UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT - service charges - power given by lease to the Manager to vary the percentage contributions of occupants - whether power properly exercised

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE SOUTHERN RENT ASSESSMENT PANEL

BETWEEN **JULIAN SHERSBY** **Appellant**

and

GRENEHURST PARK RESIDENTS CO LTD **Respondent**

Re: 10 Grenehurst Park,
Capel,
Dorking
Surrey RH5 5GA

Before: His Honour Judge Huskinson

Sitting at 43-45 Bedford Square, London WC1B 3AS
on 11 and 12 November 2009

Mr Julian Shersby (the Appellant) appeared in person
Ranjit Bhose instructed by Brethertons LLP, for the Respondent

DECISION

Introduction

1. The Appellant appeals from the decision of the Leasehold Valuation Tribunal for the Southern Rent Assessment Panel ("the LVT") dated 14 August 2007 whereby the LVT decided certain points upon an application to it by the Appellant under section 27A of the Landlord and Tenant Act 1985 as amended in relation to certain service charges payable by the Appellant as lessee to the Respondent as lessor and Manager (as defined in the relevant lease) in respect of 10 Grenehurst Park which the Appellant holds from the Respondent on a long lease.

2. The LVT decided certain points favourably to the Appellant and certain points against him. The Appellant sought to challenge the LVT's decision insofar as it was against him but was refused permission to appeal by the LVT and was granted limited permission by the Lands Tribunal. In summary the points which arise on this appeal are as follows. Under the terms of the Appellant's lease there is provision entitling the Manager in certain circumstances to alter the percentage proportion of the Manager's overall expenditure which is payable by the Appellant as service charge. Thus the lease laid down an original specified proportion of 2.8% of the Manager's overall expenditure, but in 2003 the Manager purported to alter this percentage as more particularly described below. The Appellant contended that he was only obliged to pay at the rate of the original percentage proportion. When the matter came before the LVT the Appellant accepted that he was not challenging the amount of the service charge or the standard of the works done, but the Appellant sought to argue that the proportion of the service charge he was being asked to pay was inequitable. The LVT appears to have understood the Appellant's case as being that he was asking the LVT to vary his percentage contribution. Understanding the matter in this way, the LVT concluded it had no jurisdiction to consider the point. In defence of the LVT I should observe that it may well be the Appellant did not sufficiently clearly explain to them the precise nature of the point he was seeking to raise, which was not that he was asking the LVT to vary his percentage contribution but was instead that he was asking the LVT to rule upon whether he had any obligation to pay service charge calculated upon a percentage contribution different from that specifically provided for in his lease. In essence he was saying he had only to pay as expressly provided for in his lease and that the purported variation of his percentage contribution had not been validly made. When the Appellant's point is understood in this manner it is clear (as was conceded by the Respondent in this appeal) that the LVT did have jurisdiction to consider the point, because the LVT could only properly decide the amount of any service charge payable (in accordance with section 27A of the Landlord and Tenant Act 1985 as amended) if the LVT first decided whether the Appellant was obliged to pay only in accordance with his original percentage contribution or whether the Manager had validly altered that percentage contribution so as to be entitled to require him to pay at the altered (and higher) rate. There was also a point regarding insurance contributions which the Appellant was granted permission to challenge in this Tribunal. In due course, bearing in mind that having declined jurisdiction the LVT had not considered at all the facts regarding the validity of the variation in the Appellant's contribution proportion, this Tribunal ordered that the matter should be dealt with by way of a rehearing regarding whether the Appellant's contribution proportion had been validly altered and regarding the question of the insurance contributions.

3. The Grenehurst Park Estate was inspected by the LVT who described it in the following terms:

> "The estate comprises a former mansion house, now converted into 17 flats each held on a long lease, together with a number of detached freehold houses and mews cottages which are set in the extensive grounds. In all there are 40 residential units including the flats. The main house also contains an indoor swimming pool and leisure centre to which all residents of the estate have access. Apart from the private gardens belonging to the detached freehold houses the grounds, including a tennis court, are also available for use by all residents. Drainage is by a Klargester tank (private sewage system) used by all the residential units."

The LVT described the estate as being in very good order, well maintained and attractive. The LVT commented that it was evident that maintenance and repairs had been carried out a regular basis.

4. Part of the problem that has arisen in this case arises from the fact that the Grenehurst Park Estate comprises the converted mansion (comprising the 17 leasehold premises) and comprises a further 23 freehold units constructed within the grounds. So far as concerns repairs to the main structures of the various buildings, all the freeholders are responsible for repairing their own properties. However as regards the mansion itself the Respondent (as the manager of the estate and as the person defined as "the Manager" in the leases) is responsible for repairing the main structure. Thus the costs of the repairs of the main structure of the mansion constitute one of the ingredients of the expenses incurred by the Respondent which then has to be recovered from the various occupants, namely the 17 lessees and the 23 freehold owners. When the estate was first laid out by the developer it was then sold to the first purchasers with a guarantee that the service charge would not increase for the first five years. The level of service charge thereby set was not enough to build up any reserves. In due course it became clear that substantial expenditure would become necessary for the purpose of keeping the main structure of the mansion in repair and this resulted in a dissatisfaction amongst certain occupants, principally (for obvious reasons) the freeholders, in that it was considered of dubious fairness that the freeholders should each have to pay 100% of the cost of repairing their own buildings but should also have to pay, through the service charge, a proportion of repairing the mansion which provided the homes of the 17 lessees. The matter was further complicated by the fact that it could not be said that the mansion provided facilities and accommodation solely to the lessees because there were certain communal facilities on the ground floor of the mansion (facilities which could be enjoyed not only by the lessees but also by the freeholders) and there was also a swimming pool which, although situated away from the footprint of the mansion, was accessible principally through the common parts at ground floor level of the mansion (at least this was the position until more recently a separate access which involved little intrusion into the common parts of the mansion was adopted).

5. Again in summary at this stage it can be noted that between 2000 and 2003 discussions occurred and consideration was given in relation to the altering of the original percentage contributions towards the Respondent's expenditure in running the estate so as to reflect the foregoing point. There is an express provision in the leases of the flats in the mansion and also in the transfers of the freehold units entitling the Respondent in certain circumstances to amend

the percentage contributions to be payable by the various occupants. The principal question before this Tribunal is whether the Respondent has validly done so.

6. As well as this principal point (namely that it had validly amended the percentage contributions) the Respondent took certain subsidiary points which can be summarised as follows:

(1) The Respondent contended that as a decision of this Tribunal would only bind the Appellant and the Respondent and as the estate included 39 other units (of which 23 were freehold and could not in any event be made subject to proceedings before a leasehold valuation tribunal or this Tribunal under section 27A) this Tribunal, although it possessed jurisdiction to decide the points raised in the present case, should decline to exercise such jurisdiction but should leave the parties to take proceedings in the county court to which all parties, including the freeholders, could be joined and become bound. Mr Bhose quite rightly did not pursue this point and it was formally withdrawn and I need say no more about it.

