UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2012] UKUT 247 (LC)
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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – management charges (being part of the service charges) – local authority landlord employing arm's length management company (ALMO) to manage its housing stock – construction of lease – whether landlord entitled to recover as the management change the costs of the ALMO in managing the leasehold properties – whether landlord entitled to recover a uniform management charge per leasehold property

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

BETWEEN **SOUTH TYNESIDE COUNCIL** **Appellant**

and

NICHOLAS ALFRED FRANCIS CIARLO **Respondents**
ALAN HUDSON

Re: 31 Northbourne Road
Jarrow
Tyne and Wear
NE32 5JS

5 Usk Avenue
Jarrow
Tyne and Wear
NE32 4DH

37 River Drive
South Shields
Tyne and Wear
N33 1TL

2 Hedley Close
South Shields
Tyne and Wear
NE33 2EB

Before: His Honour Judge Nicholas Huskinson

Sitting at North Shields County Courts IAC, Earl Grey Way, Royal Quays, North Shields, Tyne & Wear NE29 6AR
on 19 July 2012

Nicola Muir, instructed by Angus Taylor, Solicitor, on behalf of the Appellant
Mr Ciarlo in person
No appearance or representation on behalf of Mr Hudson

The following case is referred to in this decision
City of Westminster v Pottle (10 April 2000) (unreported)

DECISION

Introduction

1. This is an appeal from a decision of the Leasehold Valuation Tribunal for the Northern Rent Assessment Panel ("the LVT") dated 15 February 2011, being a decision made under section 27A of the Landlord and Tenant Act 1985 as amended, whereby the LVT made certain determinations as to the amount of management charges payable by the respondents as part of the service charges paid by them to the appellant as their landlord.

2. The LVT recorded that the case concerned the liability to pay service charges (in fact only that aspect of the service charges which constituted management charges was challenged) in respect of the years 2007/08, 2008/09, 2009/10 and (with the exception of one of the original applicants) 2010/11. However it appears that there have been two separate previous determinations by the LVT in respect of management charges in the case of the first respondent Mr Ciarlo, one being a determination for the year 2008/09 and one being a determination for the year 2009/10, see MAN/00CL/LSC/2009/0044, which is the later decision and which makes reference to the earlier decision. It was accepted by Ms Muir that these decisions having been given and having not been appealed, the first respondent is entitled to retain the benefit of those decisions in respect of the years for which those decisions apply whatever my decision may be on the overall merits of the case. Also I was told that there was no dispute between the appellant and any of the respondents or the other original applicants in respect of 2007/08.

3. The appellant is a local housing authority. The respondents each have purchased a long lease of their respective properties under the right to buy provisions. There is before me a lease dated 21 February 2005 between the appellant and the first respondent in respect of his flat namely 31 Northbourne Road, Jarrow, Tyne and Wear. I shall refer to the provisions of this lease in due course. Ms Muir has assured me that the second respondent's lease (and the leases of the two other applicants who have not participated in the appeal) are in effectively the same terms in so far as concerns service charge provisions.

4. The appellant possesses about 16,000 flats as its housing stock of which, by 2008, 702 had been sold off (by way of the grant of a long lease at a low rent) under the right to buy provisions. Originally the appellant managed the housing stock through its own direct employees in its own housing department. However in 2006 the appellant set up South Tyneside Homes ("STH") as an Arms Length Management Organisation (ALMO) to manage the whole of the appellant's housing stock including the properties which were the subject of long leases. In January 2007 the Audit Commission inspected STH and made various criticisms including a criticism to the effect that the management charge of £25 pa (which apparently was being charged for management to each of the lessees under long leases):

> "…. falls far short of the actual costs of administering services. While these issues are in the process of being reviewed leaseholder services are being heavily subsidised by tenants".

Thus a distinction was being drawn between tenants (i.e. tenants holding under short tenancies no doubt mostly in the nature of secure tenancies) and lessees under long leases. It was being pointed out that the tenants were, through their rents, subsidising the management costs of the lessees under long leases. This subsidy was necessary (if the lessees did not pay their full share of the management costs) because under the Local Government Housing Act 1989 there is a requirement for the appellant to ring fence expenditure on housing such that any shortfall in recovering the proper costs of management from the lessees cannot be made up from any other part of the appellant's budget other than from the remainder of the housing budget – which means in effect obtaining any money to meet any shortfall from the tenants.

5. In consequence of the Audit Commission Report the appellant decided to create a dedicated Leasehold Team to deliver a service to leaseholders and it also decided to increase the annual leasehold management fee. This dedicated team, consisting of a manager and an officer, came into post in April 2008. The Leasehold Team is part of the ALMO, i.e. part of STH. Thus since 1 April 2008 STH has continued to manage the whole of the appellant's housing stock, including the leasehold properties. But there has been within STH this Leasehold Team (consisting of two employees) who have been responsible for the leasehold properties – the other employees of STH deal with the appellant's other residential properties including in particular the large number of secure tenancies.

6. It has been the increase in the management charges charged by the appellant to its lessees, including the respondents, which has given rise to the issues in the present case.

