LRX/60/2007

LANDS TRIBUNAL ACT 1949

LANDLORD AND TENANT – service charges – Landlord and Tenant Act 1985 section 27A – incorrect allocation of charges for gas central heating between lessees of a building – overcharged lessees entitled to seek a determination as to how much payable by them without being required to prove the amount payable by each of the undercharged lessees

IN THE MATTER OF AN APPEAL FROM THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

BETWEEN

SAN MARINO ESTATES LIMITED
MS VALERIE ELLWOOD (AND OTHERS) **Appellants**

and

PEVEREL OM LIMITED **Respondent**

Re: New River Head, 173 Rosebury Avenue, London EC1R 4UJ

Before: His Honour Judge Huskinson

Sitting at: Procession House, 110 New Bridge Street, London EC4Y 6JL on 25 April 2008

Mr John Hawksley appeared (with the permission of the Tribunal) on behalf of the Appellants.
The Respondent did not appear and was not represented.

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DECISION

1. This is an appeal from a decision of the leasehold valuation tribunal for the London Rent Assessment Panel ("the LVT") dated 19 February 2007 whereby the LVT concluded that the total gas charges payable by the Appellants, as lessees of flats in New River Head, 173 Rosebury Avenue, were payable in the sums claimed by the Respondent.

2. The LVT's decision was given as a result of a further hearing, which was supplementary to an earlier decision by the LVT dated 30 March 2006. The original applicants to the LVT constituted some of the lessees of New River Head ("the Building"), which comprises 129 individual apartments. The application was made under Section 27A of the Landlord and Tenant Act 1985 as amended in respect of service charges for the years 1997-2004. Originally three bodies were named as respondent, but pursuant to a preliminary order made by the LVT on 28 February 2005 the LVT decided that only Peverel OM Limited (i.e. the present Respondent) should continue to be a party. The Respondent apparently admitted that it was the proper respondent for the purpose of any ruling as to the recoverability of service charges for the relevant years. By the time of the preliminary ruling of 28 February 2005 the number of applicants had increased to twenty. The LVT gave various directions including:

> "3. In default of any leaseholder applying to be joined or otherwise seeking to make representations to the Tribunal all remaining leaseholders will be bound by the decision of the Tribunal".

3. The original hearing took place between 20-24 February 2006 and resulted in the LVT's decision of 30 March 2006 whereby it reached various decisions regarding the recoverability of service charges for the years 1997 to 2004. There was however one aspect of service charge which the LVT recognised that it was unable to decide upon the information then before it. In paragraph 17 of its decision it recorded this fact and gave directions for the future resolution of this topic, which was a topic dealing with the recoverability of that part of the service charges for the relevant years which involved the payment, in accordance with the provisions of the leases, of charges for gas central heating consumed in the individual apartments.

4. At this original hearing of February 2006 Mr John Hawksley, who is the husband of one of the original twenty applicants, represented the applicants before the LVT. Mr Hawksley also represented the applicants before the LVT at the supplementary hearing (which is the subject of the present appeal). Mr Hawksley appeared before me and asked for permission that he should once again represent the Appellants, which I granted to him.

5. The standard form lease of apartments in the Building reserved by way of further or additional rent the "Tenant's Proportion", which was defined as meaning:

> "The proportion of the Maintenance Expenses payable by the Tenant in accordance with the provisions of the Seventh Schedule hereto".

The expression "Maintenance Expenses" was defined as meaning:

> "The monies actually expended or reserved for the periodical expenditure by or on behalf of the Manager or the Landlord at all times during the term hereby granted as mentioned in the Sixth Schedule hereto and/or in carrying out the obligations specified therein".

The Sixth Schedule was divided into various parts, Part "D" of which (Gas Supply Cost) stated:

> "The costs from time to time of gas required to heat the metered supply of hot water to the Premises for space heating purposes".

The Seventh Schedule made differing provisions for the Tenant's Proportion of various aspects of the Maintenance Expenses. Paragraph 1.4 provided:

> "100% of the costs attributable in connection with the matters mentioned in Part "D" of the Sixth Schedule hereto and of whatever of the matters referred to in Part "F" of the said Schedule are expenses properly incurred by the Manager which are relative to the matters mentioned in Part "D" of the said Schedule".

