

**TO THE PROFESSIONAL CONDUCT AND COMPLAINTS COMMITTEE OF THE
BAR COUNCIL**

**COMMENTS ON THE RESPONSE BY MS NOELLE KLOSTERKOTTER-DIT-
RAWE DATED 29 AUGUST 2004**

Introduction

1. This document is my reply to Ms Noelle Klosterkotter-Dit-Rawe's response to my Reply dated 9th June 2004. This document seeks to respond to the allegations of professional misconduct that are made against me. I have not responded to those of the points raised by Ms Rawe that I respectfully submit are not relevant to the allegations of professional misconduct. I do not seek to avoid these further allegations (which are denied). Consequently, if it is thought that I have not addressed an issue that is considered relevant by the Professional Conduct Committee, I would of course be pleased to do so upon request.
2. Moreover, given the breadth of the issues raised by Ms Rawe, I respectfully suggest that an oral hearing may be the most convenient means of ensuring that the allegations against me are properly addressed. I therefore request the opportunity of making oral submissions if there are any points of particular concern that it is thought that I have failed to address in writing.
3. In particular, I do not address in detail:
 - (1) the proper construction of Ms Rawe's lease, save to state that the fundamental point (as noted in my Reply) is that, under the terms of Ms Rawe's lease, an accountant's certificate is not a condition precedent to an obligation to pay an interim charge: the claim against Ms Rawe was for non- payment of an interim

service charge demand. In this connection I note that, contrary to what Ms Rawe¹ says, the sum claimed in the claim against Ms Rawe was a sum payable as an interim (i.e on account, or in advance of the expenditure being incurred) demand—the fact that a pre-estimate of the total cost of the works was demanded does not render the demand a final demand, rather than an interim or on account demand. As Ms Rawe notes in her Response², the works had not been completed when the LVT made its determination. Consequently, I remain of the view that there was no viable contractual defence to the claim against Ms Rawe;

- (2) whether there may have been an arguable breach of the statutory consultation procedure for “service chargeable” works under section 20 of the Landlord & Tenant Act 1985 (“the 1985 Act”)³: I briefly considered this point in my preparation for the conference and concluded that the landlord had substantially complied with the statutory consultation procedure. I appeared as Counsel for the successful tenants in *Martin v Maryland Estates Limited* (2) [1999] 2 E.G.L.R. 53 (Court of Appeal), which is the leading case on the operation of section 20 of the 1985 Act and consider myself extremely familiar with the operation of this provision;
- (3) Ms Rawe’s contentions as to the landlord’s apparent breaches of the service charge accounting requirements imposed by the 1985 & 1987 Landlord & Tenant Acts⁴: these are not matters that negate a contractual obligation to pay service charges (cf. the yet to be brought into force amendments contained in the Commonhold & Leasehold Reform Act 2002);
- (4) the status of the landlord’s offer. As explained in my Reply it was not a Part 36 Offer as it did not have the automatic costs consequences of a Part 36 offer. However, it would be regarded by the Court as a without prejudice save as to

¹ Para 23 to 24 of the Response

² Para 25 to 29 of the Response

³ Paras 9 to 22 of the Response.

⁴ Paras 28 to 30 of the Response

costs Offer (a Calderbank offer⁵) - in any event, contrary to what is said by Ms Rawe, the offer was not a pre-action Part 36 Offer - it was made 11 months after the County Court proceedings had commenced;

4. I also do not seek to comment on:

- (1) the detail of the proceedings before the LVT and/or the detail of the evidence, as the same is re-countered in Ms Rawe's response⁶: I was not instructed to advise on an appeal from the decision of the LVT. In any event, the time to apply for permission to appeal had expired long before I was instructed. My advice was limited to the likely impact of the LVT's determination on the related, and then on-going, County Court proceedings. I therefore did not enter into a detailed analysis of the merits of the LVT decision. At the time I did not consider that the course of the proceedings before the LVT was likely to carry much, if any, weight on the question of costs in the County Court proceedings;
- (2) the allegations made against the landlord's surveyor, Mr Gale⁷. What was relevant was the LVT's determination and its likely impact on the related, and then on-going, County Court, proceedings;
- (3) the LVT's observations, which it accepted were outside its jurisdiction, as to the application of the contingency fund⁸;
- (4) the criticisms by Ms Rawe of the West London County Court⁹;
- (5) the timing of the planning applications made by the landlord¹⁰;

⁵ Para 101 to 104.