(2) The Respondent also sought to argue that by reason of an application having been made to the LVT by the Appellant in 2005, which raised points including the principal point with which the present case is concerned (namely the validity of the purported variation of the percentage contributions), and as the Appellant had withdrawn that application shortly before a hearing, the matter should be dismissed by this Tribunal as an abuse of the process of the Tribunal having regard to the Leasehold Valuation Tribunal (Procedure) (England) Regulations 2003 regulation 11. No such argument had been raised in accordance with regulation 11 before the LVT. During the course of the closing submissions I made clear that I would not dismiss the application under regulation 11 and consequent upon that Mr Bhose formally withdrew his argument that I should do so. Accordingly it is not necessary for me to give any further reasons upon that point.

(3) As regards the insurance premiums, which the Appellant seeks to challenge in respect of all years from and including 1997, Mr Bhose raised a separate argument (ie separate from the principal point upon the construction of the lease) namely that the Appellant must be taken in respect of years prior to 2005 to have agreed or admitted the amounts payable so as to be precluded from raising any argument in relation thereto by section 27A(4). This argument is considered in more detail below.

7. At the hearing the Appellant appeared in person. He had prepared his case most thoroughly and had submitted a detailed amended statement of case and separately a detailed skeleton argument. He had also prepared a witness statement which appears in the bundles at pages 169 to 182 which was accompanied by various supporting documentation. The parties had helpfully prepared trial bundles which extended to 1169 pages. At the hearing the Appellant gave evidence himself and he called to give oral evidence Mr Chris Donlan, Mr Mark Love, Ms Grace Cahalane (who were or still are lessees of apartments in the

mansion) and he also called Mr Christopher Hunt BSc, MRICS as an expert witness. On behalf of the Respondent Mr Bhose called to give oral evidence Mr Robert Whitley (who is the freeholder of 41 Grenehurst Park and who has been a director of the Respondent since 1999), Mr George Kroussaniotakis (who is the lessee of apartment 12 and is now a director of the Respondent) and Mr Peter Kyte FRICS, who gave expert evidence and also gave evidence regarding the advice which he gave to the Respondent in 2002 and 2003. Mr Bhose also submitted brief written statements supporting Mr Whitley's evidence from certain other persons who he did not call as witnesses. Mr Shearsby objected to this and invited me to attach no weight to these statements as he had been unable to cross examine their makers.

The background facts

8. A brief summary of the facts has been given above. I set out below certain background facts which are either uncontroversial or, insofar as there is any disagreement regarding them, I find them as facts. I deal later when summarising the oral evidence with the more controversial factual points.

9. I have already described the Grenehurst Park Estate. This was developed and sold off by Cala Homes (Southern) Limited in the early 1990s, the disposals being by way of long leases (as regards the 17 leasehold apartments in the mansion) and freehold transfers (as regards the 23 freehold units in the grounds). The leases were granted by Cala as lessor to the relevant lessees with Grenehurst Park Residents Co Ltd (ie the Respondent) joining as a party to the lease and being described in the lease as "the Manager". In due course Cala sold the freehold of the estate insofar as it remained in Cala's hands (including of course the freehold reversion upon the mansion) to the Respondent such that after that date the Respondent has constituted both the Lessor and the Manager under the terms of the relevant leases (although I understand Cala continues to own some small pockets of land on or next to the estate).

10. The Appellant holds apartment 10 on the terms of a lease dated 3 May 1991. The lease defined "the Building" as in effect being the mansion and it defined "the Estate" as being the Lessor's estate at Grenehurst Park with the further provision that the Estate was to include

> "all or any other land or lands at Grenehurst Park, Horsham Road, Capel which the Lessor shall at any time within 25 years of the date hereof declare to be part of the Estate".

Thus it was contemplated that the Estate might be extended. Recital (D) made clear that the Respondent was a company incorporated with the object of owning, controlling and carrying out etc the management maintenance etc and insurance of the amenity lands and the main structures and performing the obligations contained in the Fourth Schedule

> "… it being the intention that the total Service Charge be divided between the lessees of the Flats and the owners of the Houses".

11. By clause 9 of the lease the Respondent as Manager covenanted to observe and perform the covenants in Part I of the Fourth Schedule which included obligations to keep the main structures (principally the main structure of the mansion) properly repaired (paragraph 14.4) and to keep the mansion and certain other matters insured in the full reinstatement value (paragraph 17) and also to pay all insurance premiums etc in relation to the amenity lands including the sewage treatment plant and the leisure facilities and the common parts of the Building. The lease contained two provisos at the end of Part I of the Fourth Schedule making it clear that the Respondent was at liberty to add to any of the items of expenditure specifically listed any other items of expenditure (including provision for future anticipated expenditure). It was further provided that all costs expenses and liabilities incurred by the Respondent should be recovered from the owners of the houses and the lessees of the flats so that no residual liability should fall upon the Respondent.

12. So far as concerns the service charge the lease contained the following provisions:

(1) The lease reserved as rent payable to the Manager the "Service Charge (which expression shall include any interim payments)".

(2) By clause 3.1 the lessee covenanted to pay to the Respondent as Manager without any deduction the Service Charge. Clause 3.2 to 3.8 are in the following terms:

> "3.2 The Service Charge shall be the percentage proportion applicable to the Premises as set out in Part II of the Fourth Schedule of the aggregate expenses and outgoings incurred by the Manager during the Manager's Financial Year in carrying out its obligations and performing the covenants contained or referred to in Part I of the Fourth Schedule (including the provisions for future expenditure therein mentioned).
>
> 3.3 ….
>
> 3.4 The amount of the Service Charge for the Manager's Financial Year shall be ascertained and certified by a Certificate (hereinafter called "the Certificate") signed by the Manager's Accountants or Auditors or Managing Agents (at the discretion of the Manager) acting as experts and not as arbitrators as soon after the end of the Manager's Financial Year as may be practicable and shall relate to such year in manner as hereinafter mentioned.
>
> 3.5 A copy of the Certificate for each Manager's Financial Year shall be supplied by the Manager to the Lessee on written request and without charge to the Lessee.
>
> 3.6 The Certificate shall contain a summary of the expenses and outgoings incurred by the Manager during the Manager's Financial Year to which it relates together with a summary of the relevant details of figures forming the basis of the Service Charge and the Certificate (or a copy thereof duly certified by the person by whom the same was given) shall be conclusive evidence for the purposes hereof of the matters which it purports to certify.

3.7 On the 25th day of December in each calendar year or at the beginning of the Manager's Financial Year if the same shall be altered by the Manager the Lessee shall pay to the Manager the Manager's estimate of the Service Charge for the Manager's Financial Year.

