Case No. LRX/26/2005
LRX/31/2005
LRX/47/2005

LANDS TRIBUNAL ACT 1949

SERVICE CHARGES – Reasonableness – Landlord and Tenant Act 1985, s.19 - Apportionment not reviewable - Procedure – Burden of proof before LVT - Appeal by review only.

IN THE MATTER OF THREE APPEALS AGAINST THE DECISION OF THE LEASEHOLD VALUATION TRIBUNAL OF THE LONDON RENT ASSESSMENT PANEL

BETWEEN **DR. CHRISTOPHER JOHN SCHILLING** **Claimant**

and
MRS JOAN M. SCHILLING

And Others

and

CANARY RIVERSIDE DEVELOPMENT PTD LIMITED **Respondent**
And Others

Re: Residential blocks within a mixed use development, Berkeley Tower, Berkeley Court, Hanover House & Eaton House, 12-48 Westferry Circus, London E14

Before: His Honour Judge Michael Rich QC

Sitting at: Procession House, 110 New Bridge Street, London EC4V 6JL
On 8 to 11 November 2005 and 28 November 2005

Tim Fancourt QC and Mark Sefton instructed by Eversheds for the Appellant
Jonathan Cavaghan instructed by Fairweather Stephenson for the Respondent

The following cases are referred to in this decision:

Arbrath v. North Eastern Ry. Co. (1883) 11 QBD 440
Nimmo v. Alexander Cowan & Sons Ltd [1968] AC107
Yorkbrook Investments Ltd v. Batten[1985] 2EGLR 100
Royal Bank of Scotland v. Etridge [2001] UKHL 44

DECISION

Introduction

1. These three appeals are against the Decision of the Leasehold Valuation Tribunal of the London Rent Assessment Panel ("the LVT") issued on 11th January 2005, upon an application by Dr and Mrs Schilling, together with the tenants of eight other flats (referred to as "the joined tenants"), for a determination under s.27A of the Landlord and Tenant Act 1985 that certain items in the service charges for the years ending 31st March 2001, 2002 and 2003 were not payable. The first appeal is by the Applicants in respect of certain parts of the Decision and the second is by the Respondents in respect of other parts. The third appeal is by the Respondents against an order made under s.20C of the Act, by way additional determination on 28th February 2005, that the Respondents' costs incurred on what I shall refer to as the Service Charge determination, were not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by any of the original or joined applicants.

2. It was agreed that the appeal against the additional determination under s.20C should be adjourned until after this Decision on the two appeals against the Service Charge determination. Accordingly this Decision is only on those two appeals.

3. On the first day of the hearing of these appeals, I allowed an application on behalf of the joined tenants, who had joined in the application under s.27A but had not joined in the appeal by Dr and Mrs Schilling but had been joined in the Respondents' appeals, to be joined in the Schillings' appeal. At that stage all the tenants, involved in these appeals, were represented by counsel (Mr Jonathan Gavaghan), but on the last day of the hearing he was no longer instructed. Dr and Mrs Schilling represented themselves, but had no standing to represent the joined tenants, who were, accordingly, not represented, nor did they appear. A list of the tenants so joined is contained in the Schedule to the application made to the Registrar under Rule 38 of the Lands Tribunal Rules 1996 and dated 24th August 2005.

4. These appeals were heard, by agreement, at the same time as the Respondents' appeal against a decision dated 3rd May 2005 by the same LVT under s.27A, whereby they determined that the costs incurred by the Respondents in resisting an application by Dr and Mrs Schilling for the appointment of a Manager under s.24 of the Act, were not payable as part of the service charge for the year ending 31st March 2004. I shall refer to this as "the Costs Decision". I have decided that although these appeals were heard together, it will be more convenient to issue separate decisions in respect of the Service Charge appeals and the appeal against the Costs Decision. Accordingly this Decision is concerned only with the two Service Charge Appeals.

