UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charge – whether "lift" maintenance costs and directors' expenses recoverable under the service charge provisions of the lease

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST-TIER PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

BETWEEN:

SOLARBETA MANAGEMENT COMPANY LTD

Appellant

and

MS ADETINUKE AKINDELE

Respondent

Re: Flat 1, Beta Court,
117 Sydenham Road,
Croydon
Surrey
CR0 2EZ

His Honour Judge Nigel Gerald

Determinations on Written Representations

The following cases are referred to in this decision:

Billson v Tristrem [2000] L&TR 220 (CA)
Campbell v Daejan Properties Limited [2012] EWCA Civ 1503
Rapid Results College v Angell [1986] 1 EGLR 53
Gilje v Sharlgrove Securities Limited [2001] EWCA Civ 1777

DECISION

Introduction

1. The appellant management company appeals against the 25 November 2013 decision of the First-tier Tribunal Property Chamber (Residential Property) ("the FFT") that the costs of maintaining a lift and also the appellant's directors' expenses were not recoverable from the respondent under the service charge provisions of the 30 November 2006 lease of his Flat 1 at Beta Court, 117 Sydenham Road, Croydon.

2. Permission to appeal those two aspects of the FFT's decision was granted by the FFT itself on 22 January 2014. The appellant has filed a detailed statement of case to which the respondent has responded by statement of case to which the appellant has replied also by statement of case.

3. By way of background, in 2006 Ruskin Homes Limited developed Solar Court, Beta Court and Gamma Court. Gamma Court contains social housing; Beta and Solar Courts are private residential. Solar and Beta Court respectively comprise 23 and 2 flats each which have been let out on long leases which are in, as I understand it, substantially the same form as the respondent's long lease. The two Beta Court flats are on the ground floor of the same building as Gamma Court but have no access to Gamma Court or to any of the grounds serving it. Instead they have access to the grounds of Solar Court, but have no use of the lift situated within and exclusively serving Solar Court.

4. The management of the private part of the development, namely Solar and Beta Courts, is vested in the appellant management company, each long lessee being or entitled to become a member of the appellant management company. Indeed not only does the lease recite that the tenant, namely the respondent, has agreed to become a member of the management company, but by clause 4.14.2 he can be required to become a member of the management company, which is a not-for-profit company vested with the management of the private residential parts of the Estate.

5. Owing to part of the development or estate forming social housing the service charge provisions of the lease are not as straight forward as they might be. However for these purposes it is only necessary to refer to those parts of the service charge provisions of the lease which give rise to this dispute.

6. The lease contains the following definitions:

" 'the Estate' means the land within or formerly within Title No. SGL622600 being the buildings and gardens and grounds surrounding the same for use of the owners and occupiers thereof… and which are capable of employing the services to be provided by the Management Company

" 'the Buildings' means the buildings constructed on the land edged blue of which the Premises form part

" 'the Premises' means the premises edged red on the Plan … known as Flat 1, Beta Court, 117 Sydenham Road, Croydon

" 'Common Parts' means all parts of the Buildings not intended to be included in the lease of any separate apartment including any Service Media used in common

" 'the Parking Area' means the parking spaces, accessway, forecourt, electric access gates and any other ancillary facilities for use in connection with the parking spaces."

7. By clause 5 of the lease the tenant covenants to pay the "Service Charge" which is defined by clause 1.12 so far as is material as being

"… 1.58%... of the expenditure incurred by the Management Company [the appellant] in the performance of its obligations in this Lease excluding obligations specific to the Parking Area on the Estate."

8. By clause 6.2 the Management Company covenants "to provide and perform the Services", namely, "the services set out in the Fourth Schedule" (clause 1.14). The Fourth Schedule, described as being "Services to be provided and obligations to be discharged by the Management Company", provides so far as material as follows:

"1. To contribute from time to time an appropriate share of the cost of the repair maintenance renewal or replacement of any party walls or other facilities used in common by the tenants of the Estate and the owners of occupiers of any adjoining or neighbouring property

"2. So far as practicable to keep clean and reasonably well lighted the entrance hall to the Premises within the Buildings and to maintain any entry phone system at such entrance to the Buildings

"3. To provide such other services and discharge such other obligations or functions as the Management Company shall reasonably from time to time consider necessary or expedient for the use and occupation of the flats in the Buildings and the Landlord's adjoining premises

"4. To keep full accounts and records of all sums expended in connection with the matters set out in this part of this Schedule and to prepare and serve upon the tenants of

all the flats in the Buildings and the landlord's adjoining premises from time to time the Certificate and such other documents as are required to be served by the Management Company on the Tenant

"…

"9. Such other services or functions as the Management Company shall think fit for the upkeep and enhancement of the Estate or for the benefit of the flats thereon".

