

THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE

DECISION OF THE SOUTHERN LEASEHOLD VALUATION TRIBUNAL
LANDLORD AND TENANT ACT 1985, S.27A and 20C

FLAT 4, RYDENS COURT, RYDENS ROAD, WALTON ON THAMES, KT12 3AA

Applicant: Mrs Joan Froude (Lessee)

Represented by: Mr D Froude (acting under a Power of Attorney)

Respondents: Ms M K Kwilman-Klelland (Landlord)

Represented by: Mr Richard Baines of Baines & Co (Managing Agents)

Date of Applications: 2 August 2010 and 10 October 2010

Date of hearing: 27 October 2010

Members of the Leasehold Valuation Tribunal:

MA Loveday BA Hons MCI Arb

Mr BHR Simms FRICS MCI Arb

INTRODUCTION

1. This is an application relating to service charges payable under a lease of Flat 4, Rydens Court, Rydens Road, Walton on Thames KT12 3AA. The initial application by the lessee (Mrs J Froude) dated 2 August 2010 sought a determination of liability to pay service charges under section 27A of the Landlord and Tenant Act 1985 ("LTA 1985"). A further application dated 10 October 2010 was made by the lessee seeking an order under LTA 1985 s.20C that the landlord's costs incurred in connection with proceedings before the Tribunal should not be regarded as relevant costs in determining the amount of any service charge.

2. Directions were given on 5 August 2010 and a hearing took place on 27 October 2010. The applicant was represented by her son, Mr D Froude, who holds a power of attorney. The landlord was represented by Mr Richard Baines of the managing agents Baines & Co. Although various service charges were referred to during the course of the proceedings, at the start of the hearing the parties agreed that a determination was only sought in relation to the following:
 - 1 Liability to pay interim service charges for the 2010 service charge year.
 - 2 The application under LTA 1985 s.20C.

INSPECTION

3. The Tribunal inspected the property before the hearing.

4. The property originally comprised a two storey semi detached house c.1890 in its own grounds on a busy bus route in Walton on Thames. The main part of the house is of fair faced brick with a slate pitched roof (incorporating dormer windows) and a porch with decorative ironwork and glazing. At some stage the house has been converted into 5 flats and a more modern side extension added with a pitched concrete tiled roof. The entrances to Flats 1 and 2 at ground floor level are to the front of the main building. The entrance to Flat 3 is at the front of the extension whilst the doors to flats 4 and 5 are to the side of the extension. The subject property, Flat 4, is located on the ground floor of the extension immediately below Flat 5. There is also a satellite dish

mounted on the side elevation of the extension. The front pitch of the main roof has Velux windows set into it and there are dormer windows at second floor level of the side pitch to the main roof. The decorative condition of the house is fair, although the woodwork is peeling and requires attention.

5. The front of the property bordering the road is largely given over to trees and shrubs, which appear to have grown untended over a considerable period of time. There is a pedestrian pathway with a wooden picket gate and a separate vehicle access between two brick pillars. The latter gives access to a metalled driveway leading to a hard standing in front of the house. The pedestrian pathway has a number of large refuse/recycling bins and there is a compost heap in the shrubs. The Tribunal was shown a dead Elm tree (approx 5ins girth) in the shrubs to the side of the path. Adjacent to the hard standing is an area of grass. The surface of the hard standing has a number of potholes and moss patches. To the side is a concrete driveway leading to separate garage block at the back of the site. Along the side of the driveway are private gardens which appear to be enjoyed by occupiers of individual flats. At the rear of the second of these gardens, adjacent to the garage block, is a large sycamore and overgrown flower beds. The general condition of the grounds was fair on the date of inspection, although the Tribunal viewed the property in the Autumn when there was a quantity of leaves on the grounds and in the undergrowth.

