UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

Residential Lease - Service charges – terms of lease - whether charges reasonable– correct test of reasonableness.

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

BETWEEN **REGENT MANAGEMENT LIMITED** **Appellant**

and

MR THOMAS JONES **Respondent**

Re: 240, Waterloo Quay,
Waterloo Road,
Liverpool, L3 0BU

Before: HIS HONOUR JUDGE MOLE QC

Sitting at: Leeds Employment Tribunal, 4th Floor, City Exchange, Albion St., Leeds
on Wednesday 1st September 2010

Mr Jonathan Manning of counsel appeared for the appellant.
The respondent did not appear and was not represented

The following case is referred to in this decision:

Yorkbrook Investments Ltd v Batten [1985] 2 EGLR 100

DECISION

Introduction

1. This matter arises by way of an appeal from a decision of the Leasehold Valuation Tribunal for the Northern Rent Assessment Panel. The decision is undated but follows a hearing that took place on the 14th of August and the 6th of October 2008. The hearing was into an application by Regent Management Ltd, the appellant, under section 27A of the Landlord and Tenant act 1985 for a determination as to the liability of Mr Thomas Jones, the respondent, to pay service charges for the years 2004, 2005, 2006, and 2007 in respect of flat 240, Waterloo Quay, Waterloo Road, Liverpool, L3 0BU. The application under section 27A arose following proceedings to recover the service charges by the appellant in the Liverpool County Court which were, apparently, transferred to the Leasehold Valuation Tribunal (hereafter the LVT) for the determination of the issue whether the service charges were reasonably incurred and of a reasonable standard. To avoid any doubt about the meaning of the County Court's order, the appellant itself applied to the LVT.

2. The LVT gave a brief account of the background to this matter.

> "The (appellant) is a management company responsible for the management of a large portfolio of residential developments, many of which contain blocks of apartments in respect of which services are provided, a service charge levied and the service provision controlled by the (appellant). One such development is Waterloo Quay, situated on the now-defunct Waterloo Dock, itself situated approximately a one-half mile north of Liverpool Pier Head. The development as a whole encompasses a conversion of the large Waterloo Dock warehouse into residential flats and a number of recently instructed apartment blocks on the sides of East Waterloo Dock. Originally the (appellant) was responsible for the management of the whole development but management of the warehouse conversion is now carried on by a "Right to Manage" company, leaving the (appellant) responsible for management of these services to the new build blocks. Some services are shared with the warehouse block, others are provided and accounted for solely to the new build blocks known as Waterloo Quay 1(being the original new build) and Waterloo Quay 2 (being a further block of apartments added later)."

3. The LVT inspected the development and described it, so far as is relevant, in paragraph 3.

> "Access to the complex, including the separate Warehouse scheme, is gained through what was the main dock gate for Waterloo Dock where there is a gatekeeper's lodge manned 24/7 by gatekeeping staff who also monitor CCTV camera images from various cameras situated throughout the site. Vehicular access is controlled by a barrier operated by the gate staff or fobs in the possession of tenants. Pedestrian access is gained more easily via the same gate or via other gates with security coded locks located in the dock wall and giving pedestrian access only. There is a large, marked parking area for residents' use and a separate visitors' area near the gate. A security fence adjacent to the car park represents the northerly boundary of the

development. Separating the car park from the apartment blocks is the main access roadway which then follows the westerly boundary of the development. This was formerly the edge of Waterloo West Dock, now partly filled in but a part of which, immediately adjacent to the boundary, will be the new canalised waterway from Nelson Dock to the Pier Head. The apartments themselves are in four-storey towers, containing either 16 or 32 apartments, around the East Dock, with front entrances facing the roadway and the Dock itself at the rear if the entrances are regarded as the "front". There are maintained areas of shrubbery at the front and further areas of paving and composite surfacing to the rear and sides of the blocks. Each tower has an entry system that can be operated from inside the appropriate flat, block paved entrance halls, common hallways, stairs and landings and utility shafts/cupboards.

There were some minor signs of ageing and use apparent during the inspection, for example to stairway carpets and the entry bell with system. Efflorescence was also present on a number of walls, otherwise the exterior of the buildings and the common parts inside were, in the Tribunal's opinion, in good condition and appeared to be maintained to an acceptable standard of repair and decoration, subject to the matters mentioned above and also the observations below.

The car park is patrolled by parking enforcement contractors and there are notices posted referring to the consequences of inappropriate or unauthorised parking. Clamping is in operation. The Tribunal's attention was drawn to an abandoned vehicle and a number of rusting and unroadworthy bicycles."

4. Mr Jones' lease is dated the 17th of September 1999. By it the Mersey Docks and Harbour Company leased the flat to Mr Jones for a period of 125 years from the 1st of January 1989, in consideration of a premium of £64,200. The Appellant, as the management company, was also a party to the lease. By virtue of part 2 of the 8th Schedule of the lease the lessee covenanted.