The respective cases

9. It is the appellant's case that the costs of maintaining and repairing the lift situated within Solar Court are recoverable as part of the Service Charge falling within paragraph 3 or paragraph 9 of the Fourth Schedule to the lease. It is the appellant's case that it is of no materiality that the lift is located within Solar Court and therefore of no benefit to the respondent in Beta Court as it is plain from these paragraphs of the Fourth Schedule that the tenant must pay his 1.58% share thereof. It is the respondent's case that the maintenance and repair of the lift can not be covered under either of those paragraphs because they do not fall within their wording and furthermore the lift is of no benefit to him or indeed his immediate neighbour, the only other long leaseholder of Beta Court, and therefore cannot sensibly be regarded as an obligation falling upon either of them.

10. It is the appellant's case that the expenses of the directors of itself, *i.e.* of the Management Company (as defined in the lease), are recoverable under clause 6.2 alternatively under paragraph 9 or 3 of the Fourth Schedule, particularly bearing in mind that the Management Company is a not-for-profit company owned by the 25 tenants of Solar and Beta Courts and charged with their management. It is the respondent's case that those costs are not recoverable, being out-with any of those provisions of the lease.

The lift

11. Surprising as it may seem the issue of whether or not the costs of maintaining and repairing the lift are recoverable under the instant Service Charge provisions has been decided on no less than three separate occasions by the FFT, or the LVT as it was previously known. In 2009 the LVT determined that the costs of maintaining and repairing the lift could not be recovered *via* the Service Charge from the respondent. In 2012 the LVT decided that they could be recovered under the Service Charge provisions In 2013 the FFT decided that they could not be recovered: it is that decision which is being appealed.

12. The material parts of the FFT's decision are to be found in the following paragraphs of the decision.

> "53. Paragraph 3 [of the Fourth Schedule] contains an obligation on the management company to "*provide such other services and discharge such other obligations or functions as the Management Company shall reasonably from time to time consider necessary or expedient for the use and occupation of the flats in the Buildings and Landlord's adjoining premises."* On the face of it this seems quite a wide provision. However as in the *Charter House* case it seems clear as a factual matter that the Applicant [i.e. the respondent] receives no benefit from the lift as it is not in her building and there is no specific mention of a lift or even a generic concept that could reasonably be said to include a lift in this paragraph 3. In the case of ambiguity service charge provisions are construed in favour of the paying party, and the tribunal does not consider that the above words are sufficient to oblige the Applicant to contribute towards the cost of maintaining a major item in respect of which it does not, and cannot, have any benefit.
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> "54 … Paragraph 9 is a 'sweeper' which refers to "such other services or functions as the Management Company shall think fit for the upkeep and enhancement of the Estate or for the benefit of the flats erected thereon", but again this is not considered to be nearly specific enough to cover the maintenance of a lift not otherwise mentioned and in respect of which the Applicant has no benefit.
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> "55. Accordingly, the tribunal determines that the Applicant's share of the lift maintenance charges of £1,410 (as per the 2012 service charge accounts) is not payable."

13. The remarkable features of this lease are the brevity and apparent width of the open-textured nature of the Management Company's obligations as set out in the recited paragraphs of the Fourth Schedule and the total absence of any explicit repairing or similar obligations in relation to the Buildings themselves on the part of the landlord. Whilst paragraph 1 of the Fourth Schedule refers to repairing and such like, that is confined to party walls and facilities used in common with neighbouring property. Apart from the specific obligation to keep clean and well lit the entrance hall to the Premises (Flat 1) and maintain the entry phone, there is no specific adumbration of repairing, maintaining, renewal or other obligations relating to the Buildings as a whole or to any specific part or parts of them or to the rest of the Estate, which are a usual and familiar part of service charge provisions and the landlord or management company obligations.