⁶ I was not instructed in the proceedings before the LVT.

⁷ Para 32 to 40 of the Response

⁸ Para 41 to 47 of the Response

⁹ Para 53 to 56 of the Response

¹⁰ Para 90 of the Response

- (6) generally, matters that have occurred after the conclusion of my instructions e.g the 2004 correspondence between Ms Rawe and the landlord¹¹;
- (7) the allegations of harassment by Mr Ladsky and Mr Ladsky's complaints' to the police etc - these are not matters that appear to relate to the allegations against me¹² and were not matters discussed in Conference, save for a very summary overview;
- (8) on the landlord's motives in making an offer to settle, it may have been that the landlord too recognised that a trial would be disproportionately expensive¹³. In any event, it does not follow that, because the landlord wanted to settle, it was contra Ms Rawe's interests to settle

The Reasons Behind My Advice that Ms Rawe should accept the Offer made by the Landlord

5. As stated in my Reply, the costs of the County Court proceedings were likely to be out of all proportion with the sums in issue. Therefore, responsible advice demanded that the risk on costs be given primacy in any assessment of the position. In taking this cautious and, in my firm opinion, responsible approach, I do not accept that I was siding with the landlord as is alleged against me¹⁴. My instructing solicitors agreed with me that the risk on costs was the primary issue. I maintain that they did so because it was a true reflection of the position.
6. I do not follow the detail of the calculations at paragraph 40 of Ms Rawe's Response. However, even on these figures, the effect of the LVT determination was that £4,615 was owing by Ms Rawe (plus statutory interest) cf. the total sum of £14,400 demanded by Ms Rawe. Ms Rawe had not made a payment into Court, or any offer to settle. My assessment at the time was that the most likely order for costs at trial was that Ms Rawe would be

¹¹ Para 90 of the Response

¹² Para 106 to 117 of the Response

¹³ Para 132 & 143 of the Response

¹⁴ Para 60 of the Response

ordered to pay the landlord's costs. I remain of that view. I accept that it is possible that, given the level of the sums disallowed by the LVT and the criticisms that could be made about the landlord's conduct, a Court may have been persuaded to make no order for costs. However, my assessment was that there was no realistic chance that the landlord would be ordered to pay any of Ms Rawe's costs: particularly as Ms Rawe had rejected the previous offer of a round table discussion - see para 60 of Ms Rawe's Response for further details. In these circumstances I remain of the opinion that the landlord's offer of a compromise on terms that there be no order for costs was a life-line for Ms Rawe.

7. The fact that the LVT disallowed sums as unreasonable does not of itself mean that the verification of the facts contained in the landlord's Particulars of Claim was improper and would not, in my opinion, result in a Court ordering the landlord to pay Ms Rawe's costs: I therefore do not accept the analysis at paras 48 to 52 (and elsewhere) of Ms Rawe's Response.
8. I should note in response to para 72 of Ms Rawe's Response that in my Reply I did not elaborate on the LVT's Determination. This was because it speaks for itself - like most LVT service charge disputes, it was a mixed bag. For example, the LVT accepted, rightly, that they had no jurisdiction to direct payments out of the contingency fund. I certainly meant no disrespect to the LVT who have produced a careful and detailed determination. I accept that the outcome was a significant reduction in the amount due from the tenants. However, significant service charges remained payable and no payment into Court or other offers to settle had been made by Ms Rawe. Hence my analysis that Ms Rawe was very vulnerable on costs.
9. There was no question of Ms Maclean or I ignoring the LVT's findings. The outcome of the LVT's proceedings was foremost in my mind, and no doubt in Ms Maclean's mind when we considered the position - if para 75 of the Response implies anything improper on my part, I strongly deny the implication.
10. As to paras 82 to 86 and para 127 of Ms Rawe's Response, I have a clear note of the question (which I wrote out before the conference) that I put to Mr Brock during our conference and of Mr Brock's reply to that question, namely, that the offer could not be bettered. In my pre-reading for the conference I identified this as a key point to clarify in

conference¹⁵. I note that Ms Rawe does not supply a statement from Mr Brock as to his recollection of the conference. I should also add that Ms Rawe appears to have misunderstood the reference in my Reply to “a technical defence” - it was a reference to a defence to the claim relying on the application of either a specific term of the lease, or a statutory provision, rather than on general principles of liability - it was not a reference to a technical point arising out of the detail of the evidence concerning the lift repairs or some other mechanical engineering point that was outside Mr Brock’s area of expertise as a surveyor¹⁶. I do not know why “the could not be bettered” statement is not recorded in Ms Maclean’s notes - if I had been asked to settle a note of the conference I would have ensured that it was recorded. However, I did not see Ms Maclean’s notes until after the complaint had been made.

