The two main issues in this appeal and cross-appeal relate to costs:

(1) Whether the costs of a successful application for the appointment of a manager under section 24 of the Landlord and Tenant Act 1987 (“the 1987 Act”) could be put through the service charge, and

(2) Whether the LVT was wrong to make an order under section 20C of the Landlord and Tenant Act 1985 (the “1985 Act”), that the costs of those proceedings should not be added to the service charge.

The issues divide very neatly, and I am therefore going to split my review of the decision in two. This post is about the recoverability of the legal costs of the section 24 application under the terms of the lease. My second post will consider the section 20C aspect of the case.

**The good old days**

There is a real vogue in London for giving converted industrial buildings names evocative of their industrial past. Amongst others, we have the Candle Factory, the old School Yard (romantically located next to the Wandsworth roundabout) – and the Jam Factory.

I imagine that these names are designed to promote a cosy, fuzzy nostalgia in potential purchasers. Regrettably, this case does not conjure up such images. It is described by Martin Rodger QC as “a sad example of the disagreements which can beset leaseholder-managed blocks of flats despite the best efforts and sacrifices of many whose only motivation is to improve the management of premises in which they and their neighbours share a common interest”.

**Background**

The Jam Factory was created in 2003 from three Victorian industrial buildings. It contains about 194 residential flats on 999 year leases in three blocks. The developer went by the seraphic name of Angel Property (Hartley Buildings) Ltd.
The management of the Jam Factory proved controversial from the outset. By 2006, when Stonedale Property Management were appointed, two firms of managing agents had resigned, Angel had itself managed the development for a while, and the lessees, dissatisfied with the quality of construction of the flats and/or the management generally, had begun to withhold their service charges.

Angel went into liquidation in October 2009.

The Jam Factory Freehold Ltd, a company set up by about half of the lessees, bought the freehold from Angel's liquidator in January 2010. As part of the sale, it became entitled to the arrears of service charges.

It decided to retain the services of Stonedale, even though some lessees were decidedly unhappy with Stonedale’s services.

The leases

The leases of the flats were in a standard form and included covenants by the landlord to provide services, coupled with an obligation on the leaseholder to pay a service charge.

The relevant clause of the lease in the appeal was the following, couched in the distinctive, punctuation-free terms which typify legal documents:

“For the avoidance of doubt the parties acknowledge and declare that notwithstanding anything herein contained or implied:-

14.1 In the management of the Building and the performance of the obligations of the Landlord hereinafter set out the Landlord shall be entitled to employ or retain the services of any appropriately qualified or experienced employee agent consultant service company contractor engineer or other advisers of whatever nature as the Landlord may reasonably require in the interest of good estate management and the proper expenses incurred by the Landlord in connection therewith shall be deemed to be an expense incurred by the Landlord in respect of which the Tenant shall be liable to make a contribution in accordance with the Service Charge Percentage under the provisions set out in the Ninth Schedule hereto.”

The applications

In November 2010, the lessees of about twelve flats applied to the LVT under section 27A of the 1985 Act. The application related to:

- Costs incurred in the years 2006-2009, and
- On account payments for 2010 and 2011.
Just over a year later, in December 2011, the same lessees applied under section 24 of the 1987 Act for the appointment by the LVT of a manager to take over Stonedale’s management responsibilities.

Both applications were made on the LVT’s standard form.

The application form included the question: “If you are a tenant, do you wish to make a section 20C application”. The lessees ticked the “yes” box.

The hearing of the appointment of a manager application took seven days.

With the LVT’s encouragement, the parties subsequently managed to settle the section 27A application and the question of costs relating to it. Martin Rodger QC notes that that agreement has gone rather pear-shaped (my words, not his). The reasons why are not relevant here, but I understand that they may feature in an as-yet-unheard appeal.

The LVT’s decision on the appointment of a manager

The LVT determined that it would not be just and convenient to appoint a manager. In its view, the leaseholders’ complaints were not sufficiently serious to justify the appointment of a manager under section 24 of the 1987 Act.

Rather fatally to the application, it also decided that the manager proposed by the lessees was “not a suitable candidate for this particular development” and “had no plans for the future of the development”.

It expressed some sympathy for Stonedale, who faced the practical difficulties of meeting the day-to-day running costs of the Jam Factory with service charge arrears of over £340,000, but did not allow them to escape without what sounds like legitimate criticism:

- Whilst Stonedale had communicated information regularly to the lessees, the tone of some of its correspondence had been inappropriate;
- There were breaches of the landlord’s repairing obligations;
- There had been some overcharging for electricity and water, and
- Remedial action had not always been prompt.

The LVT then considered the lessees’ section 20C application, which had two limbs:

1. The terms of the lease did not permit costs incurred in legal proceedings against leaseholders to be treated as service charge expenditure, and
2. If the lease did permit those costs to be so treated, it was just and equitable to make a section 20C order.
The LVT determined that the costs were recoverable under the lease by way of service charge, but made a section 20C order for the following reasons:

- A more user-friendly style of management by Stonedale may have avoided the application;
- Stonedale had delayed in attending to disrepair and utility overcharges;
- The landlord had not tried to raise capital elsewhere;
- The landlord’s hardship in absorbing its own costs was outweighed by the conduct of the Stonedale, which was its agent, and
- In any event the landlord was going to recover some of the costs under the agreement to settle the section 27A application.

The lessees appealed the decision that the costs were recoverable under the lease.

The landlord cross-appealed the decision to make a section 20C order.

**Recovery of legal costs as a service charge**

Oh, the twists and turns of this case!

Why would the lessees appeal this point when the LVT made a section 20C order in their favour? Because they were concerned that if they accepted the LVT’s determination that the lease permitted the costs to be put through the service charge, that acceptance would impact on their liability to contribute towards the costs of other proceedings.

