RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL
CASE No: CHI/21UD/LIS/2010/0010

Residential Property TRIBUNAL SERVICE

B E T W E E N :-

WE MAKE IT HAPPEN (also known as "We can make it happen") **Applicant**
and
DAVID COOK **Respondent**

PREMISES: 38 Queens Apartments Robertson Terrace, Hastings East Sussex TN34 1JE ("the premises")

Application: **Section 27A of the Landlord and Tenant Act 1985 (Service Charges)**
(2) Section 20ZA of the Landlord and Tenant Act 1985 (application for dispensation consultation requirements)
(3) Section 168(4) of the Commonhold and Leasehold Reform Act 2002 (breach of covenant or condition in lease)

TRIBUNAL: Mr H D Lederman Lawyer / Chairman
Mr JN Cleverton FRICS (Valuer/Member)
Miss J Dalal (Member)

Date of Application: 8th February 2010
HEARING: 4th May 2010

Reconvening of panel 2nd July 2010 and Late August 2010 (parties and representatives not in attendance)

Representation Victoria Osler Counsel instructed by Housing Law Services for Applicant
David Cook in person

Date of the Tribunal's Decision: 13th September 2010

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL:

1. The Applicant's name is Mr Peter Stavri and Mr David Gould t/a "We make it happen" at the request of the Applicant's legal representatives.

2. The landlord of the premises from 23 01 2008 for the purposes of section 47 of the Landlord and Tenant Act 1987 ("the 1987 Act") was "We make it Happen LLP". Demands for service charges for the periods after 23 01 2008 did not contain that landlord's name. Those service charges are not payable.

3. The landlord before 23 01 2008 for the purposes of section 47 of the 1987 Act was Mr. Peter Stavri and Mr. David Gould, t/a "We make it happen". Services charges demanded for periods before that date became payable on 12 05 2010 when notices complying with that provision were served.

4. Interim (on account) and excess service charges demanded for the service charges years ending 31 12 2006, 31 12 2007, 31 12 2008, 31 12 2009 and 31 12 2010 have not been calculated in accordance with clauses 1.24, and Schedule 5 of the Lease requiring payment of 14.29% of Building Expenditure after deduction of the Commercial Units Charge. No certificates for balancing charges complying with Schedule 5 of the Lease have been served. Those service charges are not payable by the Respondent under the Lease.

5. £245.75 "service charge deficit" for the year ended 31 12 2007 is not payable.

6. A summary of the rights and obligations of tenants of dwellings in relation to service charges complying with Regulations 2007/1257 (as amended) was served at the earliest on 12 05 2010. For service charges claimed for the period after 01 10 2007, if other conditions are satisfied those sums would have become payable on that date.

7. The challenges to service charges based upon the standard of service to the front door, the fire alarm, cleanliness and rubbish do not succeed. Challenges to costs incurred for telephone charges, electricity charges and insurance fail. The management fee was not reasonably incurred.

8. The Tribunal orders that none of the costs incurred, or to be incurred, by the Applicant in connection with proceedings before this Tribunal, are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by any of the Respondent or any of the lessees at the premises.

Preliminaries - terminology

2. References to "the Applicant" in these reasons should also be taken to refer to the Applicant's solicitors Housing Law Services, where the context is appropriate. Within these proceedings, there were issues as to (a) the name and (b) the precise identity of the individuals or entity constituting the Applicant. The use of the term "the Applicant" or cognate expressions should not be taken as prejudging those issues or the issue whether there is one or more than one Applicant. References to "the premises" are to 38 Queens Apartments. The use of the phrase "service charge demand" should not be taken to prejudge or decide the issue of whether a particular letter or demand for service charge was a valid or enforceable demand. For convenience the phrase Queens Apartments or Queens Hotel will be used although some of the documents adopt the spelling "Queen's".

Hearings, bundles and written submissions

3. The hearing of this application took place on 04 05 2010 immediately following the inspection of the premises by the Tribunal. Directions had been given on 17 02 2010 which included a requirement for service of witness statements. No witness statements were provided by the Applicant. The Respondent supplied letters dated 05 03 2010, 11 03 2010 and 18 04 2010 which provided the gist of his objections and challenges to service charges.

4. Initially the Applicant produced a bundle comprised of 311 pages of document. It was clear that the Respondent did not have any legal representation. Before the hearing the Tribunal had invited the Applicant by letter to specify the full name or names and addresses of the persons or companies who were "We *can* make it happen" (emphasis added), the name given on the application notice for the Applicant. The parties were also informed that the Tribunal considered it might be relevant for the Applicant to produce copies of all service charge demands served or alleged to have been served upon the Respondent relating to the period for which service charges are claimed. The Applicant was also invited to produce in a supplemental bundle, copies of any statutory or other information which may have accompanied demands served after 01 10 2007. In addition, the parties were invited to consider whether section 20B of the Landlord and Tenant Act 1985 (as amended) ("the 1985 Act") applied.

5. Following those directions official copies of the freehold title of The Queens Apartments were produced by the Applicant dated 23 04 2010 and served upon the Respondent.

6. Further documents were produced by the Applicant at the hearing which were included as pages 312-320 of their bundle. In the course of the

hearing and the evidence of Neil Newstead, director of Oakfield PM Limited ("Oakfield") (managing agents for the building containing the premises) a specimen copy of Oakfield's terms of engagement was produced and put into evidence.

7. With the agreement of the parties the hearing on 04 05 2010 was adjourned for the parties to make further representations and provide further evidence about the following issues:

   a. Service charge accounts for the year ended 31 12 2009;

   b. the identity and ownership of the freehold of 38 The Queens Apartments and whether the correct name is "We can make it happen" "we make it happen", whether the landlord was (or during any of the service charge years in issue has been) a partnership or a limited partnership or a company and if so giving the name and address of the landlords during that period. A print out from the Companies House website relating to a limited liability partnership known as "We make it happen LLP" (company registration number OC334302) as at 17 05 2010 was also provided to the Applicant and Respondent for comment.

   c. Any application for permission to amend the name of the Applicant;

   d. True copies of the terms of engagement of the managing agents of 38 Queens Apartments;

   e. True copies of the insurance policies for 38 The Queens Apartments for during any of the service charge years in issue;

   f. Any new service charge demands or information relied upon to support such demands;

   g. Any application for reimbursement of hearing and application fees;

   h. Written Submissions upon the same (by all parties);

   i. an order that the Applicant should not be permitted to charge the costs of the leasehold Valuation Tribunal proceedings to service charge under section 20C of the 1985 Act.

8. In response to those directions a supplemental hearing bundle was produced by the Applicant comprised of a further 117 pages on 12th May 2010. By letter of 17th May 2010 the Applicant was invited to comment upon the print out of the Companies House register relating to "We make it happen *LLP*" (emphasis added). Written submissions on behalf of the Applicant were produced under cover of a letter 28th May 2010 which

included an application for permission to amend the name of the Applicant. The Respondent provided his written comments on those submissions and the additional evidence under cover of letter of 17 06 2010.