3.8 As soon as practicable after the signature of the Certificate the Manager shall furnish to the Lessee an account of the Service Charge payable by the Lessee for the year in question due credit being given therein for all interim payments made by the Lessee in respect of the said year and upon the furnishing of such accounts showing such adjustment as may be appropriate there shall be paid forthwith by the Lessee to the Manager the amount of the Service Charge as aforesaid or any balance found payable. Any amount which may have been overpaid by the Lessee by way of interim Service Charge payment shall be credited against the liability of the Lessee to payment of the Service Charge for the following year."

(3) Part II of the Fourth Schedule set out the percentage proportions in respect of each plot on the estate. The proportion depended upon the type of the property which extended to the following types, namely studio flat, one bedroom flat, two bedroom flat, one bedroom bungalow, two bedroom cottages, two bedroom new houses, five bedroom new houses. The percentage proportion allocated to the Appellant's flat was 2.8%, it being a two bedroom flat.

(4) Part III of the Fourth Schedule is central to the present case and provides as follows:

"Variation of Proportions

If in the opinion of the Manager it should at any time become necessary or equitable so to do the Manager shall recalculate on an equitable basis the percentage proportions appropriate to the properties on the Estate and notify the owners thereof accordingly and in such case from the date specified in the notice the new proportion notified to the Lessee in respect of the Premises shall be substituted for that set out in Part II of this Schedule and the new proportions notified to the owners of the other properties on the Estate in respect of their properties shall also be substituted for those set out in Part II of this Schedule."

5. Clause 11.5 of the lease is in the following terms:

"If in the opinion of the Lessor it should at any time become necessary or equitable to do so by reason of any of the premises in the Estate ceasing to exist or to be habitable or being compulsorily acquired or requisitioned or in the number being increased or for any other reason the Lessor or its Surveyor shall recalculate the Service Charge share payable by the Lessee either as appropriate to the remaining premises (but in the same ratio as the existing

shares) or as appropriate to all the premises (as the case may be) and notify the Lessee and other lessees accordingly and in such case as from the date of such event the new share notified to the Lessee in respect of the Premises shall be substituted for that referred to in Clause 3.2 hereof and all reference to the Lessee's Service Charge share shall be construed as reference to the new Service Charge share recalculated."

(6) The lease also reserved by way of rent payable to the Manager the proportion of the insurance premium payable by the Lessee in accordance with Clause 4. Clause 4 was a covenant by the Lessee to pay the Manager

> "… from time to time the proportion of the insurance premium as determined by the Manager payable by Manager in respect of the Premises."

The lease defined the Premises as including the window frames and the door frames and the plaster on the ceilings and the walls but not including the parts of the main structure which surround lie within and support the flat.

(7) As regards the insurance premiums Cala had reached some percentage allocation as between the 17 flats for the payment of insurance premium, which covered the reinstatement of the mansion and the garages which were let to the lessees and also covered all the communal facilities including the swimming pool and the sewage works and public and occupiers liability. Cala had adopted some percentage division based, it is thought, on the original sale value of the flats, such that the Appellant's apartment 10 was to bear 6.0156% of the insurance premium. The Appellant was billed for these insurance premiums (being a payment to be made separately from the service charge) for all of the years 1997 to 2004 inclusive. However for the years 2005 onwards the Appellant has argued that he is being improperly billed and has declined to pay, which has resulted in county court proceedings (which at present are stayed) and to an arrangement whereby the Appellant has paid all but 10% demanded of him on account. At page 932 there is an insurance schedule compiled by Mr Whitley showing the amounts charged to the Appellant in each year.

13. A specimen transfer of a freehold unit is in the bundle at pages 130 and following. The transferee was granted certain easements including rights over the mansion for the purpose of access to and egress from the leisure facilities. The transferee covenanted to pay a rent charge which was effectively identical to the provisions contained in the leases regarding service charges. Once again there was a provision in Part III of the Fourth Schedule of the transfer giving the same power to the Respondent to recalculate on an equitable basis the percentage proportions appropriate to the various properties on the estate.

14. The board of directors of the Respondent became made up of two owners from the apartments (ie the flats in the mansion) two from the cottages and two from the houses, although at the time of relevant resolutions described below there was only one director from the cottages so that there were five directors in all. In November 2000 the Respondent

circulated a review questionnaire to the various occupants which included a question regarding whether the present board structure was acceptable, there being equal numbers from each group, ie from the apartments, the cottages and the houses (bundle page 417). The response to whether this was acceptable was recorded as being a unanimous yes (bundle page 418). The Appellant did not dispute there was such a questionnaire or that those that responded gave a unanimous yes answer, but he observed that he and certain other lessees felt the questionnaire was biased and he thought it was pointless having regard to the attitude as he perceived it of the board to make any objection. The questionnaire also raised for consideration and discussion the question of whether it would be desirable to make alterations regarding expenditure and recovery of expenditure including separating some of the expenditure from expenditure dealt with as relating to communal facilities.

15. In 2001 the Respondent decided it should reconsider the service charge percentages. This was principally because the cost of repairing and maintaining the mansion had risen dramatically over the previous three years whilst the expenditure on the communal parts of the development had held steady. The Respondent noted that the original developers had made no allowance for the likely costs of repairing the mansion into the future and that it had only become apparent later that this was so, once the mansion started to age (from the repaired and renovated state as left by the developer). The Respondent wished to consider the perceived unfairness to freehold owners being required to contribute pro-rata to the maintenance of the mansion but bearing the entirety of the cost of maintaining their own houses. These questions were discussed at a residents' meeting, held immediately after the Respondent's AGM on 16 December 2001, at which it was decided there should be set up a sub committee of non-board members to report back with suggestions regarding alteration in the service charge proportions. The Appellant put himself forward for this sub-committee and was elected to it. He served on it with one other lessee and two freeholders.

16. This sub-committee reported back on 30 May 2002. The introductory paragraph read as follows:

> "The present methodology we use to manage GP expenses and to set the related fees for residents is based on a formula originally set up by the developers – Cala. **This methodology has proved to be no longer appropriate, equitable or workable** given the changed expense profile and changes in other circumstances over the past 10 years or so. Inevitably, this situation has given rise to bad feeling amongst the residents and a scenario where it has been impossible to achieve agreement on how expenses & fees should be equitably managed & set going forward."

(emphasis added)

The report bore the Appellant's name as one of the contributors. The report proposed for consideration the division of overall expenditure into a common pot (contributed to by all 40 units) and a house pot (contributed to by the 17 leasehold units). The report went on to propose a method as to how and in what proportions the contributions of the various occupants to each pot should be made. As regards the repair of the mansion it was suggested that a proportion (namely 82.5%) should be placed in the house pot (and thus payable by the 17 lessees) and 17.5% should be placed in the common pot (and payable by everyone – this reflecting the usage of part of the mansion by the freeholders for leisure purposes). There is no

record in any of the documents before me that the Appellant sought to disassociate himself from this report.