> "2. To pay to the Management Company
>
> 1. The Lessee's Proportion of the Maintenance Expenses at the times and in the manner provided .."

5. The Maintenance Expenses are defined as meaning the money expended by the Management Company in carrying out the obligations in the 6th Schedule. The 6th Schedule includes, amongst other things, "generally managing and administering" the property and if necessary employing managing agents (Clause 7); "administering the Management Company itself…" (Clause 11) and confers a right to charge a management fee, being a reasonable sum for carrying out the management obligations (Clause 13).

6. A short account of the proceedings up to the LVT hearing is relevant. The appellant's application was made in March 2008. On 2nd April the LVT directed the respondent to serve a statement of case identifying those items of service charge that were disputed. On 23rd April the respondent listed the items of service charge in issue as

"Security, lighting (external/internal), external upkeep, internal upkeep (carpets, painting), gardening."

7. The questions the LVT was invited to decide were stated as

"To remove management agents (Regent) residents to undertake right to manage scheme. Failure to comply with leasehold agreement to carry out repairs and property maintenance, in breach of terms of leasehold agreement."

8. The appellant's solicitors wrote to the LVT in July protesting that it was impossible to respond in the absence of particulars. The appellant served a first bundle of documents, containing amongst other things, the respondent's lease.

9. The matter came to a hearing on 14th August 2008. The LVT said (in its undated refusal of permission to appeal) that it made the point that the basic premise in s27A proceedings is that service charges are only recoverable to the extent that they are fair and reasonable and there is an onus on the Applicant to establish that in the first instance. The appellant/applicant was therefore directed to serve further and better details to support the case that the service charges demanded were fair and reasonable. The directions expressly included –

"a) The entries in the service charge accounts relating to "Management Fees" and "Administration" identifying the nature and extent of the management and administration carried out by the Applicant……

c) The entries in the accounts relating to "security" identifying the nature and extent of the work carried out thereunder….

f) Any other matter or matters that may assist the applicant's case in explaining or clarifying any other entries in the said accounts."

10. The directions then ordered the respondent to submit any reply to the details supplied by the applicant within 14 days of receipt.

11. The progress of these proceedings is set out in section 4 of the decision of the LVT.

a. The Tribunal had the benefit of the first bundle which contained copies of the application, the Respondent's lease and the order of the County Court dated the 2 April 2008. Also included were the service charge accounts for the year ending December 2003 to December 2007 (the last year of being in draft form) together with the accountants' certificates for 2003 -- six and a summary of the service charge obligations. Also included with the response from the Respondent, in the form of a completed application form containing details of the respondent's concerns relating to external and internal upkeep, security lighting, gardening and failure to maintain or manage the development appropriately, a copy of the earlier directions and a number of photographs. Essentially no further or better details were provided than that and the final response of the Applicant was to the effect

that the Respondent had not set out any cause of action or support for any complaint. Save for those matters referred to the other items on the service charge schedule were, in the applicant's view, unchallenged.

b. At the start of the hearing the Applicants, through Mr Buck, sought to reinforce the generality of that observation in the absence of any further statement or documents in support of any challenge to the service charge. The Tribunal was however concerned that the application was prompted by the County Court proceedings. Those proceedings were to recover unpaid service charges which are only recoverable to the extent that they are fair and reasonable. It was the Tribunal's view that the applicant needed to establish that reasonableness to the satisfaction of the Tribunal and present at least an arguable case to that effect. After taking further instructions from his professional clients Mr Buck agreed that it would be necessary to adjourn to call sufficient evidence in support of his case. The Tribunal took the opportunity to issue further directions for the conduct of the application to assist the applicant in identifying those items in the service charge that appeared to require further explanation, either as a result of its inspection, or raised in either the respondent's response or earlier correspondence. Both parties were served with copies of those directions and they do not need to be repeated here.

c. Between the first hearing and the reconvening of the tribunal on six October the applicant served a very extensive bundle of documents of over 300 pages (the second bundle) in support of a statement by Mr Paul who addressed those matters raised by the tribunal in its further directions and in support of the contention that the service charges were reasonable. No further initial submissions were made by or on behalf of the Respondent, nor was any further documentation forthcoming. When dealing with questioning on behalf of the Respondent there were a number of occasions when the Applicant's witnesses were dealing with issues that were not anticipated and which were sometimes supported only by conjecture and hearsay rather than direct evidence. In coming to its conclusions in due course the Tribunal has been careful to assess the weight to be given to the Respondent's observations upon those issues.

12. After dealing with the water lease, the LVT turned to the security position:

"f. So far as security is concerned the position put to Mr Paul was that a number of issues arose:

- security guards were unlicensed and had now become concierge staff to overcome licensing difficulties.
- the barrier at the gatehouse was left raised at night enabling free and unchecked access to the development.
- Monitoring of access generally was poor.