11. As to paragraphs 87 to 88, there was nothing improper about Ms Mclean contacting me after the conference to clarify a point: the point regarding interest (in the sum of £143) on the late payment of any undisbursed service charges is simply a technical point as to whether the interest is to be credited to the landlord’s own account, or whether it is impressed with the statutory trust imposed by section 42 of the L & T Act 1987 on the basis that the unpaid principal sum (if paid) would have been impressed with the statutory trust: whatever alternative is correct, the interest is payable by the tenant- I sought to explain the position in conference, I am sorry if the explanation was not sufficiently clear, however, it was a relatively minor point that I sought to deal with briefly.
12. As to paragraph 89 to 93, the draft consent order that I settled (the tweaking exercise), if entered into, would have protected Ms Rawe from any further demands for payments in respect of the major works to which the County Court claim related, namely, the then current round of major works that Mr Brock (Ms Rawe’s surveyor) was very concerned could be the subject of a major cost overrun. As considered in my Reply, protecting Ms Rawe from such a cost overrun was an important issue that was discussed during our conference.

¹⁵ I repeat my offer to supply these notes if requested, though I am concerned about whether the notes are readable. I could of course supply a conformed typed copy.

¹⁶ Para 59 of the Response.

13. I note that Ms Rawe remains concerned about receiving further demands in respect of this round of major works. However, though the landlord had accepted my tweaked consent order, Ms Rawe chose to enter into a consent order dated 24th May 2004¹⁷ which is silent about the major works and simply recites that the action is settled following the LVT's determination of an identical claim and on the payment by Ms Rawe of £6,350¹⁸. Hence, the order entered into by Ms Rawe, affords no protection against further charges in respect of the current round of major works. I therefore do not understand why Ms Rawe has entered into a consent order in these terms, yet complains about the terms of the draft consent order that I drafted on instructions.

Specific Points Raised

14. In reference to para 98 of the Response - it is correct that I acted for Maryland Estates Limited in a County Court trial, *Maryland v Peploe*, in 1998. I have long since returned the papers and do not remember the detail of it. However, I do remember that I was instructed at short notice on the death of my colleague in my former Chambers, the late Graham Clarke. At the time Maryland's solicitors were well aware that I acted against Maryland on a number of matters. Care was exercised to ensure that none of the matters that I took over were matters in which acting for Maryland would give me an unfair advantage in any current proceedings against Maryland. For example, the Peploe case had nothing to do with *Martin v Maryland* [1998] 2 EGLR 8 (Court of Appeal): *Martin v Maryland* was a leasehold enfranchisement case, *Peploe*, from memory, was a service charge dispute.
15. I am sorry that Ms Rawe feels that the outcome of the litigation is unjust. However, I hope that it will be understood that I advised on the operation of the law of residential landlord & tenant as it is, not how leaseholders may well think that it should be.

Generally

¹⁷ Exhibited to Ms Rawe's Response

¹⁸ The only difference between this sum and the sum contained in the draft consent order that I settled was the modest interest payment, the inclusion of which is explained in my Reply.

16. I have read carefully what is said in Ms Rawe's Response and do not accept that I acted other than in accordance with my instructions, in particular, the draft consent order and the covering letter that I settled were entirely in accordance with the tweaking exercise explained and agreed by Ms Rawe during the conference subject, only to her seeking further advice on the harassment issues.
17. As noted in my introduction, I am conscious that I have not dealt with Ms Rawe's Response on a point by point basis. I repeat my request for an oral hearing if there are any points of particular concern that it is thought that I have failed to address in writing.
18. I declare the contents of this document to be true.

STAN GALLAGHER

11 October 2004

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