THE LEASE

6. The Tribunal was provided with a copy of an undated lease of Flat 4 which is for a term of 999 years from 1 January 1991. By clause 1, the demise includes the main flat on the ground floor of the extension (described in the lease as "the ground floor maisonette") together with the garden area immediately to the rear and use of one of the garages in the garage block. Clause 1 expressly includes in the demise:

"ALL THAT part of the foundations which are immediately below the Ground Floor Maisonette and shall include all sewers pipes cables wires and similar equipment and appliances thereon which exclusively serve the said premises the fences and boundary walls marked with a "T" within the red colouring on the plan shall belong to and be part of the Demised Premises and every wall common to the Demised premises and adjoining premises forming part of Rydens Court shall be party walls severed medially."

7. The following are material obligations of the lessee:

- 1 By clause 3(1)(i) "To keep the Demised premises throughout the term hereby granted in good and substantial and tenantable repair and condition and in particular so as to support the parts of the Building other than the Demised Premises."
- 2 By clause 3(1)(iii) "Once in every fourth year of the said term and also during the last year thereof to paint at a time and in a colour to be appointed by the Lessor all the outside wood and iron work of the Demised Premises and all additions thereto with two coats of good paint in a proper and workmanlike manner."
- 3 By clause 3(2) "To contribute and pay on demand to the Lessor a proportionate part of the aggregate amount of the costs charges and expenses incurred by the Lessor in carrying out the Lessor's Services set out in the Fourth Schedule hereto (hereinafter called the "Service Charge") such proportion to be calculated according to the relation which the rateable value of the maisonette bears to the aggregate rateable value of the Building The Service Charge shall be SUBJECT to the following terms and provisions:
 - (i) The expression "the Maintenance Year" shall mean the period from the first day of January in each year to the thirty-first day of December of the same year or such other annual period as the Lessor may in his discretion from time to time determine"
 - (ii) The expression "costs charges and expenses" shall be deemed to include not only those costs charges and expenses hereinafter to be described which have actually been disbursed incurred or made by the Lessor during the relevant Maintenance Year but also such costs charges and expenses whenever disbursed incurred or including a sum or sums of money by way of reasonable provision for anticipated expenditure in respect thereof (including provision of a reserve fund) as the Lessor may in his absolute discretion allocate to the Maintenance Year.
 - (iii) The Lessee shall on the first day of January in every year pay to the Lessor a sum of ONE HUNDRED POUNDS (£100.00) in advance and on account of the Service Charge or such other sum as the Lessor shall specify at his discretion to be a fair and reasonable interim payment."

- 4 By clause 3(3) "To pay and contribute on demand to the person or persons by whom, such expenses may be incurred one half of the expenses incurred by the Lessor or the Lessee for the time being of the First Floor Maisonette numbered 5 Rydens Court from time to time in repairing maintaining and renewing the roof of all that part of the Building immediately above the First Floor Maisonette."

8. The "landlord's services" are set out in the Fourth Schedule to the lease:
 - 1 By paragraph 5 that "The Lessor may provide such other services as he shall in his reasonable discretion deem necessary for the better use and enjoyment of the Property by the Lessee and other occupiers of the Building."
 - 2 By paragraph 6 that "The Lessor may employ and remunerate such staff or agents in the performance of the Lessor's Services as he shall think fit."
 - 3 By paragraph 8 that "The Lessor may employ and remunerate a competent person firm of company to act as Managing Agent of the Property and on behalf of the Lessor to carry out or supervise all or any of the Lessors Services."

THE STATUTORY PROVISIONS

9. LTA 1985 s.19(2) is as follows:

"(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."

10. Section 20C is as follows:

"(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, residential property tribunal or leasehold valuation tribunal ... 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 ... tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances."