9. The Tribunal reconvened without the parties to consider the additional evidence and submissions on 02 07 2010. After reconvening, the Tribunal gave the parties the opportunity to make further written submissions about the following issues:

    a. whether the terms of engagement of Oakfield dated 06 04 2009 (pages 57-59 inclusive of Applicants supplemental bundle) entitled or required Oakfield PM Limited to charge 10% of the net contract value of service charge (minor) works (excluding major works) being 10% of the cost of the works less any VAT payable or 10% of the cost of the works inclusive of VAT payable to a third party;

    b. whether the effect of the terms of engagement of Oakfield dated 06 04 2009 (pages 57- 59 inclusive of Applicant's supplemental bundle) was to create an agreement under section 20ZA(2) of the 1985 Act ;

    c. whether if the Tribunal decide the effect of the terms of engagement of Oakfield dated 06 04 2009 (pages 57- 59 inclusive of Applicant's supplemental bundle) was to create an agreement under section 20ZA(2) of the 1985 Act, there was non-compliance with the Service Charges (Consultation Requirements) Regulations 2003.

10. The Applicant provided further written submissions (from Counsel Ms Osler) on 14 07 2010. The Respondent did not provide any further submissions.

11. The Tribunal took into account all of those submissions and evidence in reaching this decision.

The issues for decision by the Tribunal

12. At the outset of the hearing on 04 05 2010 the parties, with the assistance of the Applicant's Counsel agreed that (at that stage) the disputed issues before the Tribunal were in effect the following:

    a. in broad terms whether service charges demanded by the Applicant for the service charge years ending 31 12 2006 to 31 12 inclusive were payable by the Respondent under section 27A

of the 1985 Act; whether or not the costs claimed as service charges were reasonably incurred under sections 18 and 19 of the 1985 Act; and more specifically,

b. whether the documents said to be service charge demands complied with section 47 of the Landlord and Tenant Act 1987 ("the 1987 Act") which provides that a landlord's name and address is to be contained in demands for service charges;

c. whether service charge demands were accompanied by a summary of the rights and obligation of the leaseholder complying with section 21B of the 1985 Act and the Service Charges Summary of Rights and Obligations and Transitional Provisions) (England) Regulations 2007 ("the 2007 Regulations") and amendments to those Regulations;

d. Whether the service charges demanded were calculated in accordance with the Lease of the premises;

e. Whether the Respondent received the demand for service charge dated 28 11 2009 at page 301 of the Bundle;

f. whether service charge demands for the following items were payable or reasonable given complaints or concerns raised by the Respondent:

i. main front door to building comprising the premises
ii. the fire alarm
iii. cleaning of common parts
iv. accumulated rubbish in the common parts
v. management charges
vi. telephone charges
vii. electricity charges
viii building insurance costs

During the hearing on 04 05 2010 or subsequently the following additional issues were identified:

g. Whether the Applicant's managing agent Oakfield was entitled to charge a fee of 10% of the cost of works and whether such a fee was reasonably incurred under section 19 of the 1985 Act;

h. whether the Management agreement produced by Oakfield amounted to a qualifying long term agreement within section 20Z of the 1985 Act and the Service Charges (Consultation etc) Regulations 2003, ("the 2003 Regulations");

i. whether there should be an order dispensing with the Consultation requirements of part II of Schedule 4 to the 2003 Regulations.

13. The Applicant issued a separate application seeking a declaration that the Respondent was in breach of a term or condition of the Lease under section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") dated 28 01 2010. However the only breaches relied upon were alleged failures to pay service charge demands. The Applicant and its Counsel did not pursue this application or contend at any stage that this was a separate issue which the Tribunal had to consider. Doubtless the Applicant had in mind section 169(7) of the 2002 Act the effect of which is to prevent an application under section 168(4) in respect of failure to pay service charges.

The Applicant's concession

14. Shortly after the start of the hearing on 04 05 2010 Ms Osler on behalf of the Applicant, very properly drew the Tribunal's attention to the fact that the service charge demand dated 01 11 2009 for £245.75 "service charge deficit" for the year ended 31st December 2007 addressed by Oakfield to the Respondent at page 58 of the bundle, had been served more than 18 months after the date when the service charges were alleged to have been incurred. She conceded that these service charges, were not due or payable by the Respondent because of the effect of section 20B of the 1985 Act. The Tribunal accepted that concession had been properly made and did not consider the issue of payability of the sums claimed in that service charge demand any further.

The Premises and the Inspection

15. The building which contains the premises is a conversion of the former Queens Hotel in Hastings, part of which faces the seafront. The original building was of some vintage and is described in the Applicant's written submissions as Victorian. As a matter of day to day administration and description, the building had been divided up into 3 parts described as Phase 1 (flats 1-20), Phase 2 (flats 21-36 and commercial units) and Phase 3 (flats 37-43).

16. There appeared to be 4 storeys. The entrance to the part of the building comprising the premises and other flats in phase 3 had a main entrance leading on to a ground floor foyer in Harold Place. The Applicant's case is that the conversion of the building took place in 3 phases: Phase 1 (flats 1-20), Phase 2 flats 21-36 and Phase 3 flats 37-43 (written submissions 27 05

2010). In addition as Mr. Newstead of the Oakfield confirmed, there are commercial units on the ground floor which he described as part of the Phase 2 conversion. This evidence was not in issue and was accepted by the Tribunal. On the inspection the Tribunal was only given access to the part of the building described as Phase 3 (flats 37-43). The Tribunal entered through a main front door leading to a vestibule on the ground floor of Harold Place. This entrance was in close proximity to a bus stop which at the time of the inspection appeared to be in regular use, Harold Place being a busy road in the morning. Part of the ground floor of the building in Harold Place appeared to include a youth hostel or similar commercial or business premises to which the Tribunal was not given access. There was a separate entrance to the youth hostel or other commercial premises which the Tribunal was not given access to. The ground floor of the building facing the seafront and part of Robertson Terrace included "Cosmo's Restaurant/Oriental Buffet", comprising a significant part of the frontage near to the corner of Robertson Terrace and the seafront.

17. The Respondent attended the inspection and gave access to the premises through the front door. No representative of the Applicant or its agents attended the inspection, despite being invited to do so. The gist of the Tribunal's observations at the Inspection was put to Ms Osler in the course of the hearing on 04 05 2010.

18. The premises are a second floor flat reached by stairs or lift from the main entrance vestibule on Harold Place. The external part to the main front door appeared scratched, worn, in need of redecoration. The main door looked as though it had been the subject of malicious damage or other abuse by persons unknown. The fire alarm control panel in the entrance hall appeared upon inspection (without any testing) to be in working order with no obvious signs of alarms or faults showing on the control panel.

19. The stairway leading to the second floor was carpeted. Some of the paintwork to the plastered walls bore signs of some minor scuff marks. The entrance hall itself appeared reasonably clean and tidy at the time of the inspection. The premises are a 1 bedroom apartment which appeared to have been recently redecorated and refurbished. There was a main living room kitchen, a bathroom and toilet.

The Lease of the premises

20. All parties proceeded on the footing that there was a true copy of the Lease dated 20 01 2006 at pages 1-46 of the bundle ("the Lease"). That Lease defines the parties as Peter Stavri of 7 Herbrand Walk Cooden Bexhill TN39 and David Gould of Blackfriars Oast Morley, Battle, East Sussex as landlord and Julie Knapp as the tenant. A "short description of the Building" in paragraph 5 of the Particulars of the Lease is "the building known as

"Block C The Queens Apartments Robertson Terrace Hastings East Sussex". This definition of "the Building" is incorporated into the service charge provisions described below. The Lease granted a term of 150 years from 01 01 2003.