In response Mr Paul explained how the cost of security provision was apportioned on a 60/40 basis between the Warehouse and the Quay developments. Honeybourne Kenny, as the managers of the warehouse therefore took the lead responsibility as to organising the provision and it was not until recently that the Applicant had become aware of the

extent of the use of unlicensed operatives, Mr Paul accepted the barrier may well be left up at night, without any direct information as to what the current position wants, but the problem if it remained down was the disturbance of the night-time comings and goings by people unable or unwilling to use the fob controls provided. Mr Paul's view was that operatives were there to monitor, which they did with CCTV systems, rather than patrol and as far as he was concerned a daybook was kept to make appropriate records. He was however somewhat unsure of that last position and indeed when the book was last seen. When questioned by the Tribunal he affirmed that the presence of security staff contributed significantly to a better environment than if the service, as currently existed, was not provided at all."

13. In a passage that is important to the issues in this case the LVT then turned to the parking signage:

> "i. Arising out of these discussions was the matter of the employment of the parking contractors to manage the parking on the development and impose appropriate penalties for breaches of parking requirements. Latterly an amount of £951.75 has appeared in the service charge accounts, being the proportion relevant to Waterloo Quay 1 of a total charge for both developments 1 and 2 amounting to £1163.25, for the provision of clamping warnings and warnings against parking in certain hatched areas. The precise number and nature of the signs and the cost for insertion in the service charge account was clarified over the luncheon adjournment. It was submitted on behalf of the Applicant that the policy of charging the signage to be tenants was as a reasonable as making no charge to the account and instead imposing higher charges in the enforcement process.

14. Then the LVT considered the administration and management charges.

> "k. The final matter from the service charge account to engage the Tribunal at length were the administration and management charges. Mr Paul had explained these in his statement, indicating that the administration charge was originally set by the developers at £104 per unit per year and then adjusted to £100 per year. This summer have now increased as costs had increased and from a total of £14,400 was now £18,660. And the amount simply marked time with inflation (RPI) it would now be a total of £17,425. The management charge is a fixed percentage of the other charges and a breakdown of its calculation, year by year, was provided in the statement. The Tribunal wish also to explore the relationship of these charges to the caretaker charge also in the accounts. Mr Hall very helpfully made available the original job description of the incumbent, Mr Davidson, then described as "House Manager" although the role had now changed. There is provision in the original description for weekly reports from the caretaker to the Applicant. Mr Paul appeared not entirely clear upon how frequently or upon what basis reports were now made. The concern of the tribunal was to fold: the three charges together represented a significant proportion of the total service charge (administration and management together amounting to over 30% of the service charge net of those items) and that

management represented a charge on a charge in relation to the care taker and administration items. The latter point was also taken on behalf of Mr Jones. Mr Paul pointed out that the descriptions of the three items from within the documents in the bundle, together with the job description of the caretaker, although varied from house manager, indicated the different responsibilities undertaken and that together, despite the proportion they represented in the total charge, were reasonable. Mr Paul also advised the Tribunal of the more complex responsibilities upon the Applicant, being both the landlord and the services provider. The contrast between the proportionate charges for administration and management in the adjacent warehouse development, compared with those for the Quay developments was raised and the Tribunal urged that this was not comparing like with like."

15. In section 5 the Tribunal set out its conclusions and reasons. After dealing with sections 18, 19 and 27A of the Landlord and Tenant Act 1985, the Tribunal addressed the issues.

"5. c. The Tribunal was in broad agreement with the Applicant in relation to the majority of substantive charges that make up the service charge. The Tribunal is satisfied that the Applicant has in those situations sought to achieve and has achieved a balance between the cost of the service and the quality of supply so as to satisfy the test that both the cost of the services provided and the standard achieved are reasonable.

d. The Tribunal is satisfied particularly as to the reasonableness of the security provision as outlined by Mr Paul in his evidence but challenged by Mr Jones. Whilst the highest standards of security would be ideal it is the view of the Tribunal that what is achieved by the applicant is significant in terms of what is provided for the tenants when compared with the price that is paid. The same view is taken on most of those other services considered in some depth at the hearing, particularly relating to landscaping, maintenance of external areas and common parts and removal of refuse and abandoned items

e. The Tribunal was however concerned by two particular items in the accounts upon which it received unsatisfactory explanations:…..

- Parking control signage. These appear in the accounts for the years ending the 31 December 2006 and 2007. The Tribunal is not convinced by the argument that it is just as reasonable to charge the signage within the service charge as it is to levy higher penalties against parking offenders. In the Tribunal's experience the latter is the more usual approach and penalises offenders rather than those whom the parking control is supposed to benefit. The charges shall be disallowed for the two relevant years.