17. The recommendations in the sub-committee's report were not agreed to, there being various objectors. The Respondent decided on 15 July 2002 to take advice from a specialist chartered surveyor. Kyte & Co were identified and in due course Mr Kyte was instructed.

18. On 21 October 2002 Mr Kyte reported (bundle P1151 and following). He gave his firm opinion that the present arrangement regarding the recovery of service charges was inequitable. He stated that the expenditure incurred in running the mansion was the crux of the problem. He proposed that the costs of repairing and maintaining the mansion should be allocated between the residents on an area basis. He was not instructed to measure the building but he understood that the area of the flats was 15815 sq ft and the area of the leisure block was 1528 sq ft, which represented 8.81% the total of 17343 sq ft. He suggested the costs allocated to the leisure facility should be divided between all unit holders as everyone could use it and that the cost allocated to the flats should be borne between the 17 flats. Thus he suggested that 91.19% of the costs relating to the mansion should be paid from the house pot and 8.81% should be paid for from the common pot.

19. Mr Kyte's report was made available to the occupants who made observations and in some cases objections regarding it. Mr Kyte was invited to prepare a supplemental report which he did – it is dated 17 March 2003. In summary he maintained his original advice. He advised that legal advice should be taken to ensure correct procedures were established. Mr Kyte gave evidence to the Tribunal. He confirmed he is a surveyor with about 30 years experience in the field of property management.

20. The Respondent did take legal advice from its solicitors who emphasised that the Respondent must act in good faith and on a reasonable basis when reaching any decision under Part III of the Fourth Schedule. The solicitors reminded the directors of the Respondent that they had an obligation to act in the best interest of the Respondent as a whole and should not be voting or making decisions on the basis of their own personal interests.

21. The board of directors of the Respondent met to consider Mr Kyte's second report on three occasions, namely 31 March, 1 April and 17 April. Various possible alternatives or compromises were considered. Ultimately the Respondent decided that the service charge proportions should be recalculated and should be levied upon the following basis, namely:

(1) As regards the expenditure on the mansion this was to be borne as to 90% from a house pot (to be divided between the 17 lessees) and 10% from the common part (to be divided between all of the occupants). It was decided that the proportion of contribution of the lessees as between themselves should remain the same for the purpose of contribution into the house pot. As regards the common pot they decided upon altered contributions with the result that the Appellant's contribution of 2.8% was reduced to 2.61%. They also reached a decision regarding how certain monies held in a reserve fund should be dealt

with. The Respondent decided that the new rates should not apply from the beginning of the then current service charge year but should commence on 1 July 2003.

(2) On 18 May 2003 the Appellant was notified of the sums payable by him into the house pot and the common pot by way of an amended payment for that year. Thereafter each year the Respondent demanded in advance a payment based upon the estimated expenditure in the forthcoming year. This demand was for a specified percentage proportion of the overall expenditure (ie the common pot expenditure and the house pot expenditure added together). This percentage proportion of the overall expenditure was calculated by applying 6.29% (which was the Appellant's new percentage of the house pot expenditure) to the house pot expenditure and 2.61% (which was the Appellant's new percentage of the communal pot expenditure) to the communal pot expenditure and then expressing the total amount claimed from him as a percentage of the total expenditure. Thus by way of example for the 2005 service charge year the Appellant received in late 2004 a demand requiring him to pay 3.49828% of the estimated aggregate expenditure for the forthcoming year.

22. Five or six lessees were sufficiently concerned regarding the proposed altered percentage proportions that they decided to seek legal advice, which they obtained from Anthony Tanney of Falcon Chambers in July and October 2003. As a result of that advice all of the lessees, save only the Appellant, commenced to pay service charges on the basis of the altered proportions.

23. On 26 September 2005 the Appellant made an application to the LVT under section 27A seeking to challenge the service charge payable for the years 2001 to 2007 inclusive. The basis of the complaint was the reapportionment of the service charge percentages. The Appellant did not make any complaint in this application regarding the payment of any insurance premiums which, as already noted, had been paid by the Appellant without complaint in respect of the years 1997 to 2004 inclusive. The Respondent filed documents in response to this application to the LVT. In due course directions were given and a hearing was set for 27 and 28 April 2006. However by letter dated 13 April 2006 the Respondent was notified that the Appellant had withdrawn his application.

24. In the present application to the LVT (ie the application under appeal) the Appellant included in his application not merely the question of the reapportionment of the percentage contributions (and also certain other matters which are no longer before this Tribunal) but also the question of the insurance contributions payable by him in respect of all years from and including 1997.

25. Despite the provisions in Clause 3.4, 3.5, 3.6, and 3.8 of the lease for the preparation of a Certificate after the end of each financial year showing the amount of the service charge for that financial year and requiring either payment by a lessee of any shortfall (ie shortfall when the interim service charge is compared with the final service charge) or for the crediting of any surplus against future payment, none of these provisions have been operated by the Respondent. Mr Whitley made this clear in his evidence. What has happened in every year is that in advance of the commencement of the financial year the Respondent has made an

estimate of the expenditure upon all of the various relevant heads of expenditure and has then demanded from each occupant their appropriate proportion of this, such proportion being (prior to 1 July 2003) calculated in accordance with the proportions originally laid down in the leases and transfers and being calculated from and after 1 July 2003 on the basis of the new proportions adopted by the Respondent in relation to the house pot and the common pot, with the occupant's overall percentage proportion of the total expenditure being calculated as explained in paragraph 21(2) above. Thus all of the sums demanded by the Respondent from the Appellant in respect of service charges have been demanded under clause 3.7 as being the Respondent's estimate of the service charge for the forthcoming financial year. The Respondent has apparently deliberately not sought to implement the provisions for obtaining a Certificate and working out any shortfall or surplus because (a) that would involve additional costs in obtaining an expert's certification and (b) because the Respondent has concluded that it is preferable for all occupants to have certainty as to what they are going to have to pay in any particular year and the Respondent does not wish occupants to find that they are billed for a shortfall at the end of the year.

The oral evidence

26. The Appellant gave evidence which included the following matters:

(1) The Appellant made criticism of the personalities of the directors of the Respondent over the years, both from reports he had received from others and on his own account, including criticism such as the following namely: the two leaseholder directors were often aggressively and loudly shouted down if they made suggestions, the board was parsimonious and cheese paring in dealing with expenditure to the mansion; there was an acrimonious culture of discussion and decision making; the two persons in due course elected to be the leasehold directors (Mr Brodie and Mr Middleton) were well intentioned but were naturally conciliatory personalities who found it very difficult to stand up to the frequently bombastic and intimidatory approach of the freeholder directors; and that there was a culture of fear and intimidation that most of the lessees felt they lived under.