21. Under the Lease, on account payments of "the Interim Charge" (the interim services charge) and Service charges are reserved and payable by way of additional rent in accordance with clause 3 (the reddendum) and Schedules 5 and 6 of the Lease. There is also a separate covenant in clause 4.1 to pay the rents "without any deduction and without any right of set off whatsoever including equitable set off". The Interim Charge is payable by equal half yearly payments in advance on 1st January and 1st July of each year (or on such other dates as may be notified in writing (paragraph 1 of the 5th Schedule).

22. The Interim Charge is defined as "such sum to be paid on account of the Service Charge in respect of each financial period as the landlord or its managing agents shall specify to be a fair interim payment" subject to provision for adjustment: (clause 1.13 of the Lease). The "financial period" is defined to mean the period commencing 1st January and ending 31st December or such other period as the landlord may specify: (clause 1.10 of the Lease). These periods appear to have been adopted for the service charge years under consideration.

23. Importantly "The Service Charge" is defined to mean "14.29% of the Building Expenditure *after deduction from the Building Expenditure of the Commercial Units Charge*": (clause 1.24 of the Lease – emphasis added). Clauses 1.6 and 1.7 read together define "the Commercial Units Charge" as such reasonable proportion of particular listed items of the Building expenditure specified in Schedule 6 as the landlord shall reasonably attribute to the premises within the Building used or allocated for business purposes. Clause 1.4 defines "the Building Expenditure" to mean "the Total Expenditure incurred in any Financial Period in providing the Building Services". There is a list of "the Building Services" in Schedule 6 to the Lease. The opening words of Part I of Schedule 6 provide a non-exhaustive definition of "the Building Services" which include the following words: "The provision .....of services in or to or for the benefit of the occupiers of the Building.....". By clause 1.2 "the Building" is defined to mean the building specified in paragraph 5 of the Particulars "shown for the purpose of identification only coloured green on plan A and each and every part thereof together with all additions alterations and improvements thereto".

24. In essence, paragraph 2 of the Fifth Schedule requires that as soon as practicable after each financial period, the landlord or its agents or their respective accountants are required to prepare and serve upon the lessee

a service charge account and certificate in respect of that service charge account containing the following information:

"a. the amount of the Building Expenditure for that Financial Period
b. The amount of the Interim charge paid by the tenant in respect of that period together with the surplus if any from the previous financial period
c. the amount of the service charge payable in respect of that financial period and the excess or deficiency of the Service Charge over the Interim Charge"

25. Clause 7.12 of the Lease provided that the addresses contain in the paragraphs 2 of Particulars of the lease were the addresses at which notices including notices under section 48 of the 1987 Act could be served, until the tenant was notified in writing to the contrary.

Other persons affected by this decision

26. It was common ground that the Respondent acquired the lease of the premises on or about 11 07 2007. The arguments before the Tribunal mostly focused upon demands for service charges made after the date although the service charge years pre-dated the assignment to the Respondent. Nothing in this decision can or is intended to bind any previous lessee of the premises, or other lessees.

Relevant legislation

27. Sections 18–30 of the 1985 Act refer to restrictions on "Service Charges". The relevant provisions are:

"18— (1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a (dwelling) as part of or in addition to the rent—
(a) which is payable directly or indirectly for services ... or insurance or the landlord's cost of management and
(b) the whole or part of which varies or may vary according to the relevant costs.
(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord or a superior landlord in connection with the matters for which the service charge is payable.

19— (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—

(a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly ...

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise."

Section 21B of the 1985 Act provides a demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges. Section 21B(3) states a tenant may withhold payment of a service charge demanded from him if that information did not accompany the demand. That information is prescribed by the Service Charges Summary of Rights and Obligations and Transitional Provisions) (England) Regulations 2007 ("the 2007 Regulations").

Where a tenant withholds a service charge under section 21B, any provisions of the lease relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it: see section 21B(4) of the 1985 Act. With a small exception, section 21B takes effect in relation to service charge demands served on or after 01 10 2007.

Section 27A(1) of the 1985 Act provides the Tribunal with jurisdiction to determine whether a service charge is payable and, if it is, as to—

(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

Subsection 27A(2) of the 1985 Act provides that jurisdiction applies whether or not any payment has been made.

Section 27A(3) of the 1985 Act provides:

"An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—

(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable"

The identity of the Applicant

28. The application form dated 08 02 2010 described the landlord as "We *can* make it happen" (emphasis added) of 14 Marine Parade Hastings East Sussex. The Applicant was described as "Oakfield". The evidence of Samantha Hensher an accounts manager employed by Oakfield on 04 05 2010 was to the effect that the correct name of the landlords was "We make it happen" a business entity (described by Ms Hensher as a company) owned by Mr Stavri and Mr Gould. . The official copies of the land register for the building known as Queens Apartments (title No ESX265585) provided by the Applicant dated 23 04 2010 show that the freehold was registered in the names of Mr Stavri and Mr Gould on 07 02 2003, that registration being subject to mortgages.

29. In response to the Tribunal's written request dated 14 04 2010 for the names and address of "We can make it happen", the Applicant's solicitors responded "the names of the partners for the Freeholders are Mr Peter Stavri and Mr David Gould and the address is as per the application to the LVT": see Housing Law Services letter of 16 04 2010. That response is inconsistent with the information that was supplied later to the effect that there was a limited liability partnership whose address was 20 Havelock Road Hastings (an address not mentioned on the application form).

30. Later in the hearing on 04 05 2010 Mr Newstead a director of Oakfield came to give evidence. His evidence was that Mr Stavri and Mr Gould were trading as "We make it happen", a limited liability partnership. No documentary or other evidence was produced about this issue. He was unable to give details of that partnership (such as its registered office), or its date of incorporation. As the Tribunal had raised the issue of the identity of the Applicant before the first hearing, it was surprising that no relevant documentation was produced.

31. A similar assertion that Mr Stavri and Mr Gould were trading as "We make it happen" a limited liability partnership was repeated in Counsel's written submissions of 27 05 2010. In paragraph 12 of those submissions it is said that the freeholders (which the Tribunal takes to be a reference to Mr Stavri and Mr Gould) are both "directors – and the only directors – of We make it happen -... a limited liability partnership under whose auspices the freeholder's (sic) trade". It is then submitted that "the freeholders are entitled to express their landlord identity in terms of that partnership".

32. It is an inescapable conclusion that the Applicant's case supported by Mr. Newstead's evidence, is that the landlord is the limited liability partnership known as "We make it Happen *LLP*" (emphasis added).

33. A copy of the entry from the Companies House website (freely available to members of the public) shows that "We make it happen LLP" (registered number OC334301) was incorporated on 23 01 2008. The accuracy of this information was not challenged by the Applicant when the print out was sent to the parties for comment by the Tribunal under cover of letter of 17 05 2010. The Tribunal finds the date of incorporation and registration of "We make it happen LLP" was 23 01 2008.

34. A limited liability partnership is a corporate entity. It is a separate legal entity from its members: see section 1 of the Limited Liability Partnerships Act 2000. It may sue and be sued in its own name. The Applicant's submission that Mr Stavri and Mr Gould are "directors" of – and the only directors – of "We make it happen" is unclear in terminology. It may be said that they are members or designated members according to the Limited Liability Partnerships Act 2000, but not directors. The Schedule to that Act requires that the Limited Liability Partnership must use the abbreviation "llp" or "LLP".