14. Viewed in that context, naturally construed the effect of paragraph 3 of the Fourth Schedule is to vest in the Management Company a discretion, which must only be exercised "reasonably", to do whatever it "considers necessary or expedient for the use and occupation of the flats in the Buildings and the Landlord's adjoining premises." In principle therefore, and provided reasonable, anything the Management Company considers as "necessary or expedient" to be done "for the use and occupation of the flats in the Buildings", the associated expenses being recoverable under the Service Charge.

15. What is to be noted is that the obligation is not confined to any flat or flats or any particular building or buildings or any part or parts thereof but is related to, and it is the duty of the Management Consider to consider, what is "necessary or expedient" for the "use and occupation" of "the flats within the Buildings". Given that "the Buildings" encompass both Solar and Beta Courts, and the "flats" encompass all 25 flats within those two buildings, it is plain that this is a global obligation to be discharged singularly in respect of the totality of all that is comprised within the Buildings, not severally in respect of say just Solar Court or just Beta Court to the exclusion of the other or in respect of part or parts or a floor or floors within either of those buildings.

16. It is a single obligation to manage the whole. The fact that generic language is used rather than specific language – such as "repair" or "renew" referenced to specific parts of the Buildings, such as "roof" or "gutters" or "lift" – is immaterial to the question of whether or not the Management Company is obligated to discharge and provide its Fourth Schedule "services" or "obligations" or "functions" for the use and occupation of the flats within the Buildings. If it were necessary for specific parts of a building, such as the "roof" or "gutters" or "lift", to be adumbrated to impose upon the Management Company any such obligation, that would denude the Fourth Schedule of its force and render near-impossible the usual estate management functions to be expected in managing a residential building.

17. Putting it in a slightly different way, the fact that something is not specifically adumbrated in paragraph 3 is not in point because virtually nothing is adumbrated in paragraph 3 rather it is left for the discretion of the Management Company. Whilst it is not uncommon for service charge provisions to refer to specific parts of buildings which are encompassed within its provisions, the fact that open-textured language has been used does not mean that any "services" or "obligations" or "functions" can not provided or discharged by the Management Company in respect of any and all parts of the Buildings or recover their costs. If that were so, bearing in mind that it is only in the Fourth Schedule that the substantive obligations of the Management Company are set out, the Management Company would be under no obligation to repair for example the roof or gutters or lifts or other parts of the buildings and would not be entitled to recover their costs. The minute that is stated it is plainly absurd as those parts of the Building, including the lift, would fall into disrepair and be unsatisfactory or otherwise unusable, which would ultimately impair the use and enjoyment of the flats in the Buildings.

18. It is very difficult to see as a matter of commonsense and good estate management that it would be unreasonable for a Management Company to conclude that it was "necessary or expedient" to maintain a lift within a residential block of flats. As I understand it, it has not been suggested that it was unreasonable for the lifts to be maintained or for the costs to be recovered but that as a matter of construction of paragraph 3 of the Fourth Schedule whose costs could not be recovered from the respondent. For the reasons already stated, in my judgment the reasoning of the LVT was flawed. If it were right, no-one would be obligated to repair the lift.

19. In short, the question is not whether the "obligation" or "service" or "function" and the associated expenditure is specifically adumbrated (virtually nothing is). Rather, it is whether or not the Management Company reasonably considers it "necessary or expedient" to do the work to the part of the relevant part or parts of the buildings for the use and occupation of the flat or flats. Whether or not they benefit any or all or only some of the long lessees is irrelevant. For example it is unlikely that the ground floor flat owners of Solar Court ever use the lift, but it would be absurd to say that they would not be obligated to pay a share of the associated costs. The fact that the two Beta Court flats are not obliged to pay a share of the associated costs fails for the same reason. Indeed, there are many items of expenditure, such as cleaning and lighting the entrance halls to the 23 flats within Solar Court, which will disproportionately benefit those residents but not benefit the two Beta Court flats at all. But the Management Company is specifically obligated to provide those services, and recover their costs through the Service Charge.