(2) Mr Kyte was initially only briefed by a freehold director and may have been given the impression that there was a widespread consensus on the estate for a change to the basis of the service charge apportionment. The Appellant was asked whether he impugned the integrity and independence of Mr Kyte. This question was repeated several times. The Appellant gave equivocal and grudging answers and did not take the opportunity of stating that he accepted the integrity and independence of Mr Kyte. Eventually however he accepted that he was sure Mr Kyte did the job to the best of his ability.

(3) The Appellant did not accept the accuracy of the various minutes of the board of the Respondent, which he submitted were usually written to reflect the views of the freeholders. The Appellant accepted that he could not point to any letters from him in the extensive bundle challenging any minutes or asking for any

amendments to be made to the minutes. The Appellant said there were a culture of rude and hostile reaction to any request for documents and that he had assessed the nature of those controlling the Respondent and thought he would be unlikely to be received in any positive way if he made any such suggestions. The Appellant accepted that he was a member of the four person sub-committee which produced the above mentioned report regarding the potential reapportionment of service charges. However the Appellant stated he did not endorse the recommendation of the sub-committee. He accepted that his name was on the report and that he did not put anything in writing at any stage disassociating himself from the report. However he maintained that the sub-committee report was written by Mr Thackray.

(4) The Appellant said that he had always been of the view that no variation was possible as to the percentage proportion contributions because there was no legal power to alter such proportions without unanimous agreement and probably without there being executed some legal document to vary the lease.

(5) The Appellant suggested that the directors of the Respondent may have found it impossible to separate their personal interest from the proper consideration of the Respondent when deciding upon the variation in the service charge proportions.

(6) As regards the questionnaire regarding the make up of the board of the Respondent and the record that all persons responding felt the make up of the board was satisfactory, the Appellant stated that this was very contentious and that he and other lessees felt the questionnaire was biased and that he knew it would hopeless to raise concerns because of the attitude of the board members where the freeholders were in the majority.

(7) The Appellant contended that at the crucial meeting where the new proportions were adopted the vote may have been unanimous, but the two leaseholder directors were extremely unhappy with the decision and only voted for it because otherwise a result even less favourable to the lessees was at risk of being voted through by the majority freehold directors.

(8) As regards his withdrawal of the 2005 application to the LVT the Appellant stated that he did not think the case had proceeded correctly and he did not have time to draw together all the necessary material and he understood that he could make a further application raising the points in issue.

27. Mr Mark Love gave evidence. He was a lessee of an apartment from 1994 to 2002. He disagreed with the proposal to alter the service charge proportions and said that all owners had freely bought into the Grenehurst Park Estate knowing what the service charge percentages were and nothing had fundamentally changed to justify a reallocation. He said that other occupiers, both leaseholders and freeholders, had concerns regarding certain aspects of the Respondent's management but these concerns rarely surfaced due to the abrasive response they

received from the Respondent. Mr Chris Donlan gave evidence. He also said that the leaseholder directors were elderly characters who were easily won over by the majority of the freehold members behind closed doors. He said all the wrangling led to a complete breakdown in the community spirit and in due course he and his partner had moved away. Ms Cahalane gave evidence. She purchased two leases in the mansion in 2006. She was concerned that it had not been made sufficiently clear to her during the course of her purchase that the percentage contributions had been altered away from those set out in the leases. However she confirmed that she had no knowledge of any facts regarding the estate before 2006.

28. The Appellant also called Christopher Hunt BSc MRICS to give expert evidence. He emphasised the word "become" in the Fourth Schedule Part III and suggested that if the proportions were inequitable in 2003 then they must always have been inequitable in similar measure so that they had not become inequitable. He accepted he had never previously dealt with a lease which had a clause contemplating an alteration of the percentage apportionments and that Mr Kyte had more experience than him in the field of property management. He gave his view that the Respondent was right to seek professional advice from Mr Kyte. Mr Hunt's view was that as the parties had appeared to go to Mr Kyte for advice they should have followed Mr Kyte's recommendations rather than some different alteration of the percentage contributions. Mr Hunt had in mind that Mr Kyte was acting as an expert under Clause 11.3 of the lease such that this was a dispute which should be resolved conclusively by the opinion of the expert. (It is in my view clear, as submitted by Mr Bhose and not dissented from by the Appellant, that Clause 11.3 is not relevant to the present case). Mr Hunt accepted that all the deviations from Mr Kyte's recommendation were deviations which were favourable to the lessees and unfavourable to the freeholders. Mr Hunt suggested that the alteration of percentages was intended to deal with circumstances where extra houses were built on the estate or a property was extended and he drew attention to Clause 11.5 of the lease.

29. Mr Whitley gave evidence. He confirmed the factual background as already set out above. He stated that the Respondent decided in 2004 that it would be appropriate from and including the year 2005 for the freeholders to contribute 10% towards the costs of the insurance, which previously had been borne solely by the lessees. The freeholders he pointed out would have to bear their own insurance on their own properties, but as they made some use of the communal facilities they should pay some proportion of the insurance premium. He stated that the Respondent had asked Norwich Union to seek to split the policies so as to have a policy for the rebuilding of the mansion and separately a policy for all the communal and leisure facilities, but the answer was that the insurance offered was a package and it would be more expensive to try to split it. Mr Whitley said that so far as concerns the alteration of the service charge proportions and the allocation of 10% of the costs relating to the mansion to the common pot, this was done on floor areas which were professionally checked by Mr Gail. Mr Whitley stated that the directors did not have a preconceived notion of what they wanted (being some form of goal to their own advantage) before they set up the sub-committee or when ultimately deciding upon the new proportions. As regards the fact that no formal certificate was provided at the end of each year, Mr Whitley pointed out that the Respondent's sole function was to run the estate and that effectively all of its income came from service charge contributions and all of its expenditure was on running the estate and that it prepared company accounts each year and that the accounts were checked by Mr Jones who was a chartered

account. He stated that no issue had ever been taken by any lessee regarding the absence of end of year certificates.

30. Mr Kroussaniotakis also gave evidence. He confirmed that he was one of the lessees who were originally unhappy with the proposed amendments and who sought legal advice but in due course he agreed to pay.

Appellant's submissions

31. In relation to the question of whether the percentage proportions had been validly altered the principal points advanced by the Appellant were as follows:

(1) He argued that the lease proceeded on the basis that there was a collective liability (ie upon all the occupants both leaseholders and freeholders) to ensure that the mansion building was repaired.

(2) The lease made no provision for the division of the global expenses in running the estate into two separate pots. There was no power to proceed in this manner.