7. The first respondent's lease operated to demise his flat to him for a term of 125 years from 11 November 1996 at a rent of £10 pa payable in advance on 1 April in every year. The lease also contained, so far as presently relevant, the following provisions:

(1) Clause 3 of the lease was in the following terms –

> "3. The Lessee hereby further covenants with the Council that the Lessee will at all times during the Term:-
>
> 3.1 Pay to the Council such annual sum as may be notified to the Lessee by the Council from time to time as representing the due proportion of the reasonably estimated amount required to cover the cost and expenses incurred or to be incurred by the Council in carrying out the obligations or functions contained in or referred to in this Clause and Clauses 5 and 7 hereof and the covenants set out in the Ninth Schedule hereto for each financial year running from the first day of April in each year to the thirty-first day of March in the following year (such cost and expenses being hereinbefore and hereinafter together called "the Management Charges") such estimated

amount to be payable yearly in advance on the day specified for payment of rent hereunder the first payment being a proportionate part for the period from the date hereof to the first day of April next to be made on the execution of these presents and IT IS HEREBY DECLARED that the Management Charges may (without prejudice to the generality of the foregoing) include such amounts as the Council shall from time to time consider necessary to put to reserve to meet the future liability of carrying out major works to the Building and Reserved Property or to the demised premises PROVIDED that

3.1.1 the Council will make an appropriate contribution to the Management Charges in respect of any flat or flats for the time being forming part of the Reserved Property and

3.1.2 in determining the Management Charges statutory provisions for the time being in force relating thereto shall at all times be complied with

3.2. Pay to the Council on demand the amount by which the estimated sum paid by the Lessee to the Council under sub-clause 3.1 of this clause in respect of the Management Charges for each financial year as aforesaid (or in the first year of the Term part of a financial year) is less than the due proportion payable by the Lessee of the total moneys properly and reasonably expended or retained by the Council constituting the Management Charges for such financial year

3.3 If the amount by which the estimated Management Charges paid by the Lessee to the Council under sub-lease 3.1 of this clause is more than the due proportion payable by the Lessee of the total moneys properly and reasonably expended or retained by the Council as above the excess so paid shall be carried forward by the Council to be credited to the account of the Lessee."

(2) By clause 5 the appellant covenanted that it would (at the expense of the lessee as therein provided) perform and observe etc the covenants in the Ninth Schedule. The Ninth Schedule contained covenants in usual form to repair and maintain the building (or which the demised premises formed part) and to insure and to paint and light certain parts of the building. There were covenants in paragraphs 5 and 6 of the Ninth Schedule:

"5. to manage the Building for the purpose of keeping the same in a condition similar to its present state and condition

6. to carry out such other works in respect of the Building or on the Estate as are in the opinion of the Council necessary for its proper maintenance and management."

The Building was defined as the block of flats known as 29 and 31 Northbourne Road (the building contained 2 flats only). So far as concerns the expression "the Estate" the lease defined the Estate as "none". It is in respect of this point that there is a difference between the first respondent's lease and the lease of one of the other original applicants namely Mr D S Shewan of 37 River Drive, South Shields, because his lease (which was of a flat in a larger building) defined the Estate as not being "none" but as being the Estate known as "River Drive Estate".

(3) Clause 7 stated that it was agreed and declared:

> "7.1 That the Council shall at all times during the Term manage the Building in a proper and reasonable manner and the Council shall be entitled:-
>
> 7.1.1 to appoint if the Council so desires managing agents for the purpose of managing the Building and to remunerate them properly for their services
>
> 7.1.2 ….
>
> 7.1.3 to delegate any of its functions under clause 5 and sub-clause 1.1 and 1.2 of this clause and the Ninth Schedule hereof to any firm or company whose business it is to undertake such obligations upon such terms and conditions and for such remuneration as the Council shall think fit."

8. I was told that all of the demands so far for service charges (including management charges) had been, so far as concerns the years with which I am concerned, demands for payments on account in accordance with clause 3.1 of the lease. The appellant has not yet, apparently, prepared any final accounts for any of the relevant years so as to generate an additional balancing demand (clause 3.2) or a credit to be carried forward (clause 3.3).

9. Before the LVT witnesses on behalf of the appellant explained in their written statements (upon which they were questioned at the hearing) the way in which the management charge was calculated. In summary it was calculated not by reference to the actual time estimated to be spent in managing each separate building containing the flat in question nor was it calculated as a percentage of the estimated costs of carrying out all the other services in relation to the building containing the flat in question. Instead the appellant proceeded in the following manner:

(1) The appellant noted that it had delegated all its housing management functions to STH which was an ALMO and a non-profit making organisation. The appellant noted that it paid STH a fee each year for its work in managing the housing stock, which was a fee which embraced not merely the management of the long leasehold properties but also of the (far more numerous) properties that were subject to tenancies.

(2) The appellant noted that STH had a dedicated Leasehold Team whose sole responsibility was to deal with the leasehold properties.

(3) The appellant therefore faced the task of seeking to identify how much of the global fee payable to STH each year was properly attributable to the Leasehold Team's work in managing the leasehold properties.

(4) The appellant and STH devised a way (explained more fully below) in which the costs of the Leasehold Team could be identified from within the global costs of STH.

(5) The appellant and STH then recognised that some of the total costs of the Leasehold Team (which they estimated at 15%) were not general costs of management of the leasehold properties but were instead specific costs incurred in relation to specific items relating to specific properties, e.g. costs in dealing with applications for consent to an assignment or costs incurred pursuing arrears of payment or breaches of covenant. It was recognised that these costs could properly be recovered from the specific lessees responsible for them (as an administration charge under schedule 11 of the Commonhold and Leasehold Reform Act 2002) rather than being dealt with as part of the global costs of management.