This case has been presented on the basis that it is the earlier part of this paragraph 1.4 with which the LVT and the Lands Tribunal are concerned. Thus each Tenant was required to pay 100% of the costs from time to time of gas required to heat the metered supply of hot water to the Premises, i.e. to the particular apartment which was demised to that Tenant.

6. Each apartment had its own meter for the purpose of recording the amount of heat consumed within that apartment by way of hot water for space heating purposes. The precise mechanism by which that was done does not matter for present purposes, but the meter was able to read the volume of the water and the temperature of the water entering the apartment and leaving the apartment, such that from an analysis of these figures the amount of heat actually used within that apartment could be calculated.

7. The manner in which the Respondent, as manager of the Building and on behalf of the landlord, calculated the amount to be charged to any individual Tenant can be summarised as follows. The total amount of money spent on gas, for the purpose of heating water in the communal boilers, was calculated (£x). Next the total amount of heat (assumed to be expressed in kilowatt hours ("Kwh")) as consumed within all of the Tenants' apartments put together was calculated (y Kwh). As a result of this the Respondent was able to calculate how many Kwh the Tenants could be charged for and how much the total bill to be shared amongst them was, and the Respondent was able to calculate the appropriate rate of charge per Kwh (namely £$\frac{x}{y}$ per Kwh). If this price of £$\frac{x}{y}$ per Kwh was applied to every Kwh consumed by each Tenant the resultant amount recovered would, of course, be £x, which was the total bill to the Respondent.

8. Part of the concern of the applicants to the LVT was that the charging for gas was wrong in various respects including the fact that there was no allowance made for the supply of hot water for heating the gym or the common parts, nor was any allowance made for the supply of

hot water to apartments with faulty meters. There was also the following separate concern, which is central to the present appeal, which results from the different nature of some of the meters in the various apartments. Thus while some apartments had a type 252 meter which measured the heat supplied in units of 1Kwh, other apartments had a meter of type 272 which measured the heat supplied not in units of 1Khw but in units of $\frac{1}{100}$ of a megawatt hour (i.e. in units of ten Kwh). This fact was either not appreciated by or was overlooked by the Respondent with the result that all meter readings (i.e. including the meters which read in units of 10Kwh) were treated as reading in units of 1Kwh. This substantially underrepresented the number of Kwh consumed within the building, because for each apartment with a type 272 meter the figure given as the amount of consumption should it seems have been multiplied by a factor of ten so as to give the proper reading in Kwh (as opposed to the reading being in $\frac{1}{100}$ of a megawatt hour). However as is summarised above the amount to be charged to each Tenant for each recorded unit of heat consumed in that Tenant's apartment was given by the fraction $\frac{x}{y}$ where the denominator y was the amount of units of heat used within the Building. If the total number of units used within the Building was taken as a figure substantially less than it should have been (i.e. because the apartments with a type 272 meter were only recorded as having used one tenth as many units as should have been recorded) then the result is that the amount to be charged per unit of heat consumed as shown on the meter of any particular apartment (£$\frac{x}{y}$ per unit) was substantially higher than it should have been for all of those apartments whose meters recorded in units of Kwh.

9. In its first decision of 30 March 2006 the LVT had been unable, on the evidence available to it, to reach any conclusion on this point. In paragraph 17 the LVT stated:

> "The Applicants conceded that their schedule was not totally accurate because in a few cases they had not been able to determine the type of meter involved. That being so, and giving consideration to the amounts involved (in some cases involving a discrepancy of several thousand pounds) the Tribunal decided that it did not have sufficient evidence before it to enable it to take a view on this issue but would give the Applicants leave to restore the application to deal with this issue alone, if they can provide accurate figures relating to each and every apartment together with expert evidence on the interpretation of the calculations."

10. The foregoing is what Mr Hawksley sought to do on behalf of certain of the original applicants in the restored hearing before the LVT. I say on behalf of certain of the applicants, because as will be clear from the foregoing problem the result of the problem was that, while some apartments were substantially over charged (i.e. the apartments with type 252 meters) other apartments were substantially undercharged (i.e. the apartments with type 272 meters whose meters read in units of 10Kwh). In his submissions to the LVT dated 16 February 2007 Mr Hawksley made it clear that the application was on behalf of those applicants as identified in the report from Mr Martin (an expert called by the Appellants) as having been overcharged. In summary the nature of the case presented to the LVT on this point was that, while there were other aspects of overcharge (namely the failure to make any allowance for heat used for