(3) He argued that Clause 11.5 of the lease was directed towards alterations in the percentage proportions which were required because of major alterations in the estate. Such major alterations (eg the addition of some new properties to the estate) could justify substantial alterations in the percentage proportions. In contrast Part III of the Fourth Schedule was only directed towards minor amendments. What had been attempted to do here was not a minor amendment.

(4) It was not possible to vary the service charge provisions during the course of a year (which happened in 2003 where the new percentage proportions were applied from 1 July).

(5) The power in Part III of the Fourth Schedule should not be construed to leave almost unlimited powers of alteration to the Respondent.

(6) Lessees were entitled to certainty regarding the proportion of the overall expenditure they were to make. Adopting the basis of charge which involved two pots would remove that certainty.

(7) The Appellant argued that the powers to alter the percentage proportions could not be properly exercised if (as he alleged was here the case) they were exercised in a coloured fashion in order to favour a particular group.

(8) The Appellant did not seek to raise any point under Clauses 3.4, 3.5, 3.6 or 3.8 regarding the preparation of a Certificate and the payment of any shortfall or the crediting of any surplus. He recognised (rightly in my judgment) that while these provisions remain in the lease it is a matter for the future (rather than a matter which arises in this case) as to whether the Respondent or any occupant (including himself) seeks to require these provisions to be operated and as to

what the parties' respective rights under these provisions may now be having regard to the fact that they have never been operated and no occupant has ever asked that they should be.

(9) He pointed out that the freehold occupants still use both entrance halls and, although there is another access to the pool area which involves little encroachment within the mansion, most freeholders enter the pool area through the main part of the mansion.

(10) As regards the insurance matter he submitted that the Respondent is not entitled to charge insurance in such manner as it wishes. He submitted that the 10% allocation of the premium to the common pot was insufficient. He submitted that insurance charges should be put on an equitable footing for the future which would involve division on a square footage basis. He also drew attention to the covenant in the lease in clause 4 which involves payment of the proportion of the insurance premium as determined by the Respondent payable by the Respondent "in respect of the Premises". He submitted that bearing in mind the definition of the expression "the Premises", which involved merely his flat including the containing plaster surfaces but not the main structure, that what he had been charged could not be said to fall within the words just cited above.

Respondent's submissions

32. On behalf of the Respondent Mr Bhose advanced the following argument as regards the proper construction of the power in Part III of the Fourth Schedule to the lease:

(1) Having regard to the general wording of the provision and a comparison with the wording in Clause 11.5 (which contemplated the Lessor having power to alter the percentage proportions) he submitted that the power to vary the percentage proportions is not limited to a circumstance where the number of units has altered or some unit has been changed in dimension.

(2) It is the opinion of the Manager (ie the Respondent) which is the trigger which, if engaged, gives rise to the power to vary the proportions. Thus if it is the opinion of the Respondent that it is equitable to do so the power to recalculate is engaged. It is not necessary for the Tribunal to be of the opinion that it was equitable to do so. The Respondent's opinion must be a genuine opinion held in good faith within the spectrum of possible reasonable opinions (as opposed to being a perverse opinion) but otherwise there is no limitation upon it.

(3) As regards the word "become" and the argument that nothing had in substance changed and so it was not open to the Respondent to be of the opinion that it had become equitable to vary the proportions, Mr Bhose drew attention to the following points. This was a new development with some plots still to be built at the time the sales or leases were first granted. The parties must be taken to have contemplated that what appeared equitable at first might become less so with the fullness of time. The ageing of the initially newly refurbished mansion is a circumstance that properly engages the word "become". In the light of

Mr Kyte's expert advice to the Respondent to the effect that the present service charge proportions were inequitable having regard in particular to the cost of maintaining the mansion, the Respondent was entitled to conclude that the fact that substantial expenditure on the mansion was now recognised as likely to arise in the future was such as to enable the Respondent to conclude it was inequitable to maintain the status quo and that it had become equitable to vary the proportion.

(4) As regards the obligations to recalculate the proportions on an equitable basis, Mr Bhose submitted that one must once again focus upon the opinion of the Manager. It is the opinion of the Manager as to whether the clause is triggered at all, so a recalculation must be to a level which the Manager (ie the Respondent) considers to be equitable. It is not for the Tribunal to substitute its view as to what would be equitable. The only question is whether the Respondent could properly hold the opinion and did genuinely hold the opinion that the new proportions were equitable.

(5) Mr Bhose recognised that a question arises as to whether the provision only allows an alteration of the percentage proportion payable of the overall expenditure or whether it enables the Respondent to determine that the expenditure should be subdivided into two pots with a different percentage proportion being applicable to each pot and with the result that the final overall proportion of the total expenditure is obtained mathematically from these two amounts. Mr Bhose submitted that it was permissible to have separate percentage proportions for different pots for the following reasons:

(a) If the operation of Part III of the Fourth Schedule can be triggered by reason of the Respondent concluding that it is inequitable for a certain category of expenditure to be borne by certain of the occupants, then it must have been the intention of the draftsman that when the proportion is recalculated upon an equitable basis it is permissible to recalculate it on a basis which cures this problem (ie cures the problem which triggered the operation of the clause in the first place). If it were otherwise then the remedy would not meet the problem.

(b) The parties must have the power to reach an equitable result. This was a mixed development and there was power to add services. Thus it was within the contemplation of the lease that some new services might be provided which benefitted exclusively a group of occupants and there should be power to allocate the proportions so as to ensure that only a limited group of occupants paid for such expenditure.

(c) As regards the requirement to notify the lessee of the new proportion Mr Bhose submitted that the way in which it was in fact done, namely before the commencement of every service charge year, was appropriate and permissible. The estimated expenditure for the forthcoming year was worked out. The Appellant's house pot

percentage was applied to the estimated house pot expenditure and his common pot percentage was applied to the estimated common pot expenditure and his total service charge was obtained which was then expressed as a percentage of the total expenditure. Thus he was told in advance of the percentage he was being asked to pay of the overall estimated expenditure. Mr Bhose accepted that the overall percentage proportion has changed in respect of each year, but he submitted that each year the powers in Part III of the Fourth Schedule were operated afresh and that there was thus a recalculation in each year being a recalculation which fell squarely within the provision of the lease.

(d) Mr Bhose accepted that all the service charges demanded from the Appellant had been demanded pursuant to the provisions of Clause 3.7 whereby the Appellant was required to pay the Respondent "the Manager's estimate of the Service Charge" for the relevant financial year.

(e) Mr Bhose accepted that the provisions of Clauses 3.4, 3.5, 3.6 and 3.8 remained in the lease but neither party had suggested they were of any relevance to the present case and neither the Respondent nor any occupant had ever sought their operation. He said that it would remain for the future for any party to seek (so far as they were still entitled to do so) to stand on their rights under these provisions, but that that did not concern the present case.