(6) It was therefore decided that 85% of the costs of the Leasehold Team should be treated as the global costs incurred by the appellant in managing all the (then 702) leasehold properties.

(7) The global costs so identified were then divided by 702 and the resultant sum was identified as the appropriate sum to be charged to each separate lessee as a management charge.

10. As a result of this calculation the appellant found that the total amount attributable to each one of the 702 flats for management for the year 2008/09 was £134.13. It decided that it should not seek to recover the entirety of this amount and so instead charged £125 per flat as the management charge for 2008/09. For 2009/10 a similar calculation revealed that the cost per flat was £141.43, but once again rather than charge this full amount the appellant decided to charge the £125 which had been charged the previous year uplifted by an appropriate percentage to represent inflation making a charge of £128.75. Similarly for 2010/11 the total calculated management charge per flat was £141.25, but the appellant instead charged a lower sum namely an inflation based uplift on the previous year giving a charge of £130.68.

11. The LVT decided that the appellant was not entitled to recover management charges calculated in this manner. In paragraphs 48 and 49 of its decision the LVT stated:

> "48. The Tribunal determined that the right of the Lessor to claim a management fee applies in these cases only for fulfilment of its obligations under clause 5 and the Ninth Schedule of the Lease, in

effect to charge a management fee for arranging insurance, collecting ground rent repairs, and managing in a proper and reasonable manner the Estate as defined in the First Schedule and the Building as defined in the Second Schedule as required under the Lease (as and when they occur). The Lease contains no provision allowing the Lessor to pass on to the Lessee all the charges of its managing agent, but only in the circumstances permitted by the Lease.

49. The Tribunal took careful note of the details of calculation of management charges identified in the statement of Graham Priestley dated 22 July 2010. It confirms (paragraph 3.0) that the Respondent has undertaken its calculations "…. based upon the amount of direct cost incurred in these services to support the leasehold service. For all of those services directly involved, a basis for splitting those costs has been used ….. This means that the management fee only reflects the costs and services incurred delivering the leasehold management fee service." (The statement maker's own emphasis). This includes costs of governance, IT support, human resources, for example. The Tribunal found that this method of calculation was not capable of being undertaken under the terms of the Lease. While the Tribunal had sympathy with the Respondent's rationale for apportioning overhead costs as to its Leasehold Section in this way, that was not within the Tribunal's interpretation of the Lease terms, as identified in paragraph 48. The effect of the Respondent's process is that the lessee becomes responsible for costs that are not concerned with proper and reasonable management of the Building (the Tribunal's emphasis), as required by the Lease."

12. Having reached this decision the LVT concluded (in paragraph 53) that each property should be looked at individually and that it was possible and reasonable for a landlord to calculate a management fee for each property, by reference to the nature of the block in which it was situated. The LVT then divided up the four properties which were before it into three categories, namely category 1 (no communal area), category 2 (buildings with some common areas), and category 3 (significant landscape areas and communal parts within the building). The LVT then decided upon what would be a reasonable management fee for each category of building and, having done so, allocated the due proportion (as defined in the lease) of this sum to each of the lessees.

The hearing

13. The appellant applied to the LVT for permission to appeal to the Upper Tribunal. The LVT granted permission. The LVT did not give any direction as to whether the appeal would be by way of (a) review, (b) review with a view to rehearing, or (c) rehearing. However the appellant's notice of appeal to the Upper Tribunal made clear that what was sought was a review with a view to rehearing. Accordingly at the hearing before me the matter proceeded in the following way, namely I invited argument from the appellant and from the first respondent as to whether the LVT's decision could stand; I then received such evidence as the parties wished to call, but reserved the question of

whether such evidence would actually fall to be considered, because if at the review stage the appellant was unable to persuade me that the LVT's decision was wrong then the appeal would simply be dismissed and the evidence was be of no significant effect. In fact the evidence adduced before me by the appellant was in no significant way different from that placed before the LVT, so the niceties of this point do not need to be explored further.

14. At the hearing the first respondent Mr Ciarlo appeared in person. Mr Hudson had responded to the appeal but had indicated he could not be present at the hearing. The other two original appellants namely Mr J S Newbrook (of 2 Hedley Close, South Shields) and Mr David Shewan (of 37 River Drive, South Shields) had not indicated any intention to respond to the appeal and they were neither present nor represented. I should however point out that the mere fact that a party to the original LVT decision has not responded to the appeal or (if he has responded as in the case of Mr Hudson) has not attended the hearing, does not mean that the appeal can therefore automatically be allowed. I can only allow the appellant's appeal if it persuades me that the LVT's decision was wrong.

15. Ms Muir and Mr Ciarlo addressed me on whether the LVT's decision should stand or whether it was wrong and should be quashed. As already stated I then received evidence in case the ultimate decision was that the LVT's decision could not stand. On behalf of the appellant I received evidence from Mr Graham Priestley, Head of Finance at STH, Miss Rosalind Woods, Leasehold Manager at STH and Mr Ron Potts, formerly a Housing Accountant with the appellant. Each of these witnesses confirmed the truth of their written statements and then answered certain supplementary questions and were cross-examined briefly by the first respondent. The first respondent then gave evidence himself. The respondents, including in particular the first respondent, had also put in written material to the Tribunal which I have taken into consideration.

16. In summary the evidence given by Mr Priestley was to the following effect:

(1) The appellant and STH had reviewed the calculation of the management fee to ensure that it was set at a level which recovered the economic cost of the service. This was necessary because if full recovery was not made the balance could only be recovered from the appellant's tenants (i.e. tenants as opposed to long lessees).