20. This leads on to the definition of "Service Charge", which is defied as being a fixed percentage (1.58%) of "the expenditure incurred by the Management Company" in performing its "obligations in this Lease" which are those set out in the Fourth Schedule. If, as is the case, the Management Company must discharge those obligations in relation to Solar and Beta Courts, it follows as a matter of logic that the respondent must pay 1.58% of those costs whether or not he directly or indirectly benefits therefrom or derives no benefit at all. There is no room for arguing that specific elements of the global expenditure are not recoverable from particular tenants. That the two Beta Court flats comprise small service charge percentages (1.58% and 1.75%) demonstrates that they bear but part of a global expenditure. There are no provisions permitting the Management Company to apportion or hive off any costs to specific parts of either of the Buildings. For example it is no doubt more expensive to maintain the entry phone system to Solar Court and keep clean and well lit the entrance hall to its 23 flats than it is for Beta Court with its two flats. However those costs cannot be apportioned before the application of the simple service charge percentages of each flat.

21. Looking at the matter more practically, there are no provisions suggesting that Solar Court should be managed separately from Beta Court or that separate service charge accounts should be maintained or that any distinction should be made between the services provided to either building or any part thereof. Rather, both Courts are to be managed by the same Management Company as the "Buildings", or part of the "Buildings", in the plural, of which the "Premises" (Flat 1, Beta Court) form part and are comprised within the "Estate". Some of the adumbrated expenditure, such as repairing or renewing party walls (paragraph 1 of the Fourth Schedule) may be of no benefit at all to any of the flats within the Buildings but may nonetheless be "necessary or expedient". Maintenance and cleaning of the entrance hall to the "Premises" within the "Buildings" of Solar Court will be of little interest to the occupants of Beta Court and vice versa, yet all are to be kept cleaned and lit by the Management Company (paragraph 2). Likewise, the roof and gutters and other parts of each Court (paragraph 3). And global accounts are to be maintained, without any indication that separate ones should be (paragraph 4).

22. Put simply, the approach laid down by the Fourth Schedule is for the total costs of the Management Company providing and discharging its "services" and "obligations" and "functions" as set out in the Fourth Schedule to be calculated and then in very simple and fairly common form for each of the tenants to pay their respective stated percentages. The fact, as is nearly always the case, that some tenants will not benefit from some aspect of the "services" or "obligations" or "functions" performed by the Management Company is of no materiality in construing whether or not the tenant is liable to pay for them. That is all part and parcel of communal living and service charge provisions, and is usually (as here) reflected in some way or another by a percentage apportionment of the global expenditure. Given those conclusions, it is not necessary to consider whether or not the lift repair and maintenance costs would be recoverable under paragraph 9 of the Fourth Schedule.

23. It is noteworthy that the percentages payable by the two flats in Beta Court are considerably less than the percentages payable by the flats in Solar Court. As originally drawn the Beta Court flats' percentages are 1.58% and 1.75% whereas the Solar Court flats' percentages range from 2.7% to 4.13%. So far as I am aware there was no evidence before the FFT and there is certainly no evidence before this Tribunal as to the reasons for the differing percentages. However it does not take too much to conclude that one of the aspects which no doubt was taken into account was the fact that the two Beta Court flats do not have the benefit of using the lift and in some respects are disadvantaged by being separate from Solar Court but underneath Gamma court, and therefore having a lesser call on the services afforded the Solar Court flats. Whether or not that is so is in material for the purposes of construing the provisions of the lease, but it is the sort of thing one would expect.

24. In my judgment the FFT misdirected itself in considering that the actual benefit, direct or indirect, of a tenant was relevant to construing the legal obligations under the provision of the lease. The FFT also misdirected itself in considering that there was ambiguity within paragraph 3. The sole question for determination whether or not the lift expenditure was recoverable was whether or not it was "reasonably … consider[ed]" by the Management Company to be "necessary or expedient" for the use and occupation of the flats in the Buildings. The FFT also failed to consider or give any weight to the definition of "Service Charge" from which it is clear that a percentage of the global expenditure incurred by the appellant in discharging its Fourth Schedule obligations was recoverable. It follows that there is no room for application of the *contra proferentem* rule, though it must be said it is doubtful whether or not that rule is applicable in a case such as this because it would seek to being invoked against the essentially neutral Management Company as distinct from being against the grantor-landlord, now in liquidation.