The Tenants' Appeal

Ground 1: The Burden of Proof

5. Dr and Mrs Schilling were granted an underlease dated 9th February 2001, of Flat 131 Eaton House, together with two underground car-parking spaces, pursuant to a sale agreement dated 26th May 1999. Their flat is one of 280 flats in one of four blocks held by Canary Riverside Development PTE Limited under a head-lease, together with 45 service apartments and some commercial premises consisting of offices and restaurants. The head landlord, Canary

Riverside Hotel Properties PTE Limited, had granted four other leases of other parts of its Estate consisting of an hotel, restaurants, a health club and part of the car-park. The two companies and another also bearing the name Canary Riverside to whom the head-lease has been assigned were named as the Respondents to the application. They are all associated companies. By agreement the underlessor, and in turn its assignee, therefore joined with the head-lessor in arranging the management of the whole Estate including the residential parts.

6. During 2002, the Schillings sought to obtain information as to the costs being incurred to provide services to the residential parts of the Estate. Their discovery that the then Manager, called JSSP, was not keeping separate accounts for separate parts of the Estate, led them to seek to prosecute their Landlord under 25 of the Landlord and Tenant Act 1985 for breach of the duty to provide inspection under s.22 of documents which they knew did not exist. Their prosecutions have been stayed as an abuse of process. They did however pursue instead an application under s.24 of the Landlord and Tenant Act 1987 for the appointment of a manager. This was refused by a decision of the LVT on 5th January 2004, on grounds to which I will refer in dealing with the appeal against the Costs Decision. The landlord meanwhile accepted that JSSP had not carried out their management function satisfactorily and replaced them as from 1st April 2003.

7. The application which led to the Service Charges determination, the subject of these appeals, was brought on the same day as the LVT's decision refusing the Schilling's application under s.24 was issued. In the course of the proceedings the Applicants sought by means of orders for discovery to obtain vouchers in respect of the expenditure for which service charges were claimed for the three years during which JSSP had been the Managing Agents. Many were not forthcoming because of the way in which JSSP had carried out their functions. It was in these circumstances that the Applicants sought to have a large number of items in the Accounts for which vouchers were not produced, disallowed.

8. In respect of over 50 items which the Applicants challenged on such grounds, the LVT, in its decision, used the formula that "No sufficient evidence was furnished to enable the Tribunal to conclude that the Applicants' challenge to this item was justified". The Applicants appeal to this Tribunal on the ground that this shows that the LVT misdirected itself by failing to hold that the burden of proof for showing that the disputed costs had been incurred, fell on the Respondent.

9. The Respondents in paragraph 18 of their Statement of Case on the Applicants' appeal, in terms "accepted that, here, the Tribunal proceeded on the basis that the applicants had the burden of proof." They went on however to say "The Tribunal was correct to do so." For reasons which I will explain at once, I am by no means certain that so stark a response is necessary in order that the instant appeal should fail on this ground. However I have come to the conclusion that Mr Fancourt QC who has appeared on behalf of the Respondents both before the LVT and on this Appeal is right as to the burden of proof being upon the Applicant.

10. In civil cases, where the standard of proof is only the balance of probabilities, the burden matters only where either there is no evidence or, in the very unusual circumstance that, having

heard all the evidence, the tribunal is unable to make up its mind. Otherwise it is of importance only in determining the right to begin, which it appears the Applicants did before the LVT. From examination of the occasions when the LVT used the formula said to demonstrate error, it is apparent that the Respondents had in each case, in response to the Applicants' evidence, provided evidence of having incurred the costs and, where the reasonableness was challenged, of the standard of provision or the reasonableness of the charge as the case may be. The LVT did not reach its conclusion on any item because it was unable to make up its mind on the evidence. It did so on the balance of probability having heard the evidence. Even therefore if the LVT had mistaken the incidence of the burden of proof, I do not think that that would have vitiated the decision as made.

11. I think that this approach is consistent with the practical approach to this question adopted by Wood J. giving the Judgement of the Court of Appeal in *Yorkbrook Investments Ltd v. Batten[1985] 2EGLR 100* at p.102k when he said:

> "During argument on the issue of garden maintenance, it was indicated that registrars of county courts and those practising in this field were finding difficulty in dealing with the burden of proof when considering applications for declarations under the Housing Acts [that is the predecessor provisions to s.19 of the Landlord and Tenant Act 1985]. Having examined those statutory provisions, we can find no reason for suggesting that there is any presumption for or against a finding of reasonableness of standard or of costs. The court will reach its conclusion on the whole of the evidence. If the normal rules of pleadings are met, there should be no difficulty. The landlord making his claim for maintenance contributions will no doubt succeed, unless a defence is served saying that the standard or the costs are unreasonable. The tenant in such a pleading will need to specify the item complained of and the general nature – but not the evidence – of his case. No doubt discovery will need to be ordered at an early stage, but there should be no problem in each side knowing the case that it has to meet, provided that the court maintains a firm hold over its procedures. If the tenant gives evidence establishing a *prima facie* case, then it will be for the landlord to meet those allegations and ultimately the court will reach its decisions. The question of a reasonable charge arises in claims for a quantum merit, and the courts over the years have not been hampered by problems about the burden of proof."

12. Those observations were made in the context where it had been enacted that a service charge should only be recoverable:

> "(a) in respect of the provision of chargeable items to a reasonable standard; and
> (b) to the extent that the liability incurred or amount defrayed by the landlord .. is reasonable."

Thus the defence of unreasonableness of standard or costs arose on a claim by the landlord that he had incurred costs which the lease entitled him to recover. It is, I think implicit in what Wood J. was saying, that no one would doubt that the landlord making such a claim had the burden of proving liability under the terms of the lease. The indicated difficulty in dealing with the burden of proof was as to the defence of unreasonableness, and the solution accepts that it is for the defendant to raise a *prima facie* case of unreasonableness, whereupon the court will reach its

conclusion on the whole of the evidence. Although I do think that these observations are of some help as to the theoretical burden in respect of allegations of unreasonableness either of standard or cost, the practical approach as to reaching decisions on the whole of the evidence is of most assistance to LVTs who do not have a formal system of pleading. In regard to proof of the costs having been incurred, Wood J. had no need to decide whether the burden rested on the landlord as the party making the claim or for some other reason: that was not, I think the subject-matter of the difficulty encountered by registrars of county courts or those practising in this field. In my judgement, as Wood J. anticipated would be the usual case, liability in respect of the service charges the subject of the application to the LVT was not determined by the burden of proof, but by consideration of the whole evidence. That is enough to dispose of this ground of appeal.

13. Nevertheless, I will set out my understanding of the relevant law as to the burden of proof. A distinction must be made between the legal burden which remains constant throughout the proceeding and the evidential burden which may shift from one party to another as the trial progresses (see Halsbury's Laws 4th Edn. Vol. 17(1) at para.420). Cross and Tapper on Evidence refers to the legal burden as the persuasive burden,and puts it at p.144 "as a matter of common sense" that "the persuasive burden of proving all facts essential to their claim normally rests upon the claimant in civil proceedings." This may be tested in regard to the jurisdiction created by s.155 of the Commonhold and Leasehold Reform Act 2002 which added s.27A to the 1985 Act. An application may be made under that Section by either party for

> "a determination whether a service charge is payable and, if it is, as to –
> a. the person by whom it is payable,
> b. the person to whom it is payable,
> c. the amount payable,
> d. the date at or by which it is payable,and
> e. the manner in which it is payable"

Mr Gavaghan suggested that it would be a nonsense for the burden in regard to such matters to depend on who makes the application. It appears to me, on the contrary that the only practical way of dealing with such an application is by so treating the burden. If the applicant does not have the burden, what detemination is the LVT to make if an application is made but not pursued? It is, in my judgement, this commonsense consideration which justifies the assertion in Halsbury that "the legal burden of proof rests upon the party desiring the court to take action".

14. This does not mean that the evidential burden of proof is upon the applicant throughout. As Bowen LJ said in *Arbrath v. North Eastern Ry. Co. (1883) 11 QBD 440* at p.456:

> " Whenever litigation exists, somebody must go on with it; the plaintiff is the first to begin; if he does nothing, he fails; if he makes a prima facie case, and nothing is done to answer it, the defendant fails. The test, therefore, as to the burden of proof or onus of proof, whichever term is used, is simply this: to ask oneself which party will be successful if no evidence is given, or if no more evidence is given than has been given at a particular point in the case, for it is obvious that as the controversy involved in the litigation travels on, the parties from moment to moment may reach points at which the onus of proof shifts,

> and at which the tribunal will have to say that if the case stops there, it must be decided in a particular manner. The test being such as I have stated, it is not a burden that goes on forever resting upon the shoulders of the person upon whom it is first cast. As soon as he brings evidence which, until it is answered, rebuts the evidence against which he is contending, then the balance descends on the other side, and the burden rolls over until again there is evidence which once more turns the scale. That being so, the question of onus of proof is only a rule for deciding on whom the obligation of going futher, if he wishes to win, rests."