…..f. The Tribunal was also exercised greatly by the administration and management charges in the accounts for the years in question and a number of points arise that gives the Tribunal cause for concern;

- for the four years being considered the administration and management charges between them amount to significant percentages of the total charges as follows:

  year to 31/12/04 -- 25.03%

  year to 31/12/05 -- 25.23%

  year to 31/12/06 -- 26.42%

  year to 31/12/07 -- 25.56%

  and although the Warehouse development is not by any means comparable the charges for administration there are considerably lower than for the Quay, where some of the same service providers are used (for example for security and caretaking) the percentage charge over the direct cost of services is less

- The Quay development is modern new build and at least in early years, after provision is made for cyclical maintenance, the development should be relatively low-maintenance in comparison with older developments and older buildings.

- The lack of action and investigation in relation to the current position regarding the Water Lease from 2004 until 2008 is not indicative of effective management or administration.

- Similarly the Tribunal is of the view that the existence of the charge to the tenants in respect of the parking control signage, as opposed to parking offenders bearing the cost of control, is indicative of less than thoroughly pro-active management.

- The correspondence in the second bundle relating to representations to Honeybourne Kenny about the problems with the security barrier being left up at night, in the absence of any further information as to matters may have improved suggests a lack of follow-up procedures to monitor the situation, particularly given the views of Mr Jones expressed prior to the first hearing and continued at the resumed hearing

- On occasions in evidence both Mr Hall and Mr Paul gave the impression of not being entirely sure of the current position in relation to certain matters Mr Hall in relation to the Water Lease, until information was forthcoming at lunchtime, and Mr Paul in relation to the situation regarding the barrier at night-time, the existence or otherwise of a daybook kept at the gatehouse and the manner of receiving weekly reports from the caretaker.

- Without trespassing greatly upon the rights of individual occupiers the ambiance of the development might be improved by more active pursuit of the owners of abandoned property.

g. Whilst the Tribunal would regard it as unfair to overemphasise the shortcomings, particularly having made the point above about the cost and quality generally of the services provided, it nevertheless takes the view that the

> administration and management charges are unreasonably high given the evidence received as to how the services appear to be managed and administered. The considered view of the Tribunal is that the appropriate percentage mark-up for administration and management, over and above the direct costs of the provision of the other services in the accounts, and after making allowance for the removal of the Water Lease and signage charges for the relevant years should be 15% and no more."

16. The Tribunal then did the arithmetic.

17. The appellant appealed against the decision to disallow the charge for parking control signage and against the decision that the Administration and management charges were unreasonably high and should be reduced to 15%.

18. The appellant's grounds of appeal were, broadly, that the LVT was wrong in paragraph 4b in that it appears to have approached the matter on the basis that the appellant needed to establish that every element of the service charges was reasonable and needed to establish at least an arguable case to that effect. The correct position is that there is no presumption either way. The position is not altered because the question of reasonableness arises in consequence of proceedings to recover service charges in the County Court.

19. The law is that where a tenant disputes items, he need only put forward sufficient evidence to show that the question of reasonableness is arguable. Then it is for the landlord to meet the tenant's case with evidence of its own. The LVT then decides on the basis of the evidence put before it.

20. In the case of the car park signage, although the tenant raised some general questions about security there was no specific reference to the reasonableness of providing car park signage. The tribunal itself raised this point at the second hearing. It was unreasonable of the LVT to expect the appellant to be able to make a fully documented reply and to draw adverse inferences against the appellant because its witnesses appeared unsure of the answers in respect of such matters.

21. In any event, the LVT applied the wrong test in deciding that it was "not convinced by the argument that it is just as reasonable to charge the signage within the service charge as it is to levy higher penalties against parking offenders." It is not for the appellant to demonstrate that it has taken the most reasonable course or even an equally reasonable course, still less the most reasonable course: it is sufficient that it show that the course it has taken is a reasonable one. The decision of the appellant to provide parking control signage cannot be stigmatised as an unreasonable one.

22. No reasonable tribunal paying proper regard to the evidence could have concluded that the decision to provide parking signage and parking control was an unreasonable one.

23. So far as the management and administration charges are concerned, the LVT failed to appreciate the distinction in the lease between management and administration charges, failed to take into account the circumstances in which those charges were imposed and other relevant matters, took into account irrelevant or erroneous matters (such as the view that the charge in respect of parking control signage was "indicative of less than thoroughly pro-active management") and had no basis of fact upon the evidence upon which a reasonable tribunal, properly advised as to the law, could conclude that the administration and management charges were unreasonable.

24. On the 17th of April 2009 the President of the Lands Tribunal granted permission to appeal observing:

> "It is not clear from the decision in relation to the charges for parking control signage that the LVT determined that it was not reasonable to include these within the service charge rather than that, of the two potential methods of charging, they regarded as preferable the levying of higher charges against offenders. The latter would not justify the disallowance of the charges. There is apparent force also in the contentions raised in the applicant's grounds.
>
> The landlord's treatment of the signage charges was one of the LVT's reasons for more than halving the total amount charged for management and administration costs, and it is therefore appropriate that permission to appeal should cover this matter to. But there is also apparent force in other contentions raised by the applicant."