25. Although *Billson v Tristrem* [2000] L&TR 220 (CA) was referred to in the notice of appeal, in my judgment it is not necessary to refer to it as it does not advance matters. Neither, in reaching the conclusions which I have reached, have I overlooked the authorities referred to in the respondent's statement of case namely *Campbell v Daejan Properties Limited* [2012] EWCA Civ 1503, *Rapid Results College v Angell* [1986] 1 EGLR 53 and *Gilje v Sharlgrove*

Securities Limited [2001] EWCA Civ 1777. All of those cases turned on the particular words of the leases in question and do not assist in construing the wording of the instant lease.

Directors' expenses

26. The relevant part of the decision of the FFT is to be found in the following paragraphs of the decision.

> "58. This issue was not specifically covered but formed part of the application and there have been written submissions on behalf of both parties. The dispute boils down to the question of whether the service charge provisions in the Lease are wide enough to cover directors' expenses.
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> "59. The Respondent relies on clause 6.2.1 of the Lease, which states that the management company may "*discharge all proper fees salaries charges and expenses payable to such agents or such other persons who may be managing the Estate."* Whilst at first glance one might think that the directors fall within the phrase "*such agents or such other persons who may be managing the Estate"* the tribunal does not consider that this phase is wide enough to cover directors' expenses. The directors manage the company, not the Estate, and – particularly in the light of the general principle that in the case of uncertainty or ambiguity payment provisions in leases are construed in favour of the paying party – the tribunal considers that the directors' expenses are not payable by the Applicant [the respondent] as a matter of construction of the Lease.
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> "60. However, looking at the certificate of actual service charge expenditure for 2012 it would seem that although this item was budgeted for it was ultimately actually not charged for. Therefore, on the understanding that the Respondent accepts that it needs (if it has not already done so) to make an appropriate balancing service charge adjustment to reflect the actual service charge for 2012 the tribunal does not need to determine that the directors' expenses and are not payable as, ultimately, they have not been charged for (merely erroneously budgeted for)."

27. The factual background, so far as is apparent, to this aspect of the appeal is as follows. The appellant Management Company has appointed Warrick Estates Property Management Limited to manage the Estate on a full-time basis for which it is paid out of the service charge contributions. However in addition to those expenses the appellant Management Company, which has no source of income independent of that which can be recovered under the Service Charge to defray its expenses of this not-for-profit tenant-owned Management Company, has by its directors incurred the not unsurprising incidental costs of photocopying, printing, postal services and the odd piece of travel which it has sought to recover *via* the Service Charge.

28. There is no suggestion that any of those costs are unreasonable or have not been incurred. What is in dispute is whether or not those directors' expenses are recoverable under

the lease. Although the FFT only referred to clause 6.2.1 of the lease, it had also been argued before the FFT that these expenses were recoverable under paragraph 9 of the Fourth Schedule and possibly paragraph 3 of that Schedule already recited. Clause 6.2.1 provides as follows:

> "6. **Covenants by the Management Company**
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> " The Management Company covenants with the Landlord and separately with the Tenant…
>
> "6.2. To provide and perform the Services **PROVIDED ALWAYS** that:-
>
> "6.2.1 The Management Company may employ at the Management Company's discretion a firm of managing agents to manage the Estate and discharge all proper fees salaries charges and expenses payable to such agents or such other person whom my be managing the Estate and the cost of computing and collecting the Rent and Service Charge but if the Management Company does not appoint such managing agents it shall be entitled to include all administration costs incurred as part of the costs of providing then Services."