(2) In order to calculate the cost a detailed exercise was done to identify those costs which impact on leaseholders receiving the management service. Management charges were calculated on the basis of these costs, as assessed for 2008/9, and an inflationary increase was applied for the next two years.

(3) For 2008/09 the overall costs of STH were examined and were divided into areas of expenditure. Each such area was then examined so that an appropriate proportion of the expenditure in that area could be allocated to the 702 leasehold properties.

(4) This identification of costs and apportionment was explained in Mr Priestley's written statement and in the table on page 307 of the bundle. The following apportionments were made.

(5) The governance costs of STH were assessed and 5% allocated to the leaseholds, this being the estimate of the time spent by the Business and Governance Manager on managing the leasehold properties.

(6) The costs of the Leasehold Team (referred to on page 307 as the leasehold section) were identified, namely and principally the salaries of the two officers employed but also including posting, printing and stationery costs. 84.6% of this was allocated to management (the remaining 15.4% of costs was identified as being attributable as administration charges to individual lessees). A detailed assessment of time spent by leasehold staff on management activities was undertaken in order to arrive at this 84.6% figure.

(7) STH's costs of support services at its HQ building were identified. These were apportioned as to 1.7% to the cost of managing the leasehold properties (i.e. 2 divided by 120, because 2 leasehold staff out of 120 staff based at the HQ building were involved in the management of the leasehold properties).

(8) The cost of IT support was identified. These were apportioned as to 3.7% to the leasehold properties (being 702 divided by 19,009 because there were 702 leaseholders and 19,009 properties in total which were the subject of IT support).

(9) A cost for human resources and training was identified. This was apportioned as to 0.3% to the leasehold properties (being 2 divided by 698 because there were the two staff involved in the Leasehold Team whereas there were 698 employees overall who had the benefit of the relevant human resources and training).

(10) A cost for communications was identified and a specific figure of £1,396 was taken as the cost of the preparing of the leaseholder's newsletter which was issued twice yearly. This was calculated at a total of 2.5 weeks of one employee's time. The whole of this £1,396 was allocated to the costs of management of the leasehold properties.

(11) A cost was identified for the office accommodation at the HQ building occupied by STH. The square footage occupied by the Leasehold Team was identified as 144 sq ft out of 16,000sq ft so the appropriate fraction (which equated to 0.9%) was applied to these accommodation costs and attributed to the management of the leaseholds.

(12) The cost of payroll services was identified and apportioned to the leaseholds in the same 0.3% as the human resources and training costs.

(13) The cost of the necessary additional pension contribution was identified and once again allocated as to 0.3% to the leaseholds on the same basis as for the human resources and training costs.

(14) The cost of the repairs management section was identified and was allocated as to 1.1% to the management of leaseholds, because there were 1,277 repairs to leasehold properties whereas the total of all repairs was 114,000.

(15) Accordingly the total cost for 2008/09 of the Leasehold Team was £94,153.55 which, when divided by 702 (the number of leaseholders as at November 2008) came to £134.13 per leaseholder as the actual management fee cost incurred by the appellant.

(16) The actual management fee charged to each leaseholder was not the full £134.13 but was £125.

(17) So far as concerns the level of salary paid to the two officers within the Leasehold Team these were the basic salaries of £28,919 and £22,845. Mr Priestley explained that STH followed government guidelines for local officer payscales.

(18) Mr Priestley confirmed that the appellant made payment to STH with a view to meeting precisely STH's costs, i.e. such that STH should recover from the appellant 100% (neither more nor less) of STH's costs of managing the appellant's housing stock. The intention is that STH neither makes a loss nor makes a profit.

17. Miss Woods said that she had been the leasehold manager at STH since April 2008. The Leasehold Team consisting of herself (the leasehold manager) and a leasehold officer came into post in April 2008. The Leasehold Team have sole responsibility for the appellant's leasehold properties. Miss Potts stated that this leasehold portfolio includes flats and maisonettes in mid and high rise blocks with communal door entry systems, flats and maisonettes in mid-rise blocks with communal gardens, flats above shops and street properties including Tyneside flats in terraces. Miss Potts also explained the following points:

(1) The Leasehold Team is responsible for the following matters:

- Responding to complaints and queries about the management of the buildings containing leasehold properties;
- Producing the annual Ground Rent notice and the Services Charges invoices including repairs costs and Buildings Insurance Premium;
- Collecting service charges;
- Producing an annual repairs statement;
- Passing on repairs requests to the appropriate members of staff, in accordance with the lease;

- Carrying out statutory consultation on major works and services;
- Ensuring the buildings are kept in good and substantial repair, including lighting and external decoration;
- Assisting with insurance claims;
- Providing a bi-annual newsletter;
- Holding a quarterly Leasehold Forum, and
- Providing general advice to Staff and Customers about leasehold issues.

She explained that these tasks are provided to all leaseholders equally. She accepted that one of these points, namely arranging building insurance, should in fact be deleted because the Leasehold Team did not arrange the building insurance.

(2) Miss Woods explained that the Leasehold Team is also responsible for taking action to recover unpaid service charges; taking action to deal with breaches of leases; providing documents under the provisions of leases; and dealing with applications or approvals under leases. These administration tasks are specific to individual leaseholders and take up approximately 15% of the Leasehold Team's time on an annual basis. These are tasks for which an administration fee can be charged to the individual leaseholders. It is for this reason that these costs have been excluded from being part of the costs of managing the leasehold properties – hence the 84.6% figure referred to in paragraph 16(6) above.