heating the common parts or the gym or for faulty meters), nothing as a matter of practicality could be done by the Appellants or their expert for the purpose of identifying the amount of overcharge referable to these other aspects of overcharge. The Appellants and Mr Martin therefore did not seek to identify any overcharge flowing from these other points but were prepared to assume against themselves that nothing could be done about it. Thus they did not seek to diminish the numerator in the fraction $\frac{x}{y}$ by removing from the £x the cost of heat supplied to the gym or the common parts (payment for which did not fall within paragraph 1.4 of the Seventh Schedule). Also so far as concerns meters which were thought to be faulty the Appellants and Mr Martin did not seek to include within the denominator, i.e. within the y units, the amount of units shown on these suspect meters. If the Appellants and Mr Martin had sought to make allowance for these matters then the necessary adjustments would have involved the numerator being smaller and/or the denominator being larger, each of which separately would have reduced the amount to be charged per unit for each unit of heat used in any apartment. However by omitting to make any adjustments for any of these other aspects of overcharge, the Appellants and Mr Martin contended that they were making assumptions against themselves and, as a result, were calculating a price to be charged per unit of heat which was the absolute maximum which could properly be justified – their case being that if allowance were made for these other unquantifiable aspects of overcharge the proper amount charged per unit of heat would in fact be smaller for the reasons just mentioned. The Appellants and Mr Martin sought merely to identify the overcharge for those Tenants whose apartment had a type 252 meter, being the overcharge arising from the point mentioned in paragraph 8 above.

11. In its further decision, i.e. its decision on this aspect of the charges for gas, dated 19 February 2007, the LVT accepted that the amounts charged to some Tenants during the period of the Respondent's management were wrong, but that the mistakes arose through a genuine miscalculation of the figures and not through any fault or negligence on the part of the Respondent. However the LVT noted that it had not been possible to provide an accurate figure relating to each and every apartment as to how much should have been charged. The LVT stated:

> "It would also be inequitable to order a repayment of overcharges without also being able to deal with the reimbursement of sums by those Tenants who had been undercharged for their share of the total bill. No figures were available for the undercharges and the Tribunal does not have the power to deal with this matter."

As a result the LVT declined to make any determination as to the amount of gas charges properly payable save to record that the total gas charges were to be paid by the Tenants without any deduction in accordance with the provisions of the leases.

12. The Appellants' principal complaint is that in reaching this decision the LVT failed to recognise that each individual Tenant within the Building possesses an individual right to have determined under section 27A the amount properly payable by way of service charge (including in particular by way of gas charge) for any particular year. It is argued that it is not open to the LVT to place a fetter on such a right and to tell such a Tenant (or group of Tenants) that the complaint about overcharging will only be entertained if the Tenant (or group of Tenants) sorts out not only the amount of the alleged particular overcharge that is complained

of but also sorts out the entire proper charging figures, including overcharges and undercharges, for the entire building. In granting permission to appeal the President of the Lands Tribunal stated:

> "It appears likely that the LVT erred in not determining the amount of gas charges due from the tenants who had been overcharged. Permission is limited to this issue, which will be determined by way of review".

13. The matter came before me for hearing on 25 April 2008. The Respondent was neither present nor represented, but had lodged a written reply to the Appellants' statement of case. The Appellants were represented by Mr Hawksley. The appeal proceeded by way of review in accordance with the President's grant of permission to appeal. I did not receive any evidence but was able to consider the evidence which was before the LVT, including the second expert report of Mr C M Martin FRICS dated 15 December 2006 and also, on behalf of the Respondent, the witness statement of Adam Cooper of 12 February 2007 and the expert report of Mr B.R. Maunder Taylor FRICS, MAE dated February 2007.

14. The Appellants' grounds of appeal and statement of case to the Lands Tribunal sought to raise various matters beyond the question of the alleged overcharge to certain of the Tenants. However bearing in mind the terms of the grant of permission to appeal I concluded that this was the only point before the Lands Tribunal.