29. Before considering the effect of these provisions, it is important to bear in mind what the Management Company, the appellant, is and what it must do. It is a single-purpose tenant-owned company which by clause 6.2 is obligated to manage the Estate – to "provide and perform the Services". It has no source of income other than the Service Charge. If it can not discharge the costs of running itself and discharging those functions which it can not delegate to a managing agent, it will become insolvent and so be unable to discharge its contractual obligations imposed by the lease. In order to manage the Estate it must manage itself and remain in existence. A company, not being a human being, can only operate and discharge its contractual obligations through the agency of its directors. The directors therefore fulfil two roles. On the one hand they embody the company in considering and discharging its contractual duties imposed by the lease managing the Estate whether that be appointment and supervision of a firm of managing agents or doing some or all of the work itself or otherwise. On the other hand they manage the company itself in the (*de minimis*) sense of ensuring that the provisions of the Companies Act and other company regulations are complied with and the filing of all appropriate annual returns and such like failing which it will be stuck off and no longer able to observe the terms of the lease. All of that would have been known to the draftsman of the lease, and indeed is self-evident from the provisions of the lease itself.

30. Drilling down a little further, whilst the Management Company *may* appoint "a" firm of managing agents to manage the Estate, that is not necessarily co-terminus with or exhaustive of what is required to discharge its obligations to provide and perform the Services imposed by clause 6 of the lease. By appointing a firm of managing agents to manage the Estate, the Management Company does not abdicate all responsibility for discharging its obligations and functions under the lease. Rather it remains in the position that it is duty bound to ensure that it is discharging its obligations and functions under the lease and that the managing agents whom

it has appointed are properly discharging those obligations as independent managing agents. In order to appoint managing agents and also to ensure that they are properly discharging their obligations as well as itself discharging other obligations under the lease it is more likely than not that the appellant will run up some albeit relatively modest expenses unless it appoints a firm to manage itself.

31. More specifically, for example, the Management Company must meet by its board of directors to consider and approve the appointment of a managing agent; it must consider and review and supervise the performance of a managing agents; it must arrange for and approve their payment; it must consider and approve the annual service charge disputes; it must consider and discharge the other obligations imposed by the lease. All of this involves or is likely to involve expense of some sort – ranging from ink to photocopying to printing to postage and so on. The Management Company may discharge those obligations or functions itself, or (unrealistically) perhaps appoint a firm of managing agents to do so. So far as is apparent from the papers, those obligations or functions were not contracted out to Warrick Estates but retained by the appellant Management Company. What is clear is that there is an overlap between those functions and a very narrow interpretation of managing the Estate.

32. Turning to clause 6.2.1, which must be construed in the context I have outlined, it in my judgment is too restrictive and too technical or mechanistic an approach to the construction of clause 6.2.1 to draw any distinction between management of *the Estate* and management of *the Management Company*. There is no sensible distinction between the two because there can not be one without the other, and the obligations and functions overlap and are all integral to the management of the Estate. Equally, it is too restrictive to construe the clause as permitting only *one* firm of managing agents to manage the Estate and that if *one* is appointed then the Management Company can not charge its administration costs of any retained functions or obligations. For example, if the Management Company decided to appoint a firm of managing agents to manage (in a restricted sense) the Estate but another to collect rents (part of management of the Estate) but retained other functions or obligations, all of those costs would be recoverable under clause 6.2.1 provided of course such are reasonable.

33. If I am wrong about that, the directors' expenses are recoverable under paragraph 3 of the Fourth Schedule. In order to provide and discharge the Fourth Schedule obligations it is "necessary or expedient" that the directors' costs and expenses be paid otherwise the overarching Services of managing the Estate will not be properly or adequately performed which is inherent in and required for "the use and occupation of the flats in the Building".

34. These costs and expenses can equally, in my judgment, be recovered under paragraph 9 of the Fourth Schedule. Properly construed, clause 9 vests in the management company a discretion as it thinks fit and provides services or functions for the upkeep and enhancement of the Estate and benefit of the flats thereon. It can not sensibly be said that the costs and expenses of the directors necessary to enable the Management Company to function and

remain in existence so as to ensure that it discharges it functions and obligations under the lease are not "for the benefit of the flats".

Conclusions

35. For those reasons I allow this appeal on both points. In short the appellant is entitled to recover the cost of maintaining and repairing the lift under the Service Charge and secondly the appellant is entitled in principle to claim directors' costs and expenses associated with running the Estate and discharging its obligations under the lease, which include its own costs of remaining in existence as a corporate entity. Precisely what can be recoverable is something which falls outside of this field.

30 September 2014

His Honour Judge Gerald