(3) The appellant charges each separate lessee a service charge which is calculated individually for each separate building (i.e. each building within which the relevant lessee's flat is situated) and which includes a charge for ground rent; buildings insurance premium and insurance premium tax; repairs carried out to that building in accordance with the provisions of the lease; cleaning of that building; cost of concierge and caretaking. She explained that if a leaseholder lived in a block of flats with communal hallways and stairwells then these costs for cleaning of the building, caretaking and concierge could be relevant, but this would not be the case where the building included no communal hallways or stairwells.

(4) Miss Woods said that the two tasks which took up the greatest part of the time of the Leasehold Team were the collection of service charges and the dealing with repairs. It was necessary for the Leasehold Team, on becoming aware of an item of disrepair, to put this item into the system (so that an appropriate person would carry out the repair) and then to check subsequently that the repair had been properly done. The management charge so far as concerns repairs is for the initiating of the work and the subsequent checking of it. The actual costs of the repairs themselves are not part of the management charge but are part of the

costs attributable to the individual building as part of the service charge for that building.

(5) Miss Woods explained that during the relevant years the appellant used to produce twice yearly an eight page publication for leaseholders giving information which was thought to be of interest or relevance to leaseholders. That had now been superseded by the new Housing Matters publication which was directed towards all persons occupying the appellant's housing stock (an example of this Housing Matters publication was before me).

(6) Miss Woods said that she understood (although she did not appear to be sure on these matters) that in Newcastle lessees are charged about £145 pa for management by the relevant ALMO and in Gateshead lessees are charge about £135 pa for management by the relevant ALMO.

(7) Miss Woods was questioned by the first respondent regarding a repair at his building which appears to have become necessary in early 2011 (a tile came off the roof at the back) and where some repairs were done in July (although apparently not satisfactory) and where in the result it took almost a year to repair a tile. Miss Woods said she was aware of this case which had a lengthy and complicated history. She accepted that there had perhaps been some delay and she reassured the first respondent that he had not been charged for this repair as it had not been well handled.

18. Mr Potts said that he had spent 30 years in the public sector with responsibilities for housing finance and had been a member of the Chartered Institute of Public Finance and Accountancy Housing Panel. He confirmed that the appellant had delegated to STH (an ALMO) the complete leasehold management services (other than dealing with changes to leases) but that the appellant retains overall responsibility as landlord. He pointed out that this delegation was permitted under the terms of the lease. He explained that STH calculates and recommends an appropriate figure for the cost of the management of a leasehold flat and the appellant will then agree this figure. The fee is calculated at the same standard rate for each leaseholder. He explained that the rationale behind this management charge was that it was designed merely to cover the majority of the costs for the dedicated leasehold section (i.e. the Leasehold Team) within STH. Those costs are largely fixed in nature and not dependent upon the type of property leased. He explained that certain costs of general management duties in area offices are in respect of work which partly benefits leaseholders, but these costs are not charged to leaseholders.

19. The first respondent Mr Ciarlo gave evidence. He explained he was present on his own behalf and because Mr Hudson had asked him to attend. He also explained that it made no difference to him how much management charge he was asked to pay, because bearing in mind his situation regarding benefits he had been told by Job Centre Plus to send them the bill and that they would sort it out. However he stated he did not believe that STH should be overpaid for the type of work and service which it offers. He

expressed his view that most of the work and the costs involved for the Leasehold Team were exaggerated. It did not take long to enter something onto a computer. Most of the documentation sent out was repetitive every year. He suggested that the LVT's calculation was fair and the LVT's decision should be upheld. He was concerned that some lessees might (as he put it) go round complaining for no reason and cause a great deal of work for the Leasehold Team. He said he should not have to pay for this. Another example was noisy neighbours. He said that he should not have to pay for dealing with noisy neighbours in other buildings. He confirmed the material he had put in his written documentation regarding the unsatisfactory way in which STH had dealt with the leak (caused by a missing tile) which was drawn to their attention in January 2011.

Parties' submissions

20. On behalf of the appellant Ms Muir advanced the following arguments.

21. The management charges are calculated on the basis of the sum which it actually costs the appellant to manage its leasehold portfolio. This cost is then divided equally between the (then 702) leaseholders so that they each pay the same charge. The rationale for this equal split is that each leaseholder has the same service available to them, whether they make use of it or not.

22. She argued that the LVT was in error in concluding that the wording of the lease did not permit the charging of a management charge in the manner adopted by the appellant. She argued that the LVT, having reached an erroneous conclusion on this point, then identified a management charge for each of the buildings with which it was concerned which was an arbitrary figure based upon an uplift of the management charges in earlier years, rather than being a management charge calculated in accordance with the wording of the lease. She also argued that the LVT was wrong in omitting to make findings as to whether the costs incurred in providing the management service were reasonable and whether the standard of the management service was reasonable.

23. Ms Muir pointed out that in the private market no managing agent charges its fees on the basis of the exact cost incurred in managing a particular building. It would be impossible to charge on this basis because a manager would agree its charges in advance with the freeholder and would not know at that stage how many problems there would be with the block, how many complaints would be made or what works would be necessary etc. She pointed out that normally any managing agent would charge a management fee enabling the managing agent to make a profit. In the present case the appellant merely seeks to charge the costs of STH managing the leasehold properties, with STH making no profit because it is a non-profit making body.