I accept Mr Gavaghan's submission that the fiduciary duty of a landlord to account for any service charge which he collects, and the landlord's statutory duties under ss.21 and 22 of the Act of 1985, mean that it is sufficient for a tenant to raise the absence of a proper account in order to place upon the landlord an evidential burden to satisfy the tribunal that costs have, in fact been incurred. That is a burden that the Respondent in this case accepted and discharged so that the LVT was not satisfied by the deficiencies in accounting that costs had not been incurred. That properly records the legal burden of proof, in respect of which as Bowen LJ said at p.457:

> "If the assertion of a negative is an essential part of the plaintiff's case, the proof of the assertion still rests upon the plaintiff."

15. I have felt more difficulty in regard to the question whether a service charge which would be payable under the terms of the lease is to be limited in accordance with s.19 of the Act of 1985 on the ground either that it was not reasonably incurred or that the service or works were not to a reasonable standard, is to be treated as a matter where the burden is always on the tenant. In a sense the limitation of the contractual liability is an exception in respect of which Lord Wilberforce in *Nimmo v. Alexander Cowan & Sons Ltd [1968] AC107* at p.130 stated "the orthodox principle (common to both the criminal and the civil law) that exceptions etc. are to be set up by those who rely upon them" applies. I have come to the conclusion, however, that there is no need so to treat it. If the landlord is seeking a declaration that a service charge is payable he must show not only that the cost was incurred but also that it was reasonably incurred to provide services or works of a reasonable standard, and if the tenant seeks a declaration to the opposite effect, he must show that either the cost or the standard was unreasonable. In discharging that burden the observations of Wood J in the *Yorkbrook case* make clear the necessity for the LVT to ensure that the parties know the case which each has to meet and for the evidential burden to require the tenant to provide a prima facie case of unreasonable cost or standard.

16. I am unpersuaded that the LVT in addressing item by item the elements of cost which the Applicants had put in issue in the Scott Schedule prepared at the LVT's direction, failed properly to weigh the whole evidence on the balance of probabilities.

Ground 2: Apportionment of Cost

17. The provisions contained in the underlease, incorporating relevant provisions from the head-lease, by reference to which the amount of the service charge payable as a

proportion of relevant costs is to be calculated are of considerable complexity. This may well have been unavoidable, having regard to the nature of the Estate of which the Building in which the Applicants' flats are housed forms part. The LVT commented on the extent to which JSSP as managing agents had failed to give transparency to the figures, amongst other things by using expressions for different elements of cost inconsistent with the leases, and by using the wrong formulae for apportionments, albeit in a manner which favoured the Applicants.

18. The underlease provides for the payment of a fixed proportion (in the case of the Schillings 0.33%) of the Building Services Charge as defined in clause 23.1.3 of the underlease. The like proportion of the amount which the landlord has to pay to the head landlord as a proportion fixed under the head-lease of the head-landlord's Estate expenditure is also payable under clause 25.1.2.2 of the underlease. Clause 25.1.2.1 requires the payment of the Parking Spaces Service percentage (in the Schillings' case 0.909091%) of the amount payable by the landlord to the head-landlord under clause 9.2(a)(i) of the Head-Lease in respect of Car Park Expenditure, which itself incorporates a formula set out in clause 9.1(b). The only provision for apportionment other than according to defined percentages are in the provisions of clause 26 of the underlease which permits variations in case of replanning of the layout of the Estate, which does not apply, and under clause 23.1.3.1 where the services provided to the Building which means the four residential blocks, are shared with other premises. In such case the cost to be apportioned is such part of the total cost as is reasonably attributable to the Building.