35. Mr Stavri and Mr Gould might in some circumstances be the agents of that LLP. The limited liability partnership might not be bound by their acts if the person dealing with them did not know there was a partnership – see section 6 of the Limited Liability Partnerships Act 2000.

36. It only became apparent that Mr Stavri and Mr. Gould were members of this LLP for the first time during the evidence of Mr. Newstead. Samantha Hensher of Oakfield did not know, or was not able to confirm that there was a limited liability partnership. That is not a criticism of her. It was evident to the Tribunal that she had been given extremely limited information and only basic training concerning the affairs of Mr Stavri and Mr. Gould. She was not in a position to provide helpful evidence about the issues before the Tribunal, through no fault of her own.

37. The Applicant through its solicitors asked for permission to amend its name from "We can make it happen" or "We make it happen" to Mr Peter Stavri and Mr David Gould t/a "we make it happen" in its letter of 12 05 2010. This application was not opposed by Mr Cook. In the Tribunal's view such a relaxation of the requirement to state the name of the Applicant in the application form, does not prejudice Mr Cook in view of the way in which service charge demands have been served in this case. The Tribunal treated that application as an application for relaxation of the requirement to give particulars of application under regulation 3 of the Leasehold Valuation Tribunals (Procedure)(England) Regulations 2003 and decided to grant the application.

38. The extent of confusion in the mind of the Applicant's legal team or part of that team on this issue is illustrated by an excerpt from the letter from Housing Legal Services of 12 05 2010 in which the request for permission to amend the name of the Applicant was sought. There it was said "the Claimant confirms that Mr Stavri and Mr Gould are a partnership and have been at all relevant times to the matter in hand". That letter is not evidence upon which the Tribunal is able to reach a finding of fact. On any view that statement is unsubstantiated as to the period before "We make it happen LLP" was incorporated on was 23 01 2008.

39. The Tribunal concludes that the Applicant is to be treated as Mr Stavri and Mr Gould trading as "We make it happen". The Applicant is not "We make it happen LLP". "The Tribunal considers separately below the identity of the landlords of the premises from time to time.

Have service charge demands been served which comply with section 47 of the 1987 Act?

40. For present purposes section 47(1) of the 1987 Act requires a written demand for service charges made to the Respondent to contain the name and address of the landlord. Until that information is furnished by the landlord to the tenant by written notice the service charges demanded is treated as not being due: see section 47(3) of the 1987 Act.

41. The Respondent did not object to this issue being raised or seek to waive the point once it was explained to him.

The name of the landlord of the premises

42. As mentioned above the Applicant's case throughout the hearing and in written submissions was that "We make it happen LLP" is the name of the landlord. It is possible of course that Mr Stavri and Mr Gould hold the freehold of the premises on trust for or as nominees for "We make it happen LLP". There was no direct evidence to that effect. No trust deed or other evidence of the assets held for any partnership was adduced. Despite absence of documentary or other evidence, the Tribunal did not feel able to reject the Applicant's clear evidence about this. The Applicant and its legal team are in the best position to know the identity of the landlord. The Respondent did not challenge the Applicant's case on this issue.

43. However the landlord can only have been We make it happen LLP from the date of its incorporation at the earliest, that is from 23 01 2008. When the Companies House print out was put before the Applicant's legal advisers for comment under cover of a letter of 17 05 2010, no challenge was made to that date.

44. For the period before 23 01 2008, the evidence before the Tribunal particularly the official copies of the land register shows (and the Tribunal finds) that the correct name of the landlord was Mr Stavri and Mr Gould at all relevant times. If they were using the trading name "We make it happen" ("WMIH") for a firm or that was the name of an ordinary partnership, the existence of such a partnership was not in evidence. No partnership accounts or other documentary evidence of such partnership for the period before 23 01 2008 was produced. Accordingly the Tribunal is unable to find that the landlords of the premises held the premises as a partnership of any kind existed before 23 01 2008. The Tribunal is not saying that a partnership did not exist, simply that there was no reliable evidence that an ordinary partnership held the premises as the immediate landlord of the Respondent for the purposes of section 47 of the 1987 Act before 23 01 2008.

45. The history of the management of the Queens Apartments as given by Mr Newstead was that Oakfield dealt with the management for the service charge year 2006 – 2007 until Oakfield sold its block management to Bridgeford & Co in about October or November 2007. Oakfield then took back the management of Queens Apartments in April 2009..

The address of the landlord

46. The addresses of Mr Stavri and Mr Gould for service are given in clause 7.12 of the Lease as 7 Herbard Walk and Blackfriars Oast respectively until notified to the contrary. The address given in service charge demand is capable of amounting to such a notification, assuming that the correct landlord is identified.

47. The following service charge demands (relied upon by the Applicant) contained in the original bundle are alleged to have been served upon the Respondent:

service charge period ending	Date	name of landlord given	address of landlord given	Page number bundle
31 12 06	19 05 07	We make it Happen ("WMIH")	20 Havelock Rd Hastings	57A
31 12 06 31 12 07	16 05 07	WMIH	20 Havelock Rd Hastings	315
31 12 07	01 11 09	WMIH	20 Havelock Rd Hastings	64A
31 12 08	01 11 09	WMIH	20 Havelock Rd Hastings	64
30 06 09	09 04 09	WMIH	20 Havelock Rd	67

			Hastings	
31 12 08	09 04 09	WMIH	No address	67A
31 12 09	19 05 09	WMIH	Haig House Station Rd Hastings	67B
30 06 10	28 11 09	WMIH	Haig House Station Rd Hastings	301

Compliance with section 47 of the 1987 Act

48. The landlord to be identified in the service charge demands for the purpose of section 47 of the 1987 Act is "the immediate landlord" of the tenant: see section 60(1) of the 1987 Act. Accordingly it is irrelevant that Mr Stavri or Mr Gould may have been superior landlords of some kind, if that was the position.

49. None of these demands mentioned Mr Stavri or Mr Gould by name. Nor did they mention "We can make it happen LLP" in respect of the period after 23 01 2008. The Tribunal accordingly finds there was not compliance with the first part of section 47 of the 1987 Act. Accordingly the sums claimed as service charges are not payable for sums claimed in these demands before the period before 23 01 2008, as the name of the landlord was not specified.

50. In respect of the period before 23 01 2008, the service charge demands did not identify Mr Stavri and Mr Gould as the landlord or landlords. They gave the name "We make it happen". The Tribunal could not ascertain from these demands that Mr Stavri and Mr Gould were the landlords. The Tribunal finds that these service charge demands did not specify the name of the landlord. Accordingly the sums claimed as service charges in these demands in respect of the periods before 23 01 2008 are and were not payable.

