seems the position was put accurately. In the appellant's Response to the Respondents' Final Submissions the table at paragraph 2.1 makes it plain that for 2006/7 the actual cost was10.3% greater than the budget. So the charge that year was in fact under-budgeted, not over-budgeted.

30. That means that in the first year there had been no 'over-budgeting', as has been explained. In the second year the budget was virtually spot on - the difference was £18 per service charge. Thus the only one of the three years where there had been 'over-budgeting' was the 3rd year. In that year the actual sum for charges was 30% under budget, a difference of £1,616 per demand. That is conceded by the appellant to be a big difference although the Landlord explained that in fact it was due partly to taking advantage of an unexpectedly favourable tender and partly to rethinking the method of dealing with the arches. The end result was very much to the tenants' advantage. This explanation seems to have been accepted by the LVT. The appellant submitted that, in that case, it could hardly be just or equitable to hold it against the appellant as justifying the removal of part of its costs. I think there is considerable force in that submission. In the three years with which the LVT was concerned there was no "repeated over-budgeting" in the annual totals. There was one "over-budgeting" for which there was a reasonable and accepted explanation.

31. Of course, it is clear that the LVT did not confine their examination to the total figures for the annual budget but looked at individual items within the annual budget, which they felt had been over-budgeted. I accept that, to a degree, that is something the LVT must be entitled to do but it seems to me that it must not lose sight of the significance of the overall budget. It is whether the landlord gets the overall annual budget right that is probably of most importance to the tenant, rather than whether the individual items are a little bit up or a little bit down. That is what determines whether his advance payment of service charge is accurate. The tenant does not

want to pay more than he has to, neither does he want to be faced with a further demand later. He knows that budgeting is probably more of an art than a science; it is not reasonable to demand too much mathematical precision from it.

32. Where the budgeting has been done professionally and sensibly, there has been no, or no significant, overall under-budgeting and the charges are both reasonably incurred and reasonable in amount it seems to me that it would be harsh indeed to seek to deprive a landlord of his costs on the basis of variations on specific heads within the overall budget.

33. There was also some evidence of "over-budgeting" in other years. (See paragraph 2.1 in the Response, mentioned above.) However the LVT expressly (and very sensibly) declined to consider other years. It is not at all clear that the LVT took any notice of that over-budgeting and it would not, in my view, have been right to do so. It would be almost impossible to get a fair view of the significance or otherwise of supposed over-budgeting without considering the charges for that year in some detail. The evidence might show that it was completely insignificant or completely and reasonably explained.

34. Of course over-budgeting in the sense that the LVT meant it may be relevant to the exercise of a decision under section 20C. I can well understand that if the LVT is convinced that it is taking place as a matter of policy in order to inflate fees or for some other improper reason it would be justified in showing its disapproval by not allowing a landlord all its costs. But budgeting is notoriously neither easy nor precise and the LVT should be very clear that consistent over-budgeting has taken place and that it is not explicable in a way that means that it is excusable before putting any significant weight on it.

35. In the present case I find it very hard to see how the LVT can properly have concluded, without taking into consideration immaterial matters, that there was serious "over-budgeting" on the basis of only three years, of which the first one was 10% more than the budget, one was virtually on target, and one was admittedly 30% less than the budget, but for an exceptional reason which, as I understand it, was accepted to be true. I am left with a real concern that the LVT may have taken into account matters that it ought not to have done, or failed to take into account matters it should, so far as this first issue is concerned. It does not seem to me that it was open on the evidence before it to reach the conclusion that there was the sort of 'repeated over-budgeting' by 'substantial' sums that would justify depriving the appellant of part of its costs.

36. I heard argument on the other two points. Interesting and forceful though those arguments were, it seemed to me that they came close to inviting me to decide the facts again. Whether or not I would have reached the same view as the LVT on the facts is immaterial, I did not identify any factor that persuaded me the LVT's decision was not within its powers. However my decision on the first point means that this appeal must be allowed. It is impossible to say that the LVT must still have come to the same conclusion on the remaining two points, if it had come to a different conclusion on the first point. The LVT will have to weigh the facts and circumstances again. The issue of the exercise of their discretion under section 20C will be remitted back to them.

Dated 15th December 2011

His Honour Judge Mole QC