19. The applicants consider that the share of the Estate and Car park expenditure thus allocated to be apportioned amongst the residential under-lessees is unfair. They made a number of challenges in their Scott Schedule, although not to the costs of the plant room, housed within the Building, but serving the Estate as a whole. The cost of electricity used in it is however the subject of an appeal by the Respondent. So far as those complaints which the Applicants were able to make by way of appeal are concerned, Mr Gavaghan after careful analysis conceded that the complaint was in each case as to the mode by which the share to be paid was calculated in accordance with the terms of the leases. Any submission which he could make depended upon construing the limitation of recoverable service charges under s.19(1)(a) of the Act of 1985 as requiring a reasonable apportionment of costs which have been reasonably incurred. In the Applicants' statement of case it was asserted that "a service charge must be reasonable under section 19 of the 1985 Act". That is not what the Section provides. Costs are to be taken into account "only to the extent that they are reasonably incurred", but if reasonably incurred they fall to be apportioned in accordance with the terms of the lease, except if excluded by a failure to consult or otherwise under for example ss20B and 20C. The foundation of the Applicants' challenge therefore falls away and their appeal on this ground can be dismissed without the need for detailed analysis of the reasons for their, I accept, genuine sense of grievance.

Ground 3: LVT's refusal to consider The Unfair Terms in consumer Contracts Regulations 1999

20. The circumstances in which the LVT refused to delay its decision in order to reopen the hearing and the grounds given for such refusal made it unarguable that the LVT had

fallen into error in exercising an admitted discretion. Mr Gavaghan became aware of the grounds given by letter refusing the re-opening only during the hearing, and on the third day of the hearing he withdrew this ground of appeal.

21. Accordingly the Applicants' appeal must be dismissed and I turn to the four grounds upon which the Respondents have appealed.

Respondents' Appeal
Ground 1: JSSP Management charges

22. The Scott Schedule prepared by the Applicants to set out the items of the service charge in dispute contained seven items under the head of "management fees" paid to JSSP. They were in the so-called "Residential Service Charges" items 24 for year 01 in the sum of £87,748, Item 49 for year 02 in the sum of £68,103 and items 72 for year 03 and 99 in year 04, with which the LVT apparently also dealt, each in the sum of £72,200. The same figures appeared in their proportions in the Estate Services Schedule as items 24, 53 and 80. In respect of each item the reason for disputing the charge was given as

> "Unreasonable charge/ 45% of the £141,000 contract price considered reasonable in line with the quotes recently tendered by other managing agents"

and the same figure of £63,450 was proposed for each year, as being what was contended was a fair proportion of what was said to be a reasonable sum to have incurred. In respect of each item except the residential charge for year 02 the Applicants had accordingly attached an annotation of "D" meaning "Reasonableness of cost and liability disputed". In respect of item 49 the annotation was "C" which should mean "Cost and/or standard of service not considered to have been reasonably incurred", but it does not appear that this distinction was deliberate, for it was not relied on either before the LVT or before this Tribunal.

23. The LVT reduced the sums allowed in respect of these items in the same way. Firstly they reduced it by 25% on the ground that the standard of service was not reasonable. Secondly, in regard to the Residential Charge in each year, they recalculated the apportionment of the expenditure which had been incurred, so that instead of accepting the Managing Agents' figures of 48% to 32% they determined that the costs should be treated as if they were all chargeable to the Estate Service charge with the effect that the Building Service Charge would in each year bear 56.2% of the reduced cost.

24. It seems that neither the LVT nor the Applicants in dealing with the appeal realised what was, no doubt, an unintended result of what appeared to the LVT to be a more reasonable apportionment of costs which had been incurred in respect of more parts of the Estate than the Building alone. Neither side was contending for a reapportionment on that basis. The 45% which the Applicants proposed was not significantly different from the result of the variable apportionment proposed by the Respondents who are content to accept that the apportionment adopted in the Accounts should be restored.

25. The Respondents do however appeal against the reduction made to reflect the less than reasonable standard of service provided by JSSP. The LVT came to the conclusion that the standard was less than reasonable on the basis of the Respondents' own submissions and evidence to the LVT which considered the application to appoint a Manager under s.24 of the 1987 Act. A number of documents included in the Applicants' bundle also referred to sub-standard service. Indeed the Respondents themselves accepted that JSSP had proved inadequate. That was why they were replaced albeit only at the end of the period in respect of which the Applicants were challenging the service charges.. But, in spite of Mr Gavaghan's valiant attempts to persuade me on the basis of the complicated and extensive material placed before the LVT that these items were being challenged under sub-s.(1)(b) of s.19 of the Act of 1985, namely that the service was not to a reasonable standard, and in spite of the misreferencing of item 49, I am satisfied that the Applicants did not challenge these items on that ground, but only under sub-section(1)(a), namely that the costs had not been reasonably incurred.