THE APPLICANT'S CASE

11. The interim service charges for the 2010 service charge year were demanded on two separate occasions. On 8 February 2010, Baines & Co demanded payment of a sum of £1,945 from the applicant (plus ground rent of £12), which was calculated as one fifth of estimated relevant costs of £9,725 for the building. Attached to this was an estimated expenditure account for the year 2010 which included the following items:

<i>"1. Building Insurance:</i>	<i>£1,200.00</i>
<i>2. Gardening:</i>	<i>£2,000.00</i>
<i>3. Managing Agent's fee including VAT:</i>	<i>£1,175.00</i>
<i>4. Company costs accountant:</i>	<i>£ 350.00</i>
<i>5. Sinking fund for external decorations:</i>	<i>£5,000.00"</i>

12. It should be said that this reference to a "sinking" fund has consistently been adopted by the parties throughout the application, although the lease at clause 3(2)(ii) refers to a "reserve" fund. No point was raised by either party about the technical distinction between a "sinking" fund and a "reserve".
13. The applicant paid a sum of £555.00 and by a letter dated 15 March 2010 Mr Froude challenged parts of the interim demand. In the light of this letter and consultation with the respondent, Baines & Co served a revised service charge invoice under cover of a letter dated 26 March 2010. The agent demanded £1,928 plus the ground rent (£12) less the sum paid on account (£555). The figure of £1,928 represented a revised figure of £213.71 for the lessee's contribution to the relevant cost of insurance, but otherwise the lessee's contributions towards the other four heads of estimated relevant costs (i.e. one fifth of £8,525) remained the same. A further demand for the same sum was made under cover of a letter dated 30 July 2010. The parties agreed that the revised interim service charge figures in the demand dated 26 March 2010 were the relevant ones for this determination.
14. General approach of landlord. The applicant relied on a statement of case dated 16 August 2010 supplemented by oral submissions at the hearing. Mr Froude contended that the interim service charge was not reasonable under LTA 1985 section 19(2). His

challenge related to the estimated contribution to a sinking fund of £5,000 (£1,000 per flat) and the estimated contribution towards gardening costs of £2,000 (£400 per flat).

15. Mr Froude argued that the landlord had not consulted properly about the above interim charges. He accepted that the agent had prepared a document dated 23 September 2009 entitled draft "Budget Possibilities for year 2000" and that this document included a list of works which might be carried out in 2010. Mr Froude confirmed that the applicant had received the document soon after it was produced. However, the "Budget Possibilities" document contained no figures for the estimated cost of works. Mr Froude referred to a meeting with residents on 16 July 2010, when Mr Baines had told lessees that he had gone on to prepare the interim demand on the basis that the works would be carried out in 2010 and that he had done so because none of the lessees had objected to the "Budget Possibilities" document. In fact, Mr Froude stated that the applicant had not objected to the "Budget Possibilities" document simply because it did not include any specific figures.
16. Sinking Fund. The first argument in relation to the sinking fund was that it was not necessary to provide for such a fund in 2010 because there were substantial cash sums available to the landlord at the time. Mr Froude referred to the certified service charge accounts for 2008 which showed a cash balance of £1,944 carried forward to the 2009 service charge year and the certified service charge accounts for 2009 which showed a cash balance of £1,539 excess of income over expenditure at the end of that year. The balance sheet showed cash reserves of £3,284 as at 31 December 2009. Although a sinking fund may have been appropriate, Mr Froude argued that a further contribution to that fund in 2010 was not.
17. The second argument was that it was wrong to include external decorations within any provision for a sinking fund. Under the lease of each flat, the individual lessee was liable to decorate certain external parts of the Building. None of the lessees required help from other lessees to do this and no contribution was therefore needed from a sinking fund towards painting and decoration. Mr Froude accepted that the landlord was liable to carry out some external works under the leases of the flats, but he

contended that £200 per flat (£1,000) would be a reasonable contribution to a sinking fund for such anticipated work.