51. Following the hearing on 04 05 2010 a series of additional service charge demands were served by Oakfield on or about 11 05 2010 on behalf of Mr P Stavri and Mr D Gould trading as "We make it happen", giving an address for service of proceedings under section 48 of the 1987 Act as 20 Havelock Road Hastings . Slightly different dates appear in these demands which are summarised below:

service charge period ending	Date	name of landlord given	address of landlord given	Page number supplementary bundle
31 12 06	11 05 10	WMIH	20 Havelock Rd Hastings	33
31 12 07 6 mths	11 05 10	WMIH	20 Havelock Rd Hastings	1
30 06 08 (6 mths)	1 05 10	WMIH	20 Havelock Rd Hastings	5
31 12 08 (1 year)	11 05 10	WMIH	20 Havelock Rd Hastings	13
30 06 09	11 05 10	WMIH	20 Havelock Rd Hastings	17
31 12 08 (6 mths)	11 05 10	WMIH	20 Havelock Rd Hastings	9
31 12 09	11 05 10	WMIH	Haig House Station Rd Hastings	21
30 06 10	11 0510	WMIH	Haig House Station Rd Hastings	29

52. None of these demands gave the name of the landlord as "We make it happen LLP" which the Tribunal has found was the immediate landlord of the Respondent for the periods after 23 01 2008. Accordingly the sums claimed in these demands for sums due after 23 01 2008 are not payable. This is not merely a technical or academic point. One of the principal issues at which section 47 of the 1987 Act is aimed, is enabling the tenant to know the identity of the landlord. Before the hearing on 04 05 2010, the Tribunal and the lessee had no way of identifying or ascertaining from the service charge demands or from any of the service charge accounts that "We make it happen LLP" was the landlord or had any involvement. Samantha Hensher of Oakfield who had day to day management of the administration of the premises was unable to give the name of this partnership in evidence. The Service Charge Residential Management Code (2nd edition 2009) gives clear guidance about providing the name of the landlord. This is not an academic point. The Respondent was misled as to the failure of the LLP and Oakfield to use the correct name when he wrote to them about this case on 11 03 2010 as "We can make it happen".

53. In respect of the period before 23 01 2008 the service demands specified the names of the landlord and comply with section 47 of the 1987 Act. However the demand for the year ended 31 12 2007 served on 12 05 2010 is for £722.53. This demand does not specify whether it is intended to reflect the excess service charge (described as the deficit in earlier service charge

demands for that period at page 58 and page 315 of the original bundle). The Tribunal finds the "deficit" must be included as the service charge year accounts have been prepared some years ago. Accordingly credit must be given for the £245.75 which was conceded not to be payable under the demand sent on 01 11 2009 at page 58 of the bundle, if any of these service charges are otherwise payable at some later stage.

Other Statutory formalities for service charge demands

54. The Applicant was unable to adduce any witness evidence in respect of the period whilst the premises had been managed by Bridgeford & Co that any summary of the rights and obligations of tenants of dwellings in relation to service charges complying with the 2007 Regulations had been served on behalf of the Applicant upon the Respondent.

55. The Tribunal finds that on the balance of probabilities no summary complying with those Regulations was served by Bridgeford and Co. Although Mr Newstead was clear in his opinion that such a summary would have been served with service charge demands produced by Oakfield, the Tribunal finds on the balance of probabilities that no such summary was served. There is no reference in any of the numerous demands which have been produced to such a summary. There was no other written or contemporaneous evidence that such summary had been served. The issue did not appear to have been in the minds of Oakfield, until raised by the Tribunal. The Tribunal finds that the day to day issuing of such demands was left to more junior employees than Mr. Newstead. No direct or first hand evidence as to how the demands were served was adduced.

56. A summary complying with the 2007 Regulations was served upon the Respondent on 12 05 2010. The Tribunal was also informed that copy had been served upon the Respondent before the hearing on 04 05 2010, although the precise circumstances of that service were only the subject of submissions. Until 12 05 2010 the sums claimed as service charges were properly withheld by the Respondent and not due, under section 21B(3) of the 1985 Act, if they are otherwise found to be payable. The Tribunal finds there are other reasons why these sums claimed as service charges are not payable, which are discussed below.

Compliance with clause 1.24 of the Lease

57. Mr Newstead's evidence was that the service charges had been calculated by reference to Phase 3 of the building known as Queens Apartments. The accounts produced for each of the service charge years were prepared by reference to the title Queens Apartments Phase 3. All the expenditure and income related to that Phase and not the Building as whole: see the accounts for the service charge years ending December 2006, December

2007, December 2008 and December 2009. In other words only the expenditure for Flats 37 -43 inclusive was part of those accounts. That final set of accounts was only produced after the hearing on 04 05 2010 in the supplementary bundle dated 12 05 2010. Signed copies of the accounts were only produced in that supplementary bundle after the Tribunal had expressed concern that the accounts did not appear to have been signed by anyone, let alone by the accountants who had apparently prepared the accounts. Unfortunately the signatures produced in the supplementary bundle were illegible and did not provide any confirmation that the person who signed was in fact an accountant, as the signature description was "Queens Apartments (Phase 3)". It was impossible to tell who was signing or for what he or she was signing.

58. There was no certificate of the kind envisaged by Schedule 5 to the Lease for any of the service charge years.

59. Mr Newstead's evidence on 04 05 2010 was that Phase 3 could be entirely separated from the other phases (parts of the Building) as the expenditure was managed and incurred entirely separately. His evidence was that Mr Stavri and Mr Gould own 4 of the flats in Phase 3 and would not have tolerated any excessive charging through service charges.

60. His evidence was that for the period when Oakfield was managing the premises, this was a proper and fair way of calculating service charges of the premises which "in effect" excluded any charges attributable to the commercial units in the Building which were only part of Phase 2. He went further and asserted that if the commercial units had been included in an original figure for chargeable costs under Schedules 5 and 6 of the Lease and then deducted, this would result in a higher service charge payable by the Respondent.

61. This assertion that a calculation in accordance with the terms of the Lease and clause 1.24 might result in a higher service charges was not self-evident to the Tribunal. The assertion was not demonstrated by any calculations or examples, except to say that insurance costs had been calculated and charged separately. Mr. Newstead's approach did not appear to be supported by the logic of the deduction of the commercial units' charges which Mr Newstead said had taken place before the service charges for Phase 3 were calculated. As the point was based upon an interpretation of the Lease which had not been raised by the Respondent, the Tribunal specifically asked the Respondent whether he wished this point to be pursued, in the light of the outcome which Mr Newstead claimed might be reached if the Lease was followed (i.e. additional sums might be payable by way of service charges to Phase 3). The Respondent has not abandoned or waived the point.

62. The Tribunal emphasises this is not a purely technical issue. The lease provides for a precise accounting procedure. Accountants who have the appropriate qualifications under section 28 of the 1985 Act, have a separate professional responsibility for such an apportionment and providing a summary under section 21 of the 1985 Act (upon request). As matters stand some of the invoices of costs appear to have been apportioned between the various Phases in the Building by person or persons unknown. To take some examples the invoices at pages 171, 179 and 274 for work to the aerial and roof were apportioned. The only evidence of who carried out that apportionment was a manuscript unsigned entry. The methodology adopted by Mr Newstead makes it unclear whether there might be savings by economies of scale or by requiring contractors to carry out works to all 3 phases of the of the Building and/or the commercial parts separately. The method of accounting adopted makes a comparative analysis of costs incurred for different parts of the Building and/or between commercial and residential parts of the building impossible.

63. However more importantly whatever the practical advantages (or disadvantages) of adopting the method suggested by the Lease, clause 1.24 has not been varied or waived and remains in force. No consent to such a variation or procedure was sought or given by the Respondent.

64. The Tribunal does not go so far as to say that clause 1.24 and the provision of paragraph 2 of Schedule 5 to the Lease requiring a certificate to be produced, amount to a condition precedent to payment being required under the Lease (although that may be the effect of the provision in relation to balancing charges). The Tribunal finds that until clause 1.24 of the Lease is applied properly, the Tribunal cannot be satisfied on a balance of probabilities that under the Lease the Interim Charge is a "fair interim payment" under clause 1.13 or that the "deficit" or excess amounts claimed are properly due. The Tribunal has been provided with very few of the costs attributable to the commercial units and has insufficient information or material to be satisfied that the sums claimed as service charges under the Lease are due, bearing in mind that the accounts have been prepared on a basis that does not demonstrably comply with clause 1.24 of the Lease.