26. I was told on behalf of the Respondents that the reason why no such challenge was made was that the Respondents had voluntarily agreed to bear the cost of additional agents to make good the deficiencies of JSSP, so that tenants would not suffer financially because of JSSP's inadequacies. It is not necessary for me to decide whether that was or was not the decision which the Applicants took, because the ambit of the LVT's jurisdiction was set by the issues joined in front of them. I think that in carefully reviewing all the material which had been presented before them they raised an issue which had not been raised by the Applicants and which they could not fairly deal with without requiring particularisation of the challenge in the Scott Schedule and giving the Respondents opportunity to reply to the matters so raised.

27. For these reasons I allow the respondents' appeal on Ground 1.

Ground 2: Integrated Reception System

28. The LVT disallowed an item of exceptional expenditure in YE03 of £28,109 for what was described as "satellite up-grade". The Applicants had challenged it on the ground that the Cable TV and aerial installations which had been promised in the original contract of sale of the flat had never been fit for its purpose and therefore needed to be replaced to meet the Respondents' contractual obligations.

29. The LVT gave three reasons for disallowing this expenditure as not having been reasonably incurred, of which two were in my judgement unjustified. There had been a dispute as to whether an up-grade was necessitated by BskyB changing the frequency bands on which it broadcast. They said that there was no independent evidence of this. That may have been technically correct in that the evidence did not come from a witness called as an expert. Nevertheless there was evidence which the LVT should, not, in my judgement, have rejected only on the ground that they had not heard of such change: although they sit as an expert tribunal, I think they should at least have identified their own expertise to reject the evidence which they had been given.

30. Secondly, they said that they had not had their attention to the consultation required under s.20 of the 1985 Act. Although under that section a tenant's contribution is limited unless the requirements of that section have been complied with or dispensed with, it is in my judgement not necessary for a landlord responding to a tenant's application to the LVT to prove compliance with such requirements, unless they are put in issue by the applicant. The good sense of an LVT abiding by such rule is demonstrated by the fact, admitted before this Tribunal, that in fact s.20 had been duly complied with.

31. But the first reason which the LVT gave for disallowing this expenditure was that they came to the conclusion that

> "On a balance of probabilities, the facts indicate an installation which did not work properly, so that the costs incurred were to put it right and this item should be classed as "snagging" work rather than as maintenance within the underlease."

Mr . Fancourt sought to argue that the Schillings were stopped from so claiming by their discontinuance of County Court proceedings claiming, as I follow them, a declaration that the expenditure was "capital expenditure" under the underlease. I have not been able to identify where and how the issue decided by the LVT in the Applicants' favour had already been determined against them by a court of competent jurisdiction.

32. The conclusion that the original installation never worked properly does not, of course determine whether the work which was undertaken did not include some improvement as well as remedial work. No evidence as to that seems to have been before the LVT and it could be determined before this Tribunal only by my ordering re-hearing, which appears to me to be disproportionate to the issue. Accordingly I will dismiss the Respondents' appeal on ground 2.

Ground 3: Garden Maintenance and Irrigation Costs

33. These items amounting together to £50,592 for YE01, £37,282 for YE02, £50,971 for YE03 and £47,450 for YE04, being, in each case, 77% of the total cost incurred, were challenged by the Applicants on a number of grounds which the LVT rejected. They were, none the less, disallowed by the LVT to the extent that they held, without hearing any evidence or submission to support such a finding, that the gardens were common parts within the meaning of the definition in the head lease. They therefore held that these costs should have been allocated to the Estate Services Charge, which would fall to be apportioned to the Building Services Charge only to the extent of 56.2%.