33. As regards whether the Respondent had given genuine and non-colourable consideration to the question of varying the percentage proportions Mr Bhose submitted that the Respondent had indeed done so and had not taken the decision for any ulterior or improper purpose. He drew attention to the fact that the variations were not suddenly decided upon by the Respondent. Instead there was a 2½ year process with many of the occupants involved. The process involved the instruction of and reliance upon an independent and experienced chartered surveyor who had given his own opinion that the present situation was inequitable. The subcommittee had reported and suggested a variation involving separate pots of expenditure. There was nothing wrong in the fact that the Respondent did not follow precisely Mr Kyte's recommendations, especially bearing in mind that all the departures favoured the lessees including the Appellant at the expense of the freeholders. There was no statutory right to any particular form of consultation, but in fact there was wide consultation over a lengthy period.

34. As regards the insurance premium dispute Mr Bhose recognised the curiosity that the lease at one and the same time included Clause 4, which contemplated the payment by the lessee of a sum in respect of insurance (being a payment separate from the service charge payment) but also contained the service charge payments in respect of the expenditure incurred under the Fourth Schedule, which included the expenditure on insurance, see paragraphs 1 and 17. Mr Bhose submitted that, while each freeholder insured his/her own building, the mansion had to be insured principally for the benefit of the leaseholders within it and that it was appropriate that this cost should be charged to the lessees. He submitted it was permissible for

the Respondent to continue to charge this insurance premium on the same percentage bases as had been adopted by Cala. Insofar as there was some unfairness in that the freeholders contributed nothing to this insurance, this had been cured by the 10% contribution from the common pot which was introduced in 2005. As regards the years 1997 to 2004 Mr Bhose submitted that the Appellant was not entitled to maintain an application under section 27A in respect of these because he had agreed or admitted the amount payable. As regards section 27A(5) which provides:

> "but the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment"

Mr Bhose submitted that the Appellant had done significantly more than merely make payment. He had continually made payment from 1997 onwards and had raised no query regarding this insurance prior to his application to the LVT in 2005. Nor had he made any complaint in this 2005 application, which in due course he withdrew. This long period of payment and absence of challenge and omission from the points challenged in the 2005 application all should be taken together to indicate that the Appellant had agreed or admitted these sums. Finally he submitted that in any event the Tribunal in its discretion should not consider any years more than six years back because if there had been an overpayment the Appellant could not seek a restitutionary remedy regarding such overpayment for any earlier overpayment.

Conclusions

35. I am unable to accept the Appellant's arguments. My reasons for so concluding are substantially those advanced in argument by Mr Bhose and can be expressed as follows.

36. The question of the variation of the percentage proportions turns upon whether the Respondent properly exercised its powers of variation under Part III of the Fourth Schedule. The trigger which engages the operation of this provision is "if in the opinion of the Manager ….". The relevant question is whether the Respondent (as the Manager) reached a genuine and bona fide opinion that it had become equitable (the word "necessary" is not relied on) to recalculate the percentage proportions. It is not for this Tribunal to conclude whether it has become equitable to do this. This Tribunal's only function is to conclude whether the Respondent reached a lawful decision on the point, being a decision which was within the range of reasonable decisions (as opposed to being a perverse decision) and whether the Respondent took into consideration relevant matters and did not take into consideration irrelevant matters. Once the power is triggered it becomes for the Respondent to recalculate the percentage proportions on an equitable basis. Once again the question is not whether the Tribunal considers that some other equitable basis should have been adopted or would have been more equitable. The question is whether this was a bona fide decision being one within the range of reasonable decisions and being reached taking into account relevant and ignoring irrelevant matters.

37. I accept that the Respondent gave careful and detailed consideration over a lengthy period and in the light of substantial consultation upon the question of the variation of the

proportions. The Respondent responsibly took legal advice and advice from a surveyor with long experience of property management. This surveyor (Mr Kyte) expressly advised the Respondent that in his firm opinion the present arrangement was inequitable. Mr Kyte advised that the arrangement was inequitable because of the expenditure incurred in running the mansion. This was an expense which had been increasing and the prospect for further increases had become clear. Accordingly the power to recalculate the percentage proportions arose.

38. I reject the Appellant's suggestion that the Respondent's exercise of the power to vary the percentage proportions was exercised in a manner which was not bona fide and which involved the Respondent, through its directors, approaching the question with self interest (ie of the freeholder directors) and with a determination to alter the percentages favourably to the freeholders. The documents indicate the contrary as does the evidence of Mr Whitley, which I accept. Mr Whitley was one of the directors who was party to the decision in April 2003 regarding the variation of the proportions. I found Mr Whitley an impressive witness and I accept his evidence without the need to find any support for it in the written statements from other persons who were not called to give oral evidence, being the statements which Mr Bhose sought to rely upon insofar as he needed and was entitled to do so and to which Mr Shersby objected on the grounds that he was unable to cross-examine their makers. I have not given weight to these written statements. I am unimpressed by the Appellant's challenge to the documents and his suggestion that in some way Mr Kyte was instructed on a basis which encouraged him to favour the freeholders. Mr Kyte denied that he had been instructed in any way other than a neutral basis and he said he had given his professional opinion without seeking to favour any side. I accept Mr Kyte's evidence. As regards the Appellant's suggestion that the minutes and other documents (which reveal this careful and proper consideration of the matter by the Respondent) having somehow been prepared to give an inaccurate impression I reject this. I note the Appellant's attitude to the documents. His attitude to the subcommittee report is instructive. The report bears the Appellant's name. The Appellant has throughout these proceedings shown himself entirely ready willing and able to complain lengthily in writing if anything occurs which he feels is wrong or contrary to his interest. However there is no evidence he ever gave any written indication that he disassociated himself from the contents of this report which bears his name. Despite this the Appellant in his evidence to me sought to distance himself from this report saying he did not endorse its recommendations and that it was written by Mr Thackray. I find this attempt now to criticise the report and to distance himself from it to be unimpressive and unpersuasive. I am equally unimpressed and unpersuaded by the Appellant's criticism of the conduct of the directors and of the minutes of the Respondent.

39. I find as a fact that the Respondent, through its directors, acted bona fide and in the proper interest of the Respondent and took into account all relevant matters and disregarded irrelevant matters when reaching its conclusion that the percentage proportions had become inequitable and in reaching its conclusion as to the equitable basis upon which the proportions should be recalculated. The Respondent could have reached a conclusion that different percentages should be adopted so far as concerns the percentage of the costs of repairing the mansion which should be placed within the house pot and the common pot, but its conclusion was plainly within the range of reasonable figures.