65. Ms. Osler on behalf of the Applicant submitted that there was "ambiguity" in the Lease because it did not make "explicit whether the entire costs of the building are to be calculated or the "re-charges" (her word) applicable to each phase are to be added up and subjected to the percentage" (paragraphs 31-34 written submissions of 27 05 2010). The Tribunal's view is that there is no relevant ambiguity in clause 1.24. Even if the Building is taken as Block C of Queens Apartments, and Block C is read as Phase 3, it is far from clear or self evident as Ms Osler asserts that such an interpretation is "most financially favourable to the Respondent". All that clause 1.24 requires *on any reading* is that there is a deduction of the

Commercial Units Charge. The way in which the service charges have been demanded and the accounts put before the Tribunal have been prepared is to ignore whether any such deduction has taken place, if such a deduction has taken place. This is not a question of deciding between two or more competing meanings of clause 1.24. It is a failure to apply clause 1.24.

66. The Tribunal finds that the principle requiring a Lease to be construed contra proferentum (against the party who prepared the document if there are competing interpretations of its meaning) does not arise. No evidence or calculations were adduced that this reading of clause 1.24 was necessarily, "financially favourable to the Respondent". Further, the "contra proferentum" principle would require a reading favourable to the Respondent, as the Lease was drafted by the Applicant's advisers.

67. The Respondent did not argue for example that some of the main structure costs to the roof should not fall within the head of expenditure envisaged by Schedule 6 to the Lease if a particular interpretation has been adopted. However he might be in a position to comment upon and understand some of the service charge costs more effectively if the vouchers relating to the commercial units were produced. One possible illustration of this is that a number of the vouchers for telephone charges appear to have been addressed to companies which were claimed to be associated with the landlord. This was far from obvious from a reading of the vouchers as the evidence about this investigated at the hearing on 05 05 2010 showed. More information about the commercial expenditure at the building might enable the lessees to understand any apportionment which has taken place.

68. Similarly the Tribunal does not accept the premise upon which Ms Osler's argument about purposive interpretation of the lease is based. It is no more than an assertion that a calculation or deduction of sums charged to the commercial units would "eradicate the mischief at which this clause is aimed". The Tribunal has not seen any calculation or other evidence to support such a proposition. The Applicant did not adduce any evidence about the "mischief" at which this clause was aimed, or its intended meaning in the light of the factual matrix when the Lease was drafted.

Were specific costs reasonably incurred?

69. The Respondent challenged a number of specific heads of expenditure in his letter of 11 03 2010 arguing (in effect) that service charges had not been reasonably incurred or services or works had not been carried out to a reasonable standard. As the Respondent is not legally qualified the Tribunal had to consider his concerns against the landscape of section 19 of the 1985 Act. The background to the issues raised is that the Respondent does not reside at the premises which had let out in the past and appeared to have been recently redecorated, presumably with a view to re-letting.

Front door entrance Phase 3

70. As the photographic evidence showed this front door was in a condition that made it appear that it had been the subject of damage in early March 2010. Mr Newstead's evidence is that a comprehensive external decoration programme is due to take place and consultation is due to take place for that programme. Mr Newstead frankly recognised that the location of the bus stop near to that front door was a problem. The Tribunal does not find the decision to defer redecoration works to that front door until the external works programme was carried out to be unreasonable. Potentially, decorative works to the front door the works can be carried out more cheaply and efficiently as part of those works. Even if the condition of the main entrance door was evidence of a breach of covenant the Tribunal could not identify any specific loss or damage suffered by the Respondent in consequence of the condition of the front door to Phase 3. Nor did the condition of the entrance door necessarily show that monies expended on repairs had not been reasonably incurred or the repairs were below an acceptable standard.

Fire alarm system

71. At the date of the Tribunal's inspection the fire alarm system appeared to be in working order. There were no obvious signs of a defect or warning status. The Tribunal did not carry out an electrical or mechanical survey of the fire alarm system. It was evident from the vouchers produced that a full service of that system had been carried out (and charged for) on 22 06 2009.

72. The broken glass in the fire alarm point was evidenced by a photograph said to have been taken on 10 03 2010. Mr. Newstead confirmed that he had spoken to the contractor who had carried out the service (JS Fire Protection) and ensured that the contractor fixed the problem to which the Respondent has referred. Mr Newstead is one of the key holders.

73. The Tribunal's view is that the existence of broken glass or alarm status on the alarm system is not necessarily evidence that the fire alarm was defective or that the management in relation to that system was substandard. At this stage the costs of the attendance by the contractor and the precise nature of the defect have not been examined as they were not criticised or obviously in issue. The Tribunal makes no finding about those matters. It remains open to the Respondent to consider those issues at later stage. However, at this stage the Tribunal does not find that there is evidence of substandard management or a defect in the fire alarm system.

74. Even if broken glass was evidence of a breach of covenant or of some kind of defect, the Tribunal could not identify any specific loss or damage

suffered by the Respondent in consequence of the condition of the alarm. There is no satisfactory evidence that the costs of maintenance of this system had not been reasonably incurred, or that the services provided were not of a reasonable standard.

Paintwork carpets and cleanliness

75. The photographs produced by the Respondent do indeed show signs of scuff marks on the communal hallway walls within Phase 3. This unfortunately is not uncommon in properties in multiple occupation which are let or sub-let. They are not necessarily evidence of substandard management or poor cleaning, or that sums spent on repairs or decoration were not reasonably incurred. Before his letter of 11 03 2010, the Tribunal had not seen any evidence of complaint or suggestions about how the issue might be addressed.

76. The carpets appeared to be in reasonable condition upon inspection. Carpet had been fitted on the stairs in August 2009 according to the voucher at page 284. There was evidence Phase 3 was regularly cleaned from Mr. Newstead and from the vouchers. There was no evidence to substantiate the implicit assertion made in the Respondent's letter of 11 02 2010 that the sums charged for general repairs had not been properly spent or that the repairs had not been carried out properly or effectively.

77. Mr Newstead accepted that rubbish may have been left downstairs on one occasion. His evidence was that Oakfield would have visited regularly by the his employees or himself. He accepted the cleaner may not have reported the issue immediately and he would attend to this. On the other hand the Respondent does not appear to have complained of this as an issue or drawn the attention of the managing agents to the problem before his letter of 10 03 2010. Although the depositing of rubbish in the communal hallway is clearly unsatisfactory and requires attention, the issue appears to have been addressed. By itself this (taken with the scuff marks) is not persuasive evidence that the monies spent on cleaning and repairs were not of reasonable value or the services provided were not at a reasonable value or not reasonably incurred. There is insufficient evidence for the Tribunal to conclude (as the Respondent in effect suggested) that the monies spent on cleaning and general repairs were not reasonably incurred or the standard of cleaning or supervision was poor.

78. No other comparable costs or quotations were produced by the Respondent to suggest that better value or a higher standard might be obtained. There was no hard evidence as to who might have caused the scuff marks or left the rubbish in the hallway.