25. The President ordered, on the 27th of October 2009, that the appeal should be initially by way of review but, if appropriate, with a re-hearing to follow at the same hearing.

Submissions

26. On behalf of the appellant Mr manning adopted the submissions in the appellant's grounds of appeal and statement of case. He maintained his submission that the LVT appeared to have mistakenly assumed that the burden was upon the appellant to make out a case in support of the reasonableness of each and every one of its charges. As a matter of law there was no such burden. He further submitted that in relation to items where there is no obvious dispute raised by the tenant the management company or landlord is not bound to spread all the evidence it has in respect of every aspect of its service charges before the LVT simply to cover the possibility that somebody may wish to question it. The management company made this application under section 27A but it was incumbent upon the parties to define the outlines of the dispute. Mr Manning referred to the directions made by the LVT. The appellant was entitled to focus upon those aspects that appeared to be live issues. There is no basis in law for the suggestion that the management company had to prove each and every element of its service charges whether or not any dispute about that element was foreshadowed. The

appellant was entitled to rely on being given a proper opportunity to deal with elements that were really in dispute.

27. It was accepted that the LVT is entitled to raise issues of its own motion, but justice demanded that if it did so a party should be given a proper opportunity to address them. It was unjust and a procedural irregularity for the LVT to find against a party on a substantial issue that the LVT itself had raised and which had not been specifically foreshadowed in the pleadings, without giving that party a real opportunity to give a properly considered and documented reply. The appellant had not had that opportunity in the case of the parking control signage or the management and administration charges. To the extent, at the second hearing, that it was not in a position to immediately call up documentation on all items or the witnesses appeared unable or uncertain of the answers to every question, it was unfair to put any weight on that. The LVT, having said that it was unfair to overemphasise the shortcomings in the evidence, then reduced the figure of management and administration fees by up to 40%. They gave no proper reason for the figure they took other than that they thought that the figure the appellant was seeking was too high. Mr Manning acknowledged that the LVT was an expert tribunal, entitled to rely upon its own experience, but that did not absolve them from the obligation to give some reason to justify the figure that they hit upon. The LVT and did not claim that the figure they reached was taken from their experience; they gave no proper basis for it at all.

28. Mr Manning emphasised the submission in the grounds of appeal and statement of case that no challenge to the parking control signage could be spelt out of the respondent's case, nor was it an issue to which the LVT had drawn attention in its directions. The LVT's approach to reasonableness was wrong. The LVT was not entitled to disallow a charge, even though it was reasonable, because it considered that there was an even more reasonable, or preferable way to recover the costs. Furthermore it was perverse of the LVT to disallow the charges on the basis that to allow them would penalise the leaseholders. Good management of the development required that proper measures be taken to deal effectively with the parking problem. Putting up parking control signage was a proper measure to deal with the parking problem. There was no dispute with the leaseholders as to the need for the signs. The erection of those signs incurred a cost. The decision to rely upon signage was reasonable and the cost of the signs was reasonable. Mr Manning elaborated on the reasons why the LVT failed to take into account relevant matters, which would have demonstrated that it would not have been more desirable to levy higher penalties against offenders.

Conclusions on the Review

29. The LVT is perfectly entitled, as an expert tribunal, to raise matters of its own volition. Indeed it is an honourable part of its function, given that part of the purpose of the legislation is to protect tenants from unreasonable charges and the tenants, who may not be experts, may have no more than a vague and unfocussed feeling that they have been charged too much. But it must do so fairly, so that if it is a new point which the tribunal raise, which the respondent has not mentioned, the applicant must have a fair opportunity to deal with it.

30. The obligation to give the landlord or management company seeking to justify its charges a fair chance to do so cannot be sidestepped by imposing on the landlord or management company an initial burden of proof in respect of every element of every charge it maintains is reasonable.

31. This has been authoritatively established in the decision of the Court of Appeal in the case of *Yorkbrook Investments Ltd v Batten* [1985] 2 EGLR 100. In that case the court said:

> "During argument .... 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. 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 in making his claims for maintenance contributions will no doubt succeed, unless a defence is served in saying that the standard all 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 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."