24. Ms Muir drew attention to the wide powers given to the appellant in relation to management matters, see in particular the wording of the parts of Clause 7.1 (as set out in paragraph 7(3) above) and the wording of paragraphs 5 and 6 of the Ninth Schedule (set out in paragraph 7(2) above).

25. Ms Muir argued that the present lease was more or less identical to the lease with which the Central London County Court was concerned in the case of *City of Westminster v Pottle* (10 April 2000) where a 54 page reasoned judgment was given after representation by Queens Counsel on both sides. She drew attention to a passage at page 15B of the judgment:

> "The effect of those three clauses is this: (a) the charge for each item of management and each item of service and repair must be proper and reasonable; (b) the decision to carry out each item of service, repair and management must be proper and reasonable; (c) the management required by Clause 6(a) is not restricted to the provision of services referred to elsewhere in the lease. …"

Clause 6(a) as referred to by Judge Green is the equivalent of Clause 7.1 in the present case. This confirms that the appellant is not confined to arranging management (and charging for management) which is merely the management involved in providing services (referred to elsewhere in the lease) to the particular building in question.

26. Ms Muir pointed out that the management charges that can be claimed under the lease are based upon the sum charged to the appellant (as landlord) for the management of the building in question and not the actual cost of providing the management of that building. However she also pointed out that in the present case, bearing in mind that STH is a non-profit making body, these two costs are the same.

27. She pointed out that the appellant has only included in the management fee the costs of the Leasehold Team which are generic and common to all leasehold properties. These costs have been carefully calculated on a reasonable basis and are based upon reasonable costs. There was no evidence before the Tribunal to the effect that, in any of the years relevant to the present case, the costs were unreasonable or the quality of the management provided was unreasonable or that any of the costs were unreasonably incurred. It was of significance that in none of the cases before the LVT was there any challenge by any of the applicants to any aspect of the service charges apart only from the management charge. Accordingly it could be inferred the services had been properly delivered which was indicative of management being reasonably carried out. So far as concerns the first respondent's particular problem with the missing tile, this was unfortunate but it had been explained (through Ms Woods) that there would be no charge to the first respondent for this repair and, separately, this was not a matter which fell within a time period relevant to the present case.

28. The first respondent had submitted a 60 paragraph written representation in advance of the hearing. In summary the principal points which he raised were as follows:

(1) He asserted that the lessees did not get any excellent service by way of management.

(2) He contended that the proper approach was "a fair pound for a fair hours work".

(3) He gave details of the problem resulting from a tile coming off the roof at the back of his building in January 2011.

(4) He contended that the manageress (by which I understand him to mean Ms Woods) is overpaid and that her assistant is overpaid.

(5) He produced a letter he had received from Mr Hudson, the second respondent, indicating that Mr Hudson had recently been informed that the appellant proposed to put a new roof on his building, with a resulting substantial charge to Mr Hudson. The first respondent queried whether, if a leaseholder filed a claim with the LVT, they would get "hit" with a roof repair.

(6) As regards work done by STH in producing demands to the lessees for the payment of the annual ground rent and the relevant service charges, he suggested that in this day and age it takes very little time with word processing equipment to produce such documentation.

(7) He pointed out that the only time he had ever seen Ms Woods was when there was a visit to his property by the LVT in relation to this case (and he also saw her at the LVT hearing).

(8) He contended that much if not all of the work done by STH in managing the leasehold premises was work which was easily done and would require little time to be spent and would incur little cost.

(9) As regards the six monthly newsletter, he contended that he could not be required to buy a particular newspaper and he should not be required to pay for the production of this one.

(10) He made various observations, some of which he accepted were not worth arguing about, regarding certain aspects of STH's costs.

(11) He suggested that the charge for IT support was too high.

(12) As regards the costs charged for managing repairs, the first respondent again gave as an example the unfortunate experience he had had with the missing tile.

(13) He drew attention to the wording of his lease and stressed that all that he could properly be asked to pay was 50% of a certain figure because his "due proportion" was defined as 50%. The wording of the lease should be followed.

(14) In summary it was his case that the staff were overpaid, that the wages should be changed to reflect properly the work done, that the service he got was "absolutely disgusting and definitely not reasonable", that the appellant was not entitled to "invent work that needs to be done", and that any work done should be reasonable (thus it should not take a year to rectify the repair of a simple tile).

(15) The methodology of how STH calculates its charges should be dismissed and the LVT's methodology should be accepted.

29. The first respondent also, in these written representations and in previous documentation, had argued that there was an estoppel by acquiescence binding the appellant and preventing it from charging the management fees it sought to charge. At first I was puzzled by this argument. However it then emerged that there had been two previous unappealed decisions by the LVT dealing with management charges payable by the first respondent (see paragraph 2 above). Bearing these two earlier decisions in mind, it is clear that the first respondent has a valid point. Ms Muir conceded that, whatever the outcome of the present appeal to this Tribunal, the appellant cannot seek to recover more by way of management charge from the first respondent for the years 2008/09 and 2009/10 than the figurers decided by the LVT in earlier unappealed decisions. To this extent therefore the first respondent's argument that the appellant is bound by these earlier decisions of the LVT is well founded. I did not understand the first respondent to be arguing that in some way the appellant was forever after bound in respect of future years by the LVT's decision on management charges in his case for these two previous years. However if he was so arguing I observe at this point that such an argument cannot succeed. The fact that a ruling is made upon a service charge (or management charge) for a certain year by an LVT and is made on a certain basis does not mean that forever after (unless such ruling is successfully appealed) the landlord is bound to charge only on that basis and is disabled from seeking, in relation to future years, to argue that a different basis is appropriate and to take the matter to the Upper Tribunal.