Unfortunately for them, Martin Rodger QC preferred the landlord’s submissions on this issue.

He declared himself satisfied that clause 14.1 was “amply wide enough to enable the recovery of the costs of employing solicitors and counsel in connection with an application by leaseholders of flats in the Jam Factory for the appointment of a manager under section 24 of the 1987 Act”.

**Canary Riverside Property Limited v Schilling (LRX/65/2005)**

In *Schilling*, Judge Rich QC was asked to determine whether the costs of resisting an application to appoint a manager under section 24 of the 1987 Act fell within a provision which entitled the landlord to recover the "proper and reasonable fees and disbursements of managing agents, solicitors, counsel, surveyors … employed or retained by the Landlord for or in connection with the general overall management and administration and supervision of the building.”
Judge Rich QC said that it was “plainly right” that:

“13. … incurring fees in resisting an application to change the manager of the building is in connection with such management and if the fees are proper and reasonable they fall within the costs chargeable to the service charge.” …

“15. Resisting such challenges is part of the ordinary cost of management, just as is the cost of collecting the service charge from tenants who fail to pay on demand. Ordinarily such an action, if dismissed, would be dismissed with an order that the unsuccessful claimant pays the landlord’s costs, but providing the landlord reasonably incurred the costs, in so far as they are not recoverable from the complaining tenant, they may surely be charged to the service charge as costs of management.”

Martin Rodger QC applied this is theme to the Jam Factory:

“The management of a complex residential building necessarily and routinely involves dealing with inquiries, complaints and criticism. If leaseholders seek the appointment of a new manager, or seek to persuade a landlord to make changes in the style or approach to management, the landlord’s participation in such discussions would, in my view, also be “in the management of the building”. Where a group of leaseholders, dissatisfied with the landlord’s response to their request for a change in the identity of the manager or in other aspects of management, made an application to the First-tier Tribunal for it to appoint a manager under section 24, resisting that application also seems to me quite properly to be within the scope of management of the building. The fact that the whole focus of the enquiry before the tribunal in such a case is on both historic management and the new management regime reinforces that clear impression”.

Wording of clause 14.1

Turning to clause 14.1, Martin Rodger QC held that:

- The opening words of the clause confirmed that it was not to be read as restricted by other parts of the lease;
- “The drafting technique of deeming costs which fall within clause 14.1 as being recoverable as part of the service charge expenditure, rather than a simple statement that the landlord is entitled in performing its service charge obligations to engage professional assistance, seems to me to indicate that the parties intended to bring within the scope of the service charge the costs of activities which might not otherwise be within that scope”;
- The costs of dealing with the section 24 application fell clearly within the conditions laid down by clause 14.1 because they were costs incurred “in the management of the building”, and
Section 27A application costs

The appeal then took rather an odd turn, because Martin Rodger QC proceeded to consider the recoverability of “the costs of the proceedings under section 27A of the 1985 Act [which] were withdrawn from consideration by the LVT by the Compromise Agreement”.

That issue was not before him.

I suspect that it would be fairer to say that the question was whether costs would, as a matter of principle, be recoverable on a section 27A application. Happily, I can reassure those who are hot on their procedural regularity that the point was fully argued at the appeal hearing itself, so presumably with the consent of all parties.

Martin Rodger QC was unhesitating:

“It seems to me to be clear that the landlord’s participation in proceedings which challenge the amount of the service charge, including the service charge payable on account for services which have not yet been incurred, is properly to be regarded as an act of management”.

He rejected the lessee’s argument that the fees of solicitors and Counsel were not included in the ambit of the clause. Those fees fell within the beautifully dismissive phrase “of whatever nature”, which followed the list of other specified advisers in clause 14.1.

I have a feeling that if clause 14.1 was drafted by a solicitor, it was drafted by one who was not altogether enamoured of their profession at the time.

Conclusion

It will come as no surprise to learn that Martin Rodger QC upheld the LVT’s determination that, in principle, the costs of the manager proceedings were recoverable through the service charge.

He dismissed the appeal.

Observations

In the second part of his decision, Martin Rodger QC examines case law on section 20C, including Sella House Ltd v Mears [1989] 1 EGLR 65 and Iperion Investments Corporation v Broadwalk House Residents Ltd (1996) 71 P&CR 34.
I have always tended to rely on those two cases on the question of whether costs are recoverable under the terms of a lease, rather than on the section 20C point. Martin Rodger QC did not however consider them at all in this part of his decision which, for me, would be their familiar habitat.

To recap: in *Sella House*, the Court of Appeal held that the clause in question did not permit the landlord to recover the costs of legal proceedings. In *Iperion Investments*, the position was the reverse. You can read a summary of both cases in *Greening v Castelnau Mansions Ltd* [2011] UKUT 326 (LC).

The principle that every lease must be construed in its own context pretty much freed Peter Gibson LJ in *Iperion Investments* to make his own decision as to the meaning of the clause before him.

*Canary Riverside Property Ltd v Schilling* (LRX/65/2005), a decision of the then Lands Tribunal by Judge Rich QC, postdates *Sella House* and *Iperion Investments* by at least nine years and is to my mind quite a broadening of the *Sella House/Iperion Investments* debate.

Having re-read the miscreant clauses in *Sella House* and *Iperion Investments*, and in the light of *Schilling* and this case, I would go so far as to suggest that there is a trend nowadays to construe potential costs recovery clauses more broadly than in 1989.

I will end this post with the fuzzy nostalgia I mentioned in its early lines. Hands up those who remember 1989, the year in which *Sella House* was decided, and the last of a decade I fondly recall for its pie-crust collar blouses, *Dynasty*-inspired shoulder pads and the beautiful, plaintive sound of The Smiths.