79. Having had an opportunity to consider the evidence given by Mr Newstead most of which had not been introduced by any witness statement or other advance notification the Respondent made the point that Oakfield do not have a clear method of work to ensure that work is carried out to a satisfactory standard (in his letter of 17 06 2010). The matters of which he produced evidence by *themselves* do not make out this complaint. It is correct that Samantha Hensher was unclear whether there was a system of monitoring. However, Mr Newstead's evidence was that he himself attended the Building from time to time. He attended to the fire alarm problem and the rubbish when it was brought to his attention. There is undoubtedly room for improvement. What the Respondent did not do however was to produce evidence that other agents would provide a higher or better level of service, or that the alleged failures in the system of monitoring caused particular problems. The Respondent's evidence about problems appears to be a snapshot. There was little evidence from which the Tribunal might infer the lapses which he pointed to were evidence of systemic failure. There is not sufficient evidence to conclude that in respect of this issue, the management services were not of a reasonable standard.

Electricity costs

80. The Respondent complained about rising electrical costs charged to service charge. No audit had been carried out by him or on his behalf. There is communal lighting, fire alarm system telephone and lift all of which use electricity.. Mr Newstead's evidence was that Oakfield had employed an electrician to look at ways of saving on electricity costs. Energy saving light bulbs had been used and an appropriate rate of charge had been checked. The Tribunal conclude that although electricity costs have undoubtedly risen, the Respondent has not established that the costs of electricity were unreasonably incurred or that the service or the provision of electricity or the underlying services were not of a reasonable standard.

Telephone costs

81. The Respondent failed to establish that these were not reasonably incurred and these were not specifically challenged by him.

Insurance costs

82. The cost of insurance was part of the Tribunal's consideration of evidence of service charges as a whole. There was no specific challenge to insurance costs by the Respondent. Nor did the Tribunal consider there were any points of law or practice in connection with this head of expenditure that needed to be investigated.

Management fees

83. The Respondent made a clear challenge to the management charges in his letter of 11 03 2010. In particular he expressed unequivocal concern in relation to the additional charge of 10% levied by Oakfield in addition to an earlier charge when compared to charges made for management by the other managing agent Bridgeford.

84. This was an issue which caused the Tribunal considerable concern. The first part to this issue was the method of charging adopted by Oakfield. Unlike many agents, for "ordinary" management services a basic figure of £855 (including VAT equating to just under £150 per unit) was charged in addition to 10% of the cost of minor works/services. These figures were for the year ended 31 12 2010 but this method of charging applied to the other service charge years in issue. Oakfield did not have copy of its terms of engagement at that hearing, only a specimen copy. A signed copy of the terms of engagement for the year commencing 06 04 2009 was produced in the supplementary bundle sent to the Tribunal and Respondent after the hearing in May 2010.

85. When that contract was produced it became apparent that the definition of minor works in that contract was "10% of *net* contract" (emphasis added) and further defined by clause 1.17 to mean "arrange minor work and maintenance contracts at the estate or property" (separate charges may apply)". The parties were invited to produce written submissions if they wished on those issues. In written submissions Ms Osler contended that page 59 prevailed over this clause so that Oakfield are entitled to 10% of net contract. The Tribunal accepts that there is an error in the terms of business so that this is how the terms of engagement should be read rather than to the asbestos works erroneously referred to on the first page of the terms of the agreement.

86. A more difficult point is whether the words "10% of *net* contract" mean that the 10% must be taken of the cost of contract works less any taxes added such as VAT. Otherwise, so it may be argued Oakfield are remunerated by reference to the sum and taxes payable. The Tribunal does decide this issue, which can be dealt with when the balancing charge is prepared.

87. The Tribunal did consider whether the method of charging encouraged Oakfield consciously or unconsciously not to achieve reasonable costs for contract works and services with suppliers. This was one of the risks of this charging method pointed out in the Residential Management Service Charge Code. Ultimately however Mr Newstead persuaded the Tribunal that the total sum charged for management fees for the service charge year 2009 was not excessive or above market rates for this kind of service, at least for the period ending 31 12 2009. This charging structure may not

always produce such a result. The Respondent did not produce any evidence of market rates for agents or suggest that the rates charged were excessive by reference to any scale of charges or other evidence of charges for managing agents of this kind of property. The Respondent did not establish that his complaints about service charges generally or the method of charging meant that the sums spent on management charges were not reasonably incurred or not payable under paragraph 20 of the Sixth Schedule to the lease.

88. A separate issue arising from provision of the agreement is whether the agreement with Oakfield amounted to a qualifying long term agreement ("a "QLTA") within the meaning of section 20ZA of the 1985 Act which required consultation with the lessees. It is common ground that a QLTA must be for a term of 12 months or more: see section 20ZA(2)(a). Here the agreement is for 12 months' continuous service from 06 04 2009 (clause 7.1). Clause 7.1 is not without difficulty as the words "providing continuous service" are capable of embracing at least 2 different concepts. The first is that at least 12 months' continuous service may be provided. The second is that the three months' notice may only be given after 12 months. The Applicant through Ms Osler appears to suggest that clause 7.1 means that the agreement can only be terminated after the 12 month period (paragraph 13 of her July 2010 submissions) has been allowed to run, but the 3 month notice can be given in the final 3 months. She cites *Paddington Walk v Peabody Trust* CHY08440 in support of the proposition that an agreement which may terminate after 12 months, is not a QLTA.

89. The Tribunal is content to follow the approach of Her Honour Judge Marshall on this issue. The issue which arises is that at the date of the hearing on 04 05 2010 and subsequently it was clear that Oakfield continued to manage the premises and the Building pursuant to that agreement.

90. As the Applicant through Ms Osler properly conceded (paragraph 13 of her July 2010 submissions) there is no evidence to show that any of the Consultation requirements in schedule 4 to the Service Charges (Consultation Requirements) (England) Regulations 2003 ("the 2003 Regulations) were followed.

91. It is clear that the reason behind this omission is that until the Tribunal raised the issue, neither the Applicant nor the Respondent had directed their minds to the issue of whether the Agreement with Oakfield amounted to a LTQA.

92. In the circumstances the Applicant through Ms Osler (at the invitation of the Tribunal) applied for dispensation from compliance with the 2003

Regulations under section 20ZA(1) of the 2003 Regulations: see paragraphs 20 -21 of the July submissions).

93. It is clear from the documents placed before the Tribunal that the Applicant through Oakfield acted in good faith in entering into the Agreement with Oakfield. This is not a case where a large landlord with an administrative team has carelessly or recklessly omitted fulfilling the Consultation Requirements. The issue is the extent to which prejudice flowed from those breaches of the requirements: see the Lands Chamber in *Daejan v Benson* [2009] UKUT 233. The Tribunal bears in mind that there is no burden on the Respondent to show financial prejudice. Nevertheless there is no evidence that had consultation taken place, a different outcome in terms of appointing managing agents might have occurred. The Tribunal's view is that had the true position been appreciated, steps would have been taken to minimise the extent to which such an agreement fell within the 2003 Regulations. The Tribunal cannot ignore the fact that no evidence has been adduced (on the issue of reasonableness) that other managing agents might have provided a cheaper or more efficient service, at least for the period from 06 04 2009.

94. Accordingly in all the circumstances the Tribunal is satisfied that it was reasonable to dispense with the Consultation requirements of the 2003 Regulations in respect of the Agreement dated 06 04 2009 with Oakfield. Although it has been said it will rarely be appropriate to provide wholesale dispensation, this is an unusual case where it appears to have been thought that the 2003 Regulations did not apply. Mr Newstead demonstrated his awareness of the 2003 Regulations in relation to decorative and external works and was proposing to follow those requirements in relation to those works.