Conclusions

30. In my judgment the first question to ask is whether the amount sought by the appellant by way of management charge (as part of the service charge claimed from the respondents) is payable under the contractual terms of the lease. If it is not so payable then the appellant cannot recover it. If it is so payable then it is necessary to consider whether the reasonableness limitations introduced by section 19 of the Landlord and Tenant Act 1985 prevent the amount claimed being recovered in whole or part.

31. I therefore first turn to the terms of the lease. I take by way of example the first respondent's lease whereby he has covenanted to pay to the appellant such sum as may be notified to him as representing the due proportion (in his case 50%) of the reasonably estimated amount required to cover the cost and expenses incurred or to be incurred by the appellant in carrying out the obligations or functions contained in or referred to in Clause 3, Clause 5, Clause 7 and the Ninth Schedule for the relevant financial year. The following points must be noted.

32. The appellant is entitled to appoint managing agents for the purpose of managing the building and to remunerate them properly for their services (Clause 7.1.1) and is entitled to delegate any of its functions under Clause 5 and Clause 7.1.1 and 7.1.2 the and Ninth Schedule to any firm or company whose business it is to undertake such obligations – and the appellant may so delegate its functions upon such terms and

conditions and for such remuneration as the appellant shall think fit. I respectfully agree with His Honour Judge Green in the *Pottle* case where he stated in relation to a clause worded in effectively the same way as Clause 7.1 in the present lease that the management required by that clause is not restricted to the provision of services referred to elsewhere in the lease. In other words the management which the appellant is entitled to provide (and charge for the cost of providing) involves not merely providing the services repairs etc referred to elsewhere in the lease but extends to the general managing of the relevant building as part of the appellant's residential property portfolio.

33. The appellant has as a matter of fact appointed STH to manage all of its housing stock including the building comprising the respondents' flats. The appellant was entitled under the terms of the lease to do so.

34. The appellant has agreed terms and conditions with STH as to the remuneration which the appellant will pay STH for managing its housing stock. The appellant was entitled to reach agreement with STH on this point. The agreement which the appellant has reached with STH is that the appellant will pay to STH 100% (neither more nor less) of STH's costs of so managing the appellant's housing stock. The appellant was entitled to agree this basis of remuneration as between itself and STH for STH's managing its housing stock.

35. Continuing to take the first respondent and the building containing 31 Northbourne Road as an example, STH's duties include managing this building. The payment made by the appellant to STH includes payment to STH for its management of this building.

36. Having regard to the wording of Clause 3.1, the appellant is entitled to charge the first respondent as a management charge through the service charge the due proportion (here 50%) of the reasonably estimated amount required to cover the cost and expenses incurred or to be incurred by the appellant in paying STH for managing this building.

37. STH does not issue to the appellant an invoice charging a separate and specific amount for the management of the building containing 31 Northbourne Road (or indeed in respect of any other particular single building). The appellant was not under any obligation under the terms of the lease to agree terms and conditions of remuneration with STH which involved STH charging a separate and specific amount for the managing of each specific building.

38. The question therefore arises as to how the cost and expenses incurred or to be incurred by the appellant in paying STH for managing the relevant building (here the building containing 31 Northbourne Road) is to be calculated.

39. The fact that no separate and specific amount is charged by STH to the appellant for managing the building containing 31 Northbourne Road does not mean that in consequence some figure must be assessed as a generally reasonable management fee for managing this sort of building (being assessed without reference to STH's actual costs

which are recharged to the appellant). The LVT appears to have taken the contrary view and to have followed the course of assessing such a generally reasonable fee, based it seems on an uplift of previous years' management fees. I respectfully conclude that the LVT was wrong in so doing. I conclude that the LVT's decision cannot stand.

40. The cost to the appellant of paying STH to manage the appellant's leasehold properties (as opposed to the more numerous properties the subject of tenancies) is a part of the global amount paid to STH for managing the entire housing stock. This part needs to be calculated. It was open to the appellant and STH to agree that this part should be calculated by a reasonable and carefully worked apportionment of STH's global costs for the relevant year, here 2008/09.

41. Such an apportionment has in fact been made. I will leave aside for the moment any question of reasonableness. This apportionment has resulted in a conclusion that for a building such as the first respondent's, where there are two flats each the subject of a long lease, the amount to be taken as paid by the appellant to STH for managing that building during 2008/09 was twice £134.13 (which is the cost per flat), namely £268.26. I conclude that this figure of £268.26 properly represents the costs and expenses incurred or to be incurred by the appellant in paying STH for its management services in relation to the building containing 31 Northbourne Road during the service charge year 2008/09. The first respondent is responsible for paying 50% of this amount, namely £134.13. The appellant has decided (for reasons which were not gone into at the hearing and in respect of which I make no comment or criticism) to limit the amount recovered to only £125. In these circumstances I conclude that (were it not for the points mentioned in paragraph 29 above which arise out of the previous LVT decisions concerning the first respondent) the first respondent would have been liable to pay £125 as management charges for 2008/09.