15. The principal objection raised by the Respondent in its reply to the Appellants' statement of case is contained in paragraph 6. In earlier paragraphs the Respondent makes clear that it accepts that certain arithmetical errors had been made in relation to the calculation of the 2002 service charge account and that the Respondent was prepared to put right by way of refund these arithmetical errors. The Respondent also pointed out that it was not within the jurisdiction of the LVT (or indeed the Lands Tribunal) to make orders for refunds – the jurisdiction under Section 27A was merely jurisdiction to determine what was properly payable. Having made those points the Respondent in paragraph 6 stated as follows:

> "6. Paragraph 4 is noted. In response thereto the Respondent says that:
>
> a. although the Applicants seek to present their claim as one made by (only) the leaseholders of certain – and not all – of the apartments at New River Head, it is not open to them to do so;
>
> b. the Applicants' section 27A application was made on 18 November 2004 (at pages 1-27): it simply sought a determination of the liability to pay service charges for the years 1998 to 2005;
>
> c. further, by direction 3 of the LVT's directions made on 1 March 2005 (at pages 34-36) it was provided that *all* leaseholders at New River Head would be bound by the decision of the LVT;
>
> d. moreover, as indicated above, the role of the LVT is to determine the liability to pay service charges;

e. that being so, the function which the LVT shouldered in this case was to determine the service charges of all leaseholders at New River Head, i.e. across the board;

f. the Appellants' attempt to limit the claim to the recovery of alleged gas overcharges, and their sole focus thereon, is thus impermissible;

g. besides, such approach grossly skews and distorts the overall picture, which is that if some lessees were overcharged then others were undercharged (with the aggregate overcharges counter-balanced by the aggregate undercharges since the total gas charges for each year were not in dispute);

h. additionally, the point made in paragraph 5(e) above concerning the distinction between determination and enforcement is repeated."

16. In my judgment this contention by the Respondent is ill-founded. It overlooks the fact that each individual Tenant of an apartment in the Building had separate individual rights to seek a determination under section 27A. If, for instance, the Tenant of apartment A had had individual complaints regarding a particular item of service charge (say in relation to the charges for gas) that Tenant would be entitled to raise this matter for determination without being told that he/she could only have the matter resolved upon if he/she was able to lay before the LVT the correct solution for the proper charging of all the apartments in the block, i.e. the consequential adjustments necessary upon the correction of an error in that particular Tenant's accounts. In my judgment it was open to the Applicants to pursue the point regarding the charges for gas on behalf only of those who complained that they had been overcharged. This is what Mr Hawksley on behalf of such persons, who he referred to as the Relevant Applicants, sought to do, see especially paragraph 2 of the Applicants' submissions of 16 February 2007. The fact that the LVT gave the direction on 28 February 2005 as recorded in paragraph 2 above could not remove this statutory right under section 27A enjoyed by any applicant who contended that he/she had been overcharged for any relevant year. In my judgment Mr Hawksley was entitled to pursue this deferred part of the hearing before the LVT on the basis of the Tenants who contended they had been overcharged and he was entitled to pursue it by way of appeal on behalf of these Tenants before the Lands Tribunal. It would have been open to the Respondent had it wished to do so to refer to the LVT the question of the proper amount payable by way of gas charges by all the other Tenants within the Building, i.e. the Tenants who did not allege they had been overcharged. Similarly it would have been open to the Respondent itself to seek to appeal against the LVT's decision. Neither of these matters occurred. Bearing in mind the foregoing and bearing also in mind the terms of the learned President's grant of permission to appeal I am now required to consider the present appeal as being pursued on behalf of those Tenants who claim to have been overcharged by reason of having a type 252 meter.

17. I have considered the second expert report from Mr Martin. I accept what he says when he records that, for the reasons he gives, the contents of his Appendix E records for each relevant flat for each year from 1998 to 2004 the maximum charge that could have properly been levied in relation to that flat for the costs of gas under Part D of the Sixth Schedule to the relevant leases. He has produced his calculation in the manner summarised above in paragraph 10. If he had sought to allow for certain other alleged aspects of overcharge there would have

been a case for diminishing the numerator of £x and increasing the denominator of y units for the purpose of calculating the appropriate charge per Kwh to be applied to the amount of Kwh consumed within each of the relevant apartments. However for the reasons he gives he has not been able to allow for these matters and therefore has made the assumptions, contrary to the interests of the Appellants and favourable to the interests of the Respondent, which he has stated. Thus nothing is deducted for the cost of heating the gym or the common parts. Also the apartments which are thought may have had faulty meters are treated, for the purpose of calculating y units, as having consumed zero units. Thus y if accurately calculated could well be larger but could not be smaller than the figure which Mr Martin has adopted for y. Having calculated the proper charge per Kwh as being a charge which represents the maximum possible proper charge (the real proper charge would for the reasons given by Mr Martin inevitably be less) he then applies that to the amount of units recorded in each relevant apartment as having been consumed. This gives a figure to be paid for each apartment for each relevant year which is a figure which is the maximum properly chargeable to that apartment (on the real proper charge per Kwh the amount chargeable to each such apartment would have been less).