32. Of course, in that case, the Court of Appeal was not expressly considering the Landlord and Tenant Act 1985, but like the court in that case, I find nothing in section 19 or section 27A of that act that suggests that there is a presumption either way. The wise claimant should, no doubt, come to the tribunal or the County Court prepared to give a general account, supported by broad documentation, to establish the overall reasonableness of the service charges. If the tenant complains about a particular specified item, the landlord or management company will have to deal with that item in the detail necessary to meet the point that appears to be being raised. If the tribunal itself takes a point that has not previously been evident with the landlord or management company must be given a fair opportunity to deal with it. What is a "fair opportunity" will depend upon all the circumstances. An important circumstance will be the significance of the point to the overall level of charges that are sought to be recovered: if the point would make a minimal difference, it may be that only a very short period for consideration would be appropriate; if the point would make a very substantial difference, justice would demand that there be a substantial opportunity to answer it properly. The advantage for the tribunal in granting a proper opportunity for a party to address the matter it has raised is that it makes it much less likely that the tribunal will take into consideration matters that are irrelevant or fail to take into account all those things that are relevant.

33. The management of a substantial property will cover a very wide number of matters, each one of which may generate a considerable amount of paper and involve many decisions, which may be more or less complicated. If a witness does the best he can from his recollection, but appears hesitant, a tribunal should, in fairness, be very cautious about drawing

an adverse inference about the efficiency of the applicant's management, based on an assumption that the witness will have every little detail at his fingertips. If the tribunal believes the point may be of substantial importance a short adjournment in order to permit a more considered answer will give the witness the opportunity to satisfy the tribunal on the point – equally it may demonstrate that the witness has no satisfactory answer to give.

34. Although I appreciate that there was debate at the second hearing about the virtues or otherwise of parking control signage and submissions were made about it, I am concerned that the appellant was not given a fair opportunity to present a full case on the matter. This might be of less significance if it were the only complaint. However, it is not. In my judgment there is real force in the argument that the tribunal appears to have applied the wrong test.

35. It is only from the words in which the tribunal expresses its decision that it can be understood what test in law it applied to the issues it had to decide. The LVT expressed itself as "not convinced by the argument that it is <u>just as reasonable</u> to charge the signage within the service charge as it is to levy higher penalties against parking offenders." (my underlining) That appears to be saying that some other approach would be more reasonable than the approach taken by the management company. What it does not say is that the approach taken by the management company was unreasonable. If the LVT meant what it said, it went wrong in law. The test is whether the service charge that was made was a reasonable one; not whether there were other possible ways of charging that might have been thought better or more reasonable. There may be several different ways of dealing with a particular problem of management. All of them may be perfectly reasonable. Each may have its own advantages and disadvantages. Some people may favour one set of advantages and disadvantages, others another. The LVT may have its own view. If the choice had been left to the LVT it might not have chosen what the management company chose but that does not necessarily make what the management company chose unreasonable.

36. This is a significant error of law, which justifies setting aside this part of the LVT's decision. This error then flaws the decision on the administration and management charges because one of the reasons that the LVT gave for being concerned about the level of administration and management charges was that "The existence of the charge to the tenants in respect of the parking control signage, as opposed to parking offenders bearing the cost of control, is indicative of less than thoroughly pro-active management."

37. While this is only one of seven points the LVT identified as giving it cause for concern about the administration and management charges, it is not possible to dismiss it as making no difference to its overall judgment. If the LVT had considered that the approach to parking control signage was reasonable, albeit not what the LVT might have done, it is not possible to be sure that its decision would have been the same. That is particularly so when the decision involved the LVT deciding upon a particular percentage which they substituted for the percentage claimed. If the LVT had taken a more favourable view of the standard of management, even if they had still made a reduction in the percentage, it might have been less of a reduction.

38. For that reason alone it seems to me that the LVT's decision about the administration and management charge cannot stand. It also seems to me that there is force in Mr Manning's other arguments to the effect that it is not possible to understand from the LVT's decision that it had properly appreciated the distinction in the lease between a management service charge and an administration service charge. Nor is it possible to understand why it settled upon the figure of 15% as an appropriate percentage, which represented a very substantial reduction, given that they said they would regard it as unfair to overemphasise the shortcomings, having accepted the point about the cost and quality generally of the services provided.

39. For those reasons the appeal by way of review succeeds.

Rehearing

40. There was no challenge to the LVT's decision on any matters other than the parking control signage and the Administration and management charges and the rehearing was confined to hearing the evidence of the appellant on those matters.

The Evidence

41. Mr David Paul said that he is a director of Regent 89 Ltd, which is the parent company of Regent Management Ltd. He did not appear at the LVT hearing as he was on holiday. Mr Darren Paul, who did appear at that hearing, is the sole director of the appellant company. Mr David Paul explained that he acts in a consultative capacity to the appellant company and has been personally involved in aspects of its management, such as the decisions concerning parking control and signage. Mr John Hall is employed as an accountant by the appellant.

42. Mr David Paul (references to 'Mr Paul' hereafter are references to Mr David Paul) started by explaining the relationship between the various bodies that are involved with Waterloo Warehouse, Waterloo Quay One, and Waterloo Quay Two. He summarised the arrangements between the appellant and other bodies for the apportionment of various tasks and expenses, such as the employment of Mr Roy Davidson as the site representative at East Waterloo Dock. He expanded upon Mr Davidson's role and the degree of supervision of the development carried out by himself and members of the appellant.