42. I note that there are other buildings in which, unlike the first respondent's building, there are some flats which are the subject of tenancies rather than long leaseholds. The way in which STH and the appellant have proceeded in respect of these buildings can in my judgment properly be analysed as follows. Consider by way of example a building containing 10 flats of which 5 are long leasehold and 5 are tenancies. The cost to STH of managing such a building (and accordingly the cost charged on by STH to the appellant for managing such a building) would be substantially more than 10 times the figure of £134.13, which is the cost which has been calculated per leasehold flat. This is because the management costs in relation to tenancies are substantially higher and the work required is substantially more intensive than the work required in managing a leasehold flat. In such a case if the actual cost to STH of managing that particular building were calculated and if a lessee in that building was charged their due proportion (say 10%) of such management costs, such a lessee would be paying substantially more by way of management charge than a lessee such as the first respondent. However what the appellant and STH have in effect done for the purpose of calculating the management charges to be sought from lessees in such a building is to make an assumption, favourable to such lessees, that the cost to the appellant of managing such a building should be taken as only ten times £134.13 (the cost per leasehold flat) rather than the larger amount which STH actually charges for managing that building. An application of the "due proportion" of a particular lessee within that building would then

normally bring the amount payable by that lessee back to the same £134.13 (but limited to £125 in accordance with the appellant's demand for payment) which is applicable to a flat such as the first respondent's. I can see nothing wrong in the appellant and STH proceeding on this basis and in the appellant charging management charges calculated on this basis, subject to the question of reasonableness to which I now turn.

43. I conclude that the appellant and STH have performed a careful and reasonable apportionment of STH's global management costs over the entire housing stock so as to obtain a fair and reasonable assessment of the cost and expenses incurred or to be incurred by the appellant in managing the relevant buildings (i.e. in managing them through the services of STH). The appellant and STH have taken care not to include items of management expenditure which are not equally available to all lessees. The mere fact that a particular lessee in a particular year may not cause any notable calls upon management time is not of itself a reason for concluding that the costs of management for the relevant building will be unreasonable unless separately calculated. There is an element of commonsense and an element of swings and roundabouts in the analysis. The commonsense aspect is that it is sensible to divide the costs in the manner chosen rather than seeking precise and detailed figures for the management cost for each individual building and in then finding (as a result of doing this) that the management costs have increased substantially because they have been swelled by the cost of the detailed work needed in seeking this (unobtainable) precision. The swings and roundabouts aspect arises in the following way, namely that it may well be for a small building (e.g. a building containing two flats only such as the first respondent's building) few problems may arise for many years and little management time is called for – but there may come a year when a particular and troublesome management problem at this building arises (being a management problem which cannot be claimed from a particular lessee as an administration charge). In such a year the first respondent would face a substantial site specific charge for management if he had to pay 50% of the actual costs incurred in managing the building in that particular year. However instead in such a year the first respondent is spared having to pay this substantial sum by reason of the manner (which I find reasonable) which the appellant and STH have agreed upon for calculating the cost of management for each building.

44. The first respondent was much concerned by the history of the leak at his building which had arisen from a defective tile in January 2011 and had not, so it seems, been properly dealt with. It seems that the first respondent had justification in being concerned about this repair and this justification was recognised by Ms Woods who indicated the first respondent would not (when the relevant service charge came to be calculated) be charged for the repair in question. However I accept Ms Muir's argument that this one-off complaint, albeit most annoying to the first respondent, cannot be taken as an indication of inadequate management, especially bearing in mind that it arose after the relevant periods with which this appeal is concerned. On the question of the general standard of management I note that there have been no challenges by the original four applicants in the present case to any charges other than the management charges. Thus there is nothing to indicate that the other services have not been properly provided. This is in my judgment some indication that the management over the relevant period has been reasonable. In any event there is no evidence before me in this present appeal (apart from unparticularised general expressions of dissatisfaction by the first

respondent) in relation to any relevant period to suggest that the management provided by STH has not been to a reasonable standard.

45. As regards the question of whether the amount charged in respect of management is reasonable, there is no evidence before me in this present appeal (apart again from general expressions of dissatisfaction from the first respondent) to suggest that any element of the costs to STH of providing management was unreasonable. As regards salaries, I accept that these are fixed following government guidelines for local officer payscales. I do not, upon present evidence and argument, see any reason for concluding that any ingredient within STH's costs of providing the management service is unreasonably high or was unreasonably incurred or that the method of extracting the cost of managing the leasehold properties out of the global cost of managing the entire housing stock is unreasonable. As regards the twice yearly publication for leaseholders (now replaced by the Housing Matters publication) a copy of this twice yearly publication was not before me. However I conclude that STH and the appellant were entitled reasonably to conclude that such a publication, containing matters relevant to leasehold properties such as I have seen included within the Housing Matters publication, would be of general advantage to the smooth running (and hence proper management) of the appellant's leasehold properties. STH was entitled to charge the appellant the cost of this publication and the appellant was entitled to recover the cost through the management charge.

46. In the result therefore I allow the appellant's appeal. I find that (subject to paragraph 29 above) the amounts charged by way of management charge for each flat held by the parties to these proceedings of £125 was reasonable and recoverable for the year 2008/09, that the management charge of £128.75 was reasonable and recoverable for the year 2009/10 and the management charge of £130.68 was reasonable and recoverable for the year 2010/11. As observed earlier, these charges were by way of the advance payment sought under Clause 3.1 of the lease. It appears that the question of any balancing charge or credit under Clause 3.2 or 3.3 remains undecided.

Dated 25 July 2012

His Honour Judge Nicholas Huskinson