18. In his closing submissions on this point, Mr Froude stated that he was not aware of the list of proposed works suggested by Mr Baines (see below). The residents meeting on 16 July 2010 had been called specifically to deal with what works were proposed, but they were not mentioned at that stage. However, Mr Froude maintained that the list of works all fell within the lessee's obligations under the lease and these should not have formed part of any interim service charge. He referred to the plan attached to the lease which showed the demised areas.
19. Gardening. Mr Froude submitted that only a "minute" area of the ground required gardening. He suggested that a reasonable provision for this would be £600 pa.
20. Accountants. Mr Froude argued that a provision of relevant costs of £50 would be reasonable for accountant's fees. His experience as a school teacher running an unincorporated association (a staff club) with an equivalent turnover of £15,000 per annum was that an accountant would not charge more than £50.
21. Provision for other relevant costs. Mr Froude accepted that the provisions for the relevant cost of building insurance (£1,200) and managing agent's fees (£1,175) were reasonable.
22. Section 20C. Mr Froude submitted that it was his entitlement to apply to the Tribunal to determine a service charge and that the presumption must be that a section 20C order should be made. In any event, there had been a lack of communication from the landlord.

THE RESPONDENT'S CASE

23. General approach of landlord. Mr Baines stated that he had been brought in to manage the property about 2 years before. At that stage the landlord faced great problems recovering service charges and works had not been carried out. He called a

meeting of lessees on 31 July 2009 and the minutes of that meeting showed a lot of hostility by the lessees from the start. For example, at the meeting, Mr Dudman (Flat 5) had called for Mr Baines's removal before he had really started management. Mr Baines prepared the "Budget Possibilities" document and none of the lessees responded. He therefore made informal enquiries from existing contractors (e.g. the accountant and the gardeners) and he adjusted the previous known relevant costs in the light of his soundings. This resulted in the figures for anticipated relevant costs included in the 8 February 2010 "Estimated Expenditure" document. That estimate was adjusted to arrive at the second "Estimated Expenditure" document which he circulated with the revised service charge demands on 26 March 2010. The reason for the revision was that under the terms of the lease the insurance costs were not divided between the lessees in the same way as the other relevant costs and they had been divided up incorrectly in the original estimate. From the outset there had been a serious breakdown of trust and some £6,000 of service charges were now due from lessees.

24. Sinking Fund. Mr Baines stated in his oral evidence that he had carried out a survey in 2008 and identified works of external decoration which needed to be carried out. He returned on 12 March 2010 and identified a number of specific items which he had recorded in his notes. These included:

- 1 Redecorate name and number on brick post;
- 2 Repair and redecorate wooden pedestrian gate;
- 3 Front window arches, sills and reveals to windows;
- 4 Render panel and lean-to, plus doors into flats 1 and 2;
- 5 Lean-to entrance to flat 3;
- 6 Painted walls to flats 4 and 5;
- 7 Roof dormers to flat 5;
- 8 Rear wall window sills and reveals. Remove creeper.
- 9 Garage doors.

In this list (a written copy of which was supplied to the Tribunal after the hearing at its request), Mr Baines confirmed that the words "lean-to" meant the extension. He accepted that this list was not included in any document disclosed prior to the hearing

or in the bundle of documents prepared for the Tribunal by the respondent. However, he stated that his conclusion at the outset had been that the property had not been decorated for a considerable period of time.

25. Mr Baines submitted that under the terms of the lease of flat 4, the landlord was obliged to carry out external works including decoration. He relied on paragraph 1(b) of Schedule 4 and suggested that the landlord must "*whenever reasonably necessary maintain repair redecorate and renew ... any parts of the Property enjoyed by or used or capable of being enjoyed or used by the Lessor in common with the Lessee as aforesaid*". The works set out above therefore all fell within the definition of "*Landlord's services*" to which the lessee was required to contribute under clause 3(2) and Schedule 4 to the lease. Furthermore, under paragraph 1(c) of the Fourth Schedule, the landlord was required to maintain the walls fences and gates "*surrounding the property*". By contrast, the lessee had no responsibility to carry out these works under clause 3(1)(iii) of the Lease. It followed that the costs set out above were properly included in the estimated relevant costs for 2010. As far as the leases of the other flats were concerned, there were similar obligations imposed on the landlord and the lessees as those which applied to the lease of flat 4.
26. When questioned by the Tribunal, Mr Baines accepted that when he prepared the interim demand he anticipated that the works would be carried out in the 2010 service charge year, although it was possible that some works would not be completed or paid for until the 2011 service charge year.
27. Gardening. Mr Baines explained that the actual cost of gardening incurred in the 2008 service charge year had been £496 (see 2008 service charge accounts). He had increased the provision for 2010 largely because of an outbreak of Japanese Knotweed. This was referred to in item 4 of the "Budget Possibilities" document dated 23 September 2009. By that stage it was clear that a considerable amount of work would be needed to eradicate the infestation over the coming year, and Mr Baines had obtained informal estimates from the existing gardeners (Messrs Dedmans) to arrive at the figure of £2,000 for relevant costs estimated on 8 February 2010 and 26