43. Dealing with the topic of security and parking control, Mr Paul said that Warehouse RTM employs the static security staff who operate the car park security barrier from the Lodge as well as monitoring the whole development with CCTV and supervising the alarm and door entry systems for Warehouse. Warehouse RTM then charges a proportion to the appellant in respect of the parts of Waterloo Quay. As for the parking, although the access is shared with Warehouse it is possible to distinguish between the parking for the flats in that development and the developments at Quay One and Quay Two.

44. Mr Paul explained how problems with the car parking at Quay One and Quay Two arose. This was largely because insufficient parking spaces were provided initially. When further spaces were provided by the developer they were sold on a 'first come, first served' basis. Some flats have more spaces than they need. Many flats have now got two cars but only one parking space. Some flats are sublet. Sometimes there are problems with visitors. Some people are just too lazy or thoughtless to park in the proper places. Mr Paul produced some of the complaints that have been made in 2004 and 2005. They included complaints from residents who had found their legitimate parking spaces occupied by other people and, when they were forced to park on the road, had been outraged at being clamped. The correspondence shows that parking and clamping were evidently contentious matters amongst the residents, some being vehemently against clamping and some being strongly for it. The appellant wrote to all tenants in October 2005 to ask for their views about regulating the car parking. They did not receive many replies. Mr Paul investigated the options with two companies. He said that National Clamps appeared to him to be the more professional and to provide the best option for dealing with the problem. They advised a combination of warning notices and parking permits with clamping used as a backup. He produced National Clamps' brochure which referred to the law on clamping on private land and the conditions that should be satisfied in order to comply with the law, namely that there should be sufficient signage around the property warning drivers of the consequences of improper parking and that the clamp release fees should be of a reasonable amount. National Clamps would not have been prepared to act on the basis of simply receiving clamping fees. Mr Paul then wrote to the residents about the options but got few replies. Mr Paul said his experience was that over-reliance on clamping could produce problems and complaints. Certainly one or two of the letters he had received argued that over-reliance upon clamping could make matters worse. Mr Paul said that he concluded that, as advised by National Clamps, a combination of warning signage, and the issue of permits and penalty notices, with clamping as a final resort, was the best overall solution to the parking problem and in the best interest of the tenants. He produced the contract with National Clamps. Their charges seemed to him to be reasonable. He said he had not received a single complaint since engaging that company.

45. Turning to the charges for management and administration Mr Paul repeated that there is a direct contractual relationship between the appellant and the individual lessee and referred to the 6th schedule of the lease to show that a distinction is made for a charge for generally managing and administering the property and for administering the management company itself. He distinguished between the role of a management company and the role of a managing agent. The appellant is not simply acting as an agent, taking instructions from the directors of a RTM, as, by way of contrast, is the position of Honeybourne Kenny who are the managing agent on behalf of the Warehouse RTM. The Management Company is responsible for making the decisions and carries a financial responsibility for those decisions if, for example, they are found to be unreasonable: an agent refers the decision up to the RTM and incurs no financial liability (in the absence of negligence).

46. Paragraph 13 of part B of Schedule 6 provides for the payment of "a reasonable sum for carrying out the management obligations hearing contained which sum shall be the Management fee". The management fee or charge, said Mr Paul, is based on costs charged to the service charge account, which included the cyclical maintenance provision. The management charge was calculated once the costs were known which was not until after the

relevant year had ended. The charge is calculated at 10% of the costs for the year. He produced and explained invoices for the years 2004 to 2006.

47. What is described as the Administration charge is the charge under paragraph 11 of part B of Schedule 64 "administering the Management Company itself". Mr Paul argued that it is in the interests of the tenants to have a competently administered management company, which can recover its own administration costs. This includes keeping up-to-date on the statutory responsibilities under the legislation, the giving of directions and instructions and the maintenance of proper premises, files and systems. This is different from the management of the development itself. As the LVT recorded, the charge was originally agreed with the developer at £104 per unit. He produced a note of the approval. It was then adjusted to £100 per unit. However the sum had increased as costs had increased.

48. Mr Paul criticised the reasons why the LVT justified a reduction in the charges. As the LVT accepted, the Warehouse development was not comparable. Honeybourne Kenny are managing agents not management companies and apart from security and caretaking, different contractors are used. It does not follow that a modern development is necessarily going to be less expensive to manage than an older one. There was no reliable evidence of that in the current case. Indeed the evidence is that Quay One and Quay Two form a complicated development to manage. The additional difficulty in controlling the car parking at Quay One and Quay Two is a case in point. It was explained that there are a number of complexities in the management of these developments. Against the background of the LVT's satisfaction with both the costs of the services provided and the standard achieved, the criticisms are trivial compared with the size and significance of the reduction made. Mr Ben Jordan added that in his opinion it was quite unreasonable to draw any conclusions from the fact that at the hearing the appellant's representatives were unable to provide specific answers to questions about which they had little or no prior knowledge. It would be almost impossible for a witness to recall every fact relating to management without having the files and records to hand, which files and records would themselves be very substantial. The LVT provided no justification for their figure of 15%. They did not even assert that it was based upon their experience of comparable developments.