18. In my judgment the Appellants were entitled to present their case in this way. They have given evidence, through their expert Mr Martin, to the effect that they have been overcharged and that the amount of the overcharge cannot be less (and is almost certainly more) than the amount of the overcharge shown by Mr Martin in his Appendix E. I accept this evidence.

19. The Respondent made various further points in paragraph 14 of its reply to the Appellants' statement of case. paragraphs (1) to (6) redeployed, with further elaboration, the points already made in Paragraph 6 of the reply. Sub paragraph (7)a-g raised certain detailed criticisms of some aspects of Mr Martin's approach. In my judgment these points are satisfactorily answered in Paragraphs 55-61 of the Appellant's submission dated 24 April 2008. In short some of these matters are de minimis and in any event there is nothing therein which undermines the correctness of Mr Martin's evidence that he has calculated the minimum amount of the relevant overcharges (with the true overcharge almost necessarily being larger and in any event not smaller than the amount of overcharge calculated by him). As regards the points in sub paragraph (7)d and e of the reply there is a distinction between excluding the heat recorded as being consumed by apartments which are thought to have had faulty meters (thereby decreasing the denominator of y units in the fraction $\frac{x}{y}$ and giving rise to a higher allowable charge per Kwh) on the one hand and considering how much was properly chargeable for these apartments on the other hand. The latter operation involves the application of the charging rate per unit (which errs on the side of being larger than it should be and hence favourable to the Respondent) to the amount of units actually recorded for that apartment. It may be that the amount of units recorded for that apartment is right or wrong, but in the absence of any evidence to the contrary the only proper basis is to charge that apartment for the number of units it is recorded as having consumed and to apply to that number of units the price per unit calculated on the above mentioned favourable assumptions (i.e. favourable to the Respondent).

20. For the purpose of reaching a conclusion as to how much is payable by way of gas charges for each of the allegedly overcharged apartments for each relevant year it is not necessary for it to be proved that the Respondent was at fault or knew of the fact that some of the meters were recording in units of ten Kwh. The question is simply how much is properly payable by way of gas charges for each relevant year for these apartments. The question of fault does not come into it.

21. There is nothing in any of the other criticisms in the Respondent's reply which leads me to doubt the evidence given by Mr Martin, namely that he has calculated for each relevant flat (i.e. for each allegedly overcharged flat) an amount for each relevant year which is the absolute maximum charge which could be justified for that apartment – his evidence being that the proper charge was almost necessarily less than the figure he has given and could not in any event be more than the figure that he has given.

22. In my judgment the Appellants were entitled to present their case in the manner in which it has been presented. It was not necessary for them to solve every problem regarding gas charges and to establish exactly how much should be paid by every apartment, including for the apartments apparently undercharged.

23. In the result therefore I allow the Appellants' appeal and I conclude that for each of the relevant service charge years the amounts properly chargeable by way of charge for gas under Part D of the Sixth Schedule are the sums shown in the column headed "Maximum charge" for that apartment for the relevant year in Appendix E to Mr Martin's second expert report. Thus by way of example for apartment one for the 1999 year the amount properly chargeable was £141.85. For apartment two for this same year the amount properly chargeable was £167.69.

24. I accept that neither the LVT nor the Lands Tribunal has power specifically to order the making of refunds. The jurisdiction is merely to determine how much was properly payable, which I have done in the manner aforesaid. I have noted that the Respondent admitted that various arithmetic errors had also been made and that these would be put right and that there was no need for any order to be made in respect of those arithmetic errors. Beyond recording this point I therefore say nothing further regarding these arithmetic errors, beyond of course the fact that if my decision as to the amount properly chargeable by way of gas charges for each relevant apartment for each relevant year as stated above effectively deals with some or all of the arithmetic errors, then clearly the arithmetic errors need only be corrected once rather than twice.

Dated 21 May 2008

His Honour Judge Huskinson