95. It is worth emphasising that the Tribunal is not by this order deciding that in respect of the period after 04 05 2010, the managing agents' costs are reasonable or were reasonably incurred. The excess or balancing charges for service charge years ending 31 12 2009 and 31 12 2010 are not the subject of this decision on this issue as they are not before the Tribunal.

Legal and other costs of these proceedings

96. The Respondent objected strongly to the suggestion that the legal and management costs should be paid by him and other lessees through service charge in his letter to the Tribunal of 17 06 2010. The Applicant's written submissions on this issue were dated 27 05 2010.

97. Paragraph 20 of the 6th Schedule to the Lease empowers the landlord to include as a head of service charge expenditure:

"The payment of all fees charges expenses and commission of the Managing Agents and any other person firm or company engaged in connection with the management and supervision of the Building (including without limitation legal and other costs incurred in the collection of the Interim Charge and the Service Charge which are not recoverable from the Lessees)"

98. That provision might be used to claim Oakfield's costs and those of the Applicant's solicitors and Counsel relating to these Tribunal proceedings as service charge. The extent to which the legal costs of re-service of service charge demands and of preparation of amended accounts or certificates are recoverable under this provision where they have been incurred through omissions or culpable failure on the parts of the person or firm whose costs are claimed must be open to debate. Nothing in this decision should be taken as reaching a decision on that issue.

99. Section 20C of the 1985 Act provides in its material parts (immaterial amendments omitted):

> "(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court or leasehold valuation tribunal, or the Lands Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application."
>
> .....
>
> "(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances".

100. The proposition in cited in *Holding & Management Ltd v. Property Holding and Investment Trust plc* [1989] 1 W.L.R. 1313 at 1324 per Nicholls L.J.) Is often cited in respect of section 20C. "To my mind it is unattractive that a tenant who has been substantially successful in litigation against his landlord and who has been told by the court that not merely need he pay no part of the landlord's costs but has had an award of costs in his favour should find himself having to pay any part of the landlord's costs through the service charge. In general, in my judgment, the landlord should not "get through the back door what has been refused by the front". This was said in a different factual context and the Tribunal is not bound by those dicta on the question of what is just and equitable.

101. The Applicant repeats in another form the dicta of Peter Gibson LJ in Iperion *Investments v Broadwalk House Residents Ltd* (1995) 27 H.L.R. 196 who held the court has a discretion to direct that litigation costs be excluded from

a service charge, even if the costs have passed the test of section 19 of the 1985 Act and have been reasonably incurred. "The obvious circumstance which Parliament must be taken to have had in mind in enacting section 20C is a case where the tenant has been successful in litigation against the landlord and yet the costs of the proceedings are within the service charge recoverable from the tenant". The Tribunal has regard to that guidance.

102. The Tribunal has also helpfully been referred to propositions outlined in Tenants *of Langford Court (El Sherbani) v Doren Ltd* LRX/37/2000 (5th March 2001). At paragraph 30 His Honour Judge Michael Rich QC made the point that in the Lands Tribunal, there is no automatic expectation of an order under section 20C in favour of a successful tenant, although a landlord who has behaved improperly or unreasonably cannot normally expect to recover his costs of defending such conduct. In paragraph 31 he went on to say that the primary consideration that the Tribunal should keep in mind is that the power to make an order under section [20C] should be used only in order to ensure that the right to claim costs as part of the service charge is not used in circumstances that make its use unjust. The point was also made that section 20C may provide a short route by which a Tribunal which has heard the litigation giving rise to costs can avoid arguments under section 19 of the 1985 Act, but its purpose is to give an opportunity to ensure fair treatment as between landlord and tenant in circumstances where even although costs have been reasonably and properly incurred by the landlord it would be unjust that the tenants or some particular tenant should have to pay them.

103. That decision also repeats the well known proposition that section 20C is a power to deprive a landlord of a property right. The Tribunal has looked at these considerations carefully and separately in relation to each of the stages of these proceedings.

104. Looked at in the round, a considerable part of the time and costs in these proceedings have been taken up with issues which arose from failure of the Applicant and its solicitors to provide documents (including witness statements) and to address issues (such as the identity of the Applicant and of the landlord) before the Tribunal hearing. There was no evidence that the Applicant or its solicitors had addressed issues which arose from the Lease before these proceedings were commenced. In addition a considerable amount of time and costs has been incurred on basic questions arising from the identity of the landlord and the identity of the Applicant. Those questions were wholly within the control and knowledge of the Applicant. It is hard to see how it could be just for the lessees to pay any costs arising from that issue.

105. The hearing on 04 05 2010 was considerably lengthened by the omission of the Applicant and its solicitors to provide written statements in

accordance with directions dated 17 02 2010 or to provide a witness who was able to provide evidence and information about issues which the Tribunal had indicated might be relevant before that hearing. The omission to provide the managing agents' agreement and evidence of service of summary of rights of information also lengthened the hearing and brought about the need to seek additional written submissions and additional evidence.

106. As matters stand none of the service charges claimed have been found to be payable, although it is conceivable some of the sums previously claimed may become payable. Accordingly the offer of accepting payments by instalments referred to in the Applicant's submissions does not appear to be of much relevance.

107. The Applicant's submissions suggest that the Applicant as a private landlord will be detrimentally affected by an inability to recover costs. No evidence has been put before the Tribunal as to the Applicant's means, their ability to meet any costs which may be claimed by its own legal advisers, the amount of those costs or other mans of recovering those costs. Assuming without deciding that it was reasonable to incur significant legal costs, there must be a real question whether all of those costs will be payable by the Applicant, if the conclusions reached by this Tribunal stand.

108. The Applicant submits that had County Court proceedings been issued, and had they succeeded it would have been entitled to its costs. As the amounts in issue were at all material times below £5,000.00 it is doubtful whether any costs would have been recovered in the County Court, even if any sums had been found recoverable. It is a real possibility service charge issues would have been transferred to the Leasehold Valuation Tribunal which is largely a no costs jurisdiction. In any event, as no service charges have been found to be payable, it is extremely unlikely any costs would have been awarded to the Applicant if the same result had been reached.

109. Accordingly the Tribunal makes an order that none of the costs of these proceedings are to be recovered from the Respondent or any other lessee as service charge.

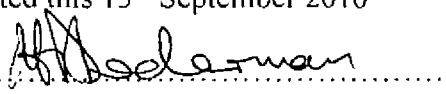
Reimbursement of fees

110. Under paragraph 9(1) of the Leasehold Valuation Tribunal (Fees)(England) Regulations 2003, the Tribunal "may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings". The Applicant applies for reimbursement of fees by the Respondent. The provisions contains no indication of the criteria to be considered by the Tribunal. However, for similar reasons to those given in granting the Respondent's application that

no management or legal costs of the proceedings should be charged as part of service charge, the Tribunal declines to orders reimbursement of fees by the Respondent. In summary the Applicant has not been successful in obtaining the orders which it sought and much of the costs of these proceedings and the hearings have been incurred or increased by the Applicant's conduct of the hearing.

111. The Tribunal cannot leave this decision without extending its gratitude for the work of Ms Osler who provided helpful and concise submissions on the legal and factual issues which were of considerable assistance to the. Tribunal.

Dated this 13th September 2010



HD Lederman, (Lawyer Chairman)