49. Mr Ben Jordan gave evidence that he is the managing director of Premier Estates Ltd, a company specialising in residential leasehold management, which provides leasehold management services to approximately 250 residential leasehold developments which include approximately 10,000 individual properties. These interests include properties in the Merseyside area. He was instructed primarily to give expert evidence as to the reasonableness of the total charge made by the appellant.

50. He explained why he regarded the relevant clauses of the lease to be somewhat unusual in a lease that incorporates a professional Management Company. He referred to the approved RICS Service Charge Management Code. While this relates to fees charged by a managing agent, rather than a management company, and while he was of the opinion that the fees of a management company should exceed those charged by a managing agent as a result of the increased exposure to risk, he felt this Code was a useful guide. He questioned the desirability

of considering fees as a percentage of expenditure, and explained why. In order to make a proper comparison he considered it appropriate to consider the appellant's "total monetary take" which he described as the "total fee", rather than compare on the basis of percentages. Mr Jordan said that he had obtained information from two companies who manage developments throughout the country in addition to those developments that are managed by Premier Estates. He had taken into account location and size, whether the development is new build or conversion and whether the management is carried out by a Managing Agent or a Management Company. Necessarily, he had to make a number of assumptions in order to reach what he considered to be sensible conclusions. Since he could only rely upon management fees that are currently being charged he had to make some allowance for a degree of fee inflation. He would have preferred to take comparable figures that related directly to the relevant years but the method he had used was the best available to him. He referred to a number of developments, most of which were in Liverpool but some of which were in Manchester. He considered the location and size of each one and tabulated his results. Overall he believed his methodology to be robust. His conclusion was that the appellant's total fee for the years in question was well within the range of the highest and lowest comparables and very close indeed to the average where the manager had been appointed as the professional Management Company.

Conclusions

51. In my judgment, with regard to the parking control and parking signage, the proper approach is to consider whether the costs incurred were reasonably incurred and were of a reasonable standard. I am satisfied by the evidence of Mr Paul, supported by some additional oral evidence given by Mr Jordan, that the parking control solution adopted by the appellant was a perfectly reasonable one. It chose a rational and informed balance between the use of signage, permits, penalties and clamping. It took account of the difficulties that had been experienced on the development. That is not to say that the problems could not have been dealt with in another way. It is not necessary to find that what the appellant did was the most reasonable solution or even "just as reasonable" as some other solution; it is sufficient that it was a reasonable choice.

52. As I have said above, that means that one of the reasons given for the reduction in administration and management charges is plainly unsustainable. It cannot be said that adopting a reasonable approach to parking control and signage is indicative of substandard management.

53. Some criticism of the way of the management and administration charges are divided, taking into account the provisions of the lease, seems to me to be justified. It is a system that is not easy to fathom and likely to prove confusing for tenants. I have sympathy for the suggestion that it appears, at least, as if there might be the danger of a degree of double counting. Mr Jordan's criticisms of such a system carry force, in my opinion. However, given what the LVT accept (in paragraphs 5c and d) as being the provision of a generally reasonable standard of service at a reasonable cost, there would have to be substantial grounds for the conclusion that the management and administration charges were at an unreasonable level. I

am afraid that I am driven to the conclusion that the grounds relied upon by the LVT do not justify such a conclusion.

54. Certain grounds are justly stigmatised by Mr Manning as trivial; for example, after expressly approving the reasonableness of the services in relation to (amongst other things) abandoned items the remark that "the ambience of the development might be improved by more active pursuit of the owners of abandoned property" is far too slight a basis to justify a reduction in the management and administration charges. Other grounds might have had more arguable substance had they been based upon truly comparable properties or careful investigation of the particular circumstances, rather than general assertion. In my judgment the reasons put forward by the LVT are of insufficient weight to counter the evidence put forward by the appellant that their management and administration charges are reasonable.

55. While I approach Mr Jordan's evidence with a degree of caution, bearing in mind the inevitable assumptions and adjustments he fairly acknowledges he has had to make, he has assembled a sufficient number of comparable charges to give real support to the reasonableness of the management and administration charges claimed and I put some weight upon his conclusions.

56. In conclusion, I find on the evidence as a fact that both the parking signage and control charges and the management and administration charges as claimed by the appellant are reasonable. The appeal is allowed.

Dated 15th October 2010

His Honour Judge David Mole QC
Judge of the Upper Tribunal