40. As regards the argument that there was no power under Part III of the Fourth Schedule to adopt an approach which involved placing expenditure into two pots, the following points must be noted. I find, in agreement with Mr Bhose's submissions, that if the cause of the existing proportions being in the opinion of the Respondent inequitable is because there exist certain items of expenditure which should be apportioned in a manner different from the remainder of the expenditure, then it must be permissible when recalculating the proportions to do so on a basis which removes this inequity, being the inequity which triggered the clause in the first place. Also it must be noted that the way the Respondent has proceeded is not to adopt a formula (namely X% of the house pot and Y% of the common pot) to be charged to the Respondent in circumstances where the Respondent will not know how much he is to be charged until the year has finished and the final accounts have been drawn up. Instead the Respondent has made detailed estimates in advance of each year and has divided these into the house pot and the common pot has applied the percentage charges (ie the charges which in April 2003 the Respondent concluded was equitable for the Appellant) to each of these pots and the Respondent has then obtained a single percentage figure which is the amount to be charged to the Appellant in respect of the entirety of the budget for the forthcoming year. Thus for example for the year 2005 the Appellant was notified in advance of that year what the estimated total expenditure would be and that his percentage was 3.49828% of this. The document by which he was notified of this stated.

> "in accordance with the Fourth Schedule Part III the Manager has recalculated your contribution. With effect from 1 January 2005 your new contribution, based on the revised rate and estimate of expenditure for the year is as shown below…".

In my judgment the Respondent in each year, prior to the commencement of the relevant financial year, lawfully took a decision in accordance with the Fourth Schedule Part III, being a decision taken consistently with the principle established in its decision in April 2003, as to a single percentage proportion to be charged to the Appellant for the forthcoming year. If any party had subsequently sought to operate the provisions for certification and for calculating of any surplus or shortfall, then even if the ultimate figures for expenditure turned out to be different from those in the estimates, I conclude that the manner in which the Respondent has operated the clause involves the single specified percentage (ie specified before the year commenced) being the percentage figure which would be charged to the Appellant upon the final outcome figures. Thus there would be no question of the percentage proportion which had previously been notified for that year being subsequently amended. In my judgment the Respondent was entitled to proceed in this manner.

41. As regards the year 2003, there is nothing in the relevant provisions which requires that the percentage proportion is only changed from the first day of a calendar year. The Respondent having concluded that the existing proportion was inequitable and having concluded upon what would be equitable, the Respondent was entitled to give notice in May 2003 that the proportion would be changed as from the dates specified, namely 1 July 2003.

42. There are not before me any specific figures which I am asked to find as the precise amounts payable by the Appellant by way of service charge in respect of any of the years with which this case is concerned. I was told that once I had decided the point of principle (namely as to whether the amendment to the percentage proportions had been lawfully made) the parties

could reach agreement as to how much was payable. I decide this point in favour of the Respondent.

43. As regards the question of insurance premiums, both parties accepted that this was very much a subsidiary issue.

44. As regards the years 1997 to 2004 inclusive I accept Mr Bhose's argument that the Appellant is not entitled to make an application under section 27A in respect of these payments. I find that he has agreed or admitted these sums and that section 27A(4) prevents his application in respect of these years. As regards section 27A(5) this provides that the Appellant is not to be taken to have agreed or admitted any matter by reason only of having made any payment. However, the Appellant has done substantially more than merely make payments in respect of these years. He has not only made the payments but has waited a long time (namely until the 2007 application) before seeking to challenge them, and has in the meantime made a separate application to an LVT raising various matters regarding services charges but not raising any matter as regards these insurance premiums. The 2005 proceedings were then withdrawn without the insurance premiums ever being raised as an issue. The combination of these repeated payments, without any complaint or reservation, coupled with the lapse of time and with the express challenging in formal 2005 proceedings of certain matters (but not these insurance matters) leads me to conclude that the Appellant must be taken to have agreed or admitted these premiums.

45. As regards the period from 2005 onwards the Respondent included 10% of the insurance premium (the principal aspect of which was the insurance of the fabric of the mansion) into the common pot. The wording of the lease is unsatisfactory regarding the payment of insurance premiums. Clearly some insurance premiums fall to be dealt with as part of the overall service charge because the obligation to keep the mansion and various other matters insured is included in the Fourth Schedule Part I and the service charge is designed to enable the Respondent to recover its costs of performing its covenants contained in Part I of the Fourth Schedule. However, the fact remains that the lease does expressly reserve by way of a separate rent the proportion of insurance premium payable in accordance with Clause 4, which provides that the lessee is to pay to the Respondent

> "… the proportion of the insurance premium as determined by the Manager payable by the Manager in respect of the Premises."

This wording is in itself inapt because on one reading it appears to require the payment of a proportion (determined by the Manager) of the insurance premium payable in respect of the Premises. Bearing in mind the definition of the Premises (as being effectively merely the Appellant's flat and garage) there seems to be no reason for the Appellant merely to be paying a proportion of such insurance premium as is payable to insure these matters – one would expect the Appellant to be paying the whole of this. In my judgment the proper way of reading Clause 4 is as follows: there is an insurance premium payable by the Manager; the lessee is to pay to the Manager a proportion of this insurance premium; and in determining the proportion of this insurance premium which is payable by the lessee the Manager is to have regard to the fact that the lessee is paying a proportion because he holds the Premises. It is not intended that

there shall be found how much the Manager has paid for insuring only the Premises (to the exclusion of all other property) and for the lessee then merely to pay some proportion of this sum.

46. In my judgment the Respondent was entitled to treat the insurance of the mansion as being the insurance premium which fell to be dealt with under Clause 4 rather than through the service charge. The Respondent adopted the percentage figures to be attributable to each apartment which had originally been adopted by Cala as the original developer and which had been paid by the various lessees ever since. In my judgment the Respondent was entitled to do so. The Respondent was also entitled, when deciding the proportion payable under Clause 4, to decide that it was equitable for some proportion of the insurance premium to be charged through the general service charge provisions as part of the common pot, such that the proportion of the insurance premium payable by the lessee under Clause 4 became less than it previously was. This is what has happened since 2005. I conclude the Respondent was entitled to charge the Appellant on this basis.

47. Accordingly in the result I allow the appeal only to the extent that I find that the LVT did have jurisdiction to consider the matters which are now before this Tribunal and that this Tribunal has jurisdiction, having conducted a re-hearing, to decide them. I decide that the Respondent has lawfully exercised its power as Manager under Part III of the Fourth Schedule and has validly recalculated on an equitable basis the percentage proportion payable by the Appellant for each of the years with which the present case is concerned. I also find that the Appellant is not entitled to make application under section 27A in respect of the insurance premiums paid by him for the years 1997 to 2004 inclusive. As regards the insurance premiums charged to him for the years 2005 and following I conclude that the Respondent was entitled to charge the Appellant for insurance premiums in the manner it did.

Dated 16 December 2009

His Honour Judge Huskinson