34. Issue was joined before this Tribunal as to the state of the evidence as to the use of the gardens not only by residents but also by other occupiers of the Estate, and whether it was necessary that an area had to be intended for the use of all the occupiers in order that it should fall within the definition of "Common Parts". In my judgement these arguments are quite unnecessary to resolve. The definition is that

> " "Common Parts" means those parts of Riverside (Phase1) Estate … which are from time to time intended for common use ….and designated as such by the Landlord with the agreement … of the Tenant …" (my underlining).

It is quite clear that the gardens had not been so designated. The LVT's reallocation of these costs to the Estate Services Charge was therefore wrong and the Respondents' appeal on ground 3 must be allowed.

Elecricity Charges

35. The electricity supply to the Estate was by a high voltage supply, which was then distributed to consumers and to the estate plant. It was accepted that not all the meters were working properly until 25th February 2003. The LVT therefore was not satisfied that the costs relied on in the accounts had in fact been fully incurred. They made a number of reductions saying, for example, in respect of the Car Park Service Charge for YE02

> "sufficient doubt has been cast upon the accuracy of electricity charges for any evidential burden to have shifted: what is required is cogent evidence from the Respondent that the challenged charges for electricity are actually accurate."

The respondents appeal, in respect of the items where the LVT has used that reasoning, on the ground that the LVT has misapplied the burden of proof. It seems to me that the LVT was doing no more than describe its process of reasoning in complete accordance with the explanation of the shifting evidential burden which I sought to set out in paragraph 14 of this Decision. The speech of Lord Nicholls of Birkenhead in *Royal Bank of Scotland v. Etridge [2001] UKHL 44* to which the Respondents referred in their statement of case, is, in my judgement, an example of the application of this process of judicial reasoning in the context of an allegation of undue influence, and does not lead to any doubting of the explanation given by Bowen LJ in the *Arbrath Case.* This ground of appeal should therefore be dismissed.

36. In respect of the charge on the Residential Service Charge for the year ending 31st March 2003 (item 56 on the Scott Schedule) a different point is taken. The charge in the account was £263,770. The LVT reduced it to £150,000. Their reasoning was in two stages. They were dissatisfied as to the accuracy and reliability of the metering before 25th February 2003, but accepted that the budget for the year ending in March 2004 was "a very precise figure ..calculated .. after all problems had been overcome and all plant was being correctly metered and charged". It was, on this basis that "the Tribunal has decided that a reasonable starting point would be £200,000 (including admin and maintenance)", but they then made a further reduction of 25% to arrive at their figure of £150,000 which they said "should be applied to reflect the uncertainties which still existed during the period". The Respondents maintain that this second reduction must involve double counting. I have hesitated before accepting that criticism, having regard to the respect that the LVT's careful decision, given as it seems to me with scrupulous fairness, commands. But I find myself forced to that conclusion. The LVT regarded it as suspicious that the charges for YE03 had risen so markedly from the £50,982 and £75,293 charged for the two previous periods. They

accepted that the earlier figures may have involved under-charging because a large number of units was not accounted for. They therefore looked for a degree of certainty to the budget for 2004, based, as they accepted, on verifiable calculation. Although they do not set it out, the figure used in the budget for 2004 is ascertainable as £212,598 including as they say "admin and maintenance". Thus their "starting point" of £200,000 was already a rounding down. No further uncertainty justifying a further reduction of £50,000 has been explained, and the process by which the LVT reached the figure of £200,000 does not, in my judgement, leave room for such reduction without reason. I therefore allow the appeal on this ground to the extent of £50,000.

Conclusion

37. These appeals have all been heard "in the first instance" as reviews. That is to say that in the hope of avoiding unreasonable expenditure of time and costs, this Tribunal has not re-heard the evidence, even in regard to the matters the subject of appeal. I have been conscious that this has meant that this Tribunal's decision may work somewhat arbitrarily, according to the LVT's reasoning, rather than arriving at the conclusion at which either the LVT would have wished to arrive, if it had not fallen into what I have decided was error, or at which this Tribunal might have arrived on the evidence. I think that this may have worked to the Applicants' advantage in of the Integrated Reception System and possibly a little against them in respect of the Garden Maintenance, but even on the basis upon which these appeals proceeded, they occupied the majority of three days out of the four and a half days taken by the appeals which this Tribunal has so far heard, and any other mode of appeal would, I think, have certainly been disproportionate.

6 December 2005

His Honour Michael Rich QC