March 2010. However, he accepted that these estimates included some work for protecting tree roots during the course of proposed repairs to the concrete access to the garages (see item 1 of the "Budget Possibilities" document).

28. Accountants. Mr Baines stated that in 2007 and 2008, the service charge accounts had been prepared by CB Heslop & Co chartered accountants, and that they had charged fees of £293.75. For 2009, the landlord employed Mr Alan D Bott FCCA to prepare the annual accounts. Mr Bott was a chartered accountant and the bursar at a local school who had charged £250 for preparing the 2009 accounts. Mr Baines asked Mr Bott what he would charge for 2010, and Mr Bott gave the figure of £350.
29. Other matters. When questioned by the Tribunal, Mr Baines stated that the demands dated 8 February, 26 March 2010 and 30 July 2010 were the only ones that were sent out. He was not aware of the formalities for such demands required by LTA 1985 s.21B and by s.47 of the Landlord and Tenant Act 1987.
30. Section 20C. Mr Baines contended that the costs incurred by the landlord in connection with proceedings before the Tribunal were recoverable under paragraphs 5 and 7 of Schedule 4 to the Lease. As to the merits of the s.20C application, the landlord and/or Baines & Co could not be blamed for any default before November 2008 when Baines & Co were appointed managing agents. Since that date Baines & Co were paid by the landlord to collect service charges which were not forthcoming. The lessees had become abusive despite the agents trying hard to be constructive and going through proper procedures for arriving at an interim charge. The application was unnecessary and vexatious and the landlord had quite properly incurred costs in meeting the allegations.

FINDINGS

31. General approach of landlord. On this issue, the Tribunal finds that the general conduct of the landlord and her agent was reasonable. There is no specific obligation in the lease to consult with lessees before the landlord "*at his discretion*" specifies a sum "*to be a fair and reasonable interim payment*": see clause 3(2). Indeed, the

landlord's agent went beyond what was strictly required by circulating the "Budget Possibilities" document before the 2010 service charge year started. No objections were received to that document and it was reasonable for the agent to have drawn some comfort from this. Furthermore, apart from the one matter set out below, the agent cannot be faulted in his general approach to calculating the interim payment. Mr Baines's (unchallenged) evidence was that he generally had regard to actual costs incurred in previous years and to informal soundings with service providers and he then adjusted the previous years' figures accordingly. A mistake was made in the calculation of the 2010 interim charges included in the 8 February 2010 "Estimated Expenditure" document, but this was promptly corrected by way of the revised "Estimated Expenditure" document circulated on 26 March 2010. The Tribunal can therefore turn to the individual items of complaint.

32. Sinking Fund. The first argument in relation to the sinking fund was that it was not necessary to provide for such a fund in 2010 because there were at that time substantial cash sums available to the landlord. The Tribunal does not consider that this alone renders the provision for the sinking fund in the 2010 interim charge unreasonable. Clause 3(2)(ii) of the lease was intended to create a fund of moneys for works etc which was ring fenced from the sums held for regular ongoing expenditure. It is therefore not unreasonable to create a separate fund from the general cash balance in the general service charge account. Furthermore, the cash balance at the end of the 2009 service charge year included moneys some of which would have to be applied to other purposes. For example, the 2008 and 2009 income and expenditure accounts show that the landlord retained ground rent receipts in the service charge account: the "excess of income over expenditure" figure at 31 December 2009 masks the fact that the landlord is apparently a debtor. These claims could (and probably will) deplete the cash available for general service charge expenditure during the 2010 service charge year.
33. The applicant's second argument is based on the premise that the landlord was required to interpret the terms of the lease correctly when including a sinking fund provision in the interim charge. If she or Mr Baines interpreted the lease incorrectly, at

least part of the provision of £5,000 was not “reasonable” under LTA 1985 s.19(2) and/or “payable” under s.27A. This premise was not challenged by the respondent and it is accepted by the Tribunal. The Tribunal therefore proceeds to construe the terms of the lease.

34. The starting point is that the interim charge may properly include provision for a reserve fund as part of the “reasonable provision for anticipated expenditure” in respect of various “costs charges and expenses”: see clause 3(2)(ii). By clause 3(2) itself, the “costs, charges and expenses” are limited to those required to carry out the “Landlord’s Services” in the Fourth Schedule. Both parties therefore correctly concentrated their submissions on the question whether the landlord’s provision for the sinking fund in the interim charge covered one or other head of expenditure in the Fourth Schedule. Before the Tribunal, the main argument related to works to the external faces of the walls of Flat 4 and to external window reveals and sills which formed part of items 3, 4 and 6 of Mr Baines’s list of anticipated works. Mr Froude advanced the proposition that these anticipated works fell outside the “Landlord’s Services” in the Fourth Schedule. Mr Baines contended that these works were included in the Fourth Schedule.
35. In construing these provisions, the Tribunal notes that the service charge provisions of the lease of Flat 4 are not in the usual form commonly encountered for residential blocks. Ordinarily, such leases provide that the landlord retains the structure of the building (including the roofs and foundations) and the common parts and the landlord is then required to maintain and repair those parts. The landlord recovers a service charge in respect of that expenditure. In this case, certain parts which would ordinarily form part of the landlord’s retained parts in most other cases are in fact demised to the lessee. For example, clause 1 demises the foundations beneath the flat to the lessee of Flat 4, and by clause 3(1)(i) the lessee must repair the foundations. This scheme appears to apply to structural parts other than the foundations of the extension. For example, clause 3(3) of the lease of Flat 4 strongly suggests that the roof above the extension is included in the demise of Flat 5. In any event, the lease of Flat 4 removes any obligation for the applicant to contribute towards the cost of roof

repairs from the “general” service charge provisions of clauses 3(2) and the Fourth Schedule.

36. On balance, the Tribunal accepts the contention that the outer faces of the external walls of the extension around Flat 4 are demised to the lessee. This construction is consistent with the provisions of clause 1 of the lease which defines the other vertical and horizontal boundaries of the flat. Horizontally, the ‘internal’ walls between Flat 4 and its neighbours (including any structural load bearing walls) are treated as party walls “*severed medially*”. Vertically, the demise extends upwards to the joists beneath Flat 5 and (as noted above) downwards to the foundations below Flat 4. This pattern suggests that the parties to the lease of Flat 4 intended the demise all the structural parts of the extension to the various lessees rather than for the landlord to retain some parts. There is further support for this construction in the express obligation imposed on the lessee by clause 3(1)(iii) of the lease to paint “*all the outside wood and iron work of the Demised Premises and all additions thereto*”. The landlord was therefore under no obligation to carry out works to the external walls of Flat 4. Those parts were demised to the lessee.
37. Mr Baines relied on paragraph 1(b) of the Fourth Schedule which requires the landlord to maintain repair and redecorate “*any parts of the Property enjoyed or used or capable of being enjoyed or used by the Lessor in common with the Lessee*”. However, the Tribunal does not accept that in the ordinary sense of these words, the external walls, rendering, window sills etc can in fact be “*enjoyed or used*” by the landlord or that those parts are “*capable of being*” so enjoyed or used. The landlord does not in reality exercise any control of the structural parts of the extension. In some cases it might be said that a wall window or window sill could be capable of being “*enjoyed or used*” to support a landlord’s wall or a roof above. However, in this instance even this argument appears not to be available to the landlord - since in this case the walls of flat 5 and the roof above Flat 5 seem to be demised to the lessee of Flat 5. Ultimately, the Tribunal is not satisfied that there is any clear provision in the Fourth Schedule which requires the landlord to carry out works to the external parts of the walls of Flat

4, and there is therefore no obligation to contribute to those works by way of the service charge.

38. It follows that the Tribunal does not consider that paragraph 1(b) of the Fourth Schedule permits the landlord to recover the costs of carrying out works to the outer faces of the external walls around Flat 4. A number of items in Mr Baines's list related wholly or in part to works to the exterior parts of other flats (for example, the entrance to Flat 3 and the roof dormers to Flat 5). The Tribunal was not shown the leases of the other flats in the block, but the assumption by both parties was that those leases are in similar form to the lease of Flat 4. Similar principles therefore apply to those works.
39. As far as paragraph 1(c) of the Fourth Schedule is concerned, this is a very limited provision. It should be noted that Recital 1 to the lease distinguishes between "the Building" (defined as "*the freehold building known as Rylands Court*") and the property (defined by reference to the landlord's title number). The walls fences etc "*surrounding the property*" are therefore boundary features in the grounds of Rylands Court rather than the elevations of the extension or the main building. The obligation in paragraph 1(c) applies to such matters as the garden gate and the brick pillars on either side of the driveway, but not the walls, porches etc of the building.
40. Applying these findings to the list of works given by Mr Baines which he included in the provision for the sinking fund, it follows that only some of the anticipated costs properly form part of an interim service charge:
- 1 Redecorate name and number on brick post. This redecoration falls within paragraph 1(c) of the Fourth Schedule. The landlord may properly make provision for this cost as part of the interim service charge.
 - 2 Repair and redecorate wooden pedestrian gate. This work falls within paragraph 1(c) of the Fourth Schedule. The landlord may properly make provision for this cost as part of the interim service charge;

- 3 Front window arches, sills and reveals to windows. This work does not fall within any of the landlord's obligations in the Fourth Schedule. The landlord may not properly make provision for this cost as part of the interim service charge.
- 4 Render panel and lean-to, plus doors into flats 1 and 2. This work does not fall within any of the landlord's obligations in the Fourth Schedule. The landlord may not properly make provision for this cost as part of the interim service charge.
- 5 Lean-to entrance to flat 3. This work does not fall within any of the landlord's obligations in the Fourth Schedule. The landlord may not properly make provision for this cost as part of the interim service charge.
- 6 Painted walls to flats 4 and 5. This work does not fall within any of the landlord's obligations in the Fourth Schedule. The landlord may not properly make provision for this cost as part of the interim service charge.
- 7 Roof dormers to flat 5. This work does not fall within any of the landlord's obligations in the Fourth Schedule. The landlord may not properly make provision for this cost as part of the interim service charge.
- 8 Rear wall window sills and reveals. Remove creeper. This work does not fall within any of the landlord's obligations in the Fourth Schedule. The landlord may not properly make provision for this cost as part of the interim service charge.
- 9 Garage doors. This work does not fall within any of the landlord's obligations in the Fourth Schedule. The landlord may not properly make provision for this cost as part of the interim service charge.

41. Most of the anticipated relevant costs to be covered by the sinking fund (as appears in the revised Estimated Expenditure account for 2010 sent out on 26 March 2010) are not therefore recoverable under the terms of the lease. The parties did not address the Tribunal in any detail about alternative figures for a sinking fund contribution. However, doing its best with the evidence available, the Tribunal adopts Mr Froude's figure of £200 per flat (£1,000) as a reasonable contribution to establish a sinking fund to deal with the landlord's rather limited obligations under the Fourth Schedule to the lease.

42. Gardening. The complaints here are that the estimated interim costs for 2010 were excessive compared to the actual relevant costs incurred in previous years and that it was self evident that an estimate of £2,000 for gardening in 2010 was excessive when considered in the context of the limit areas of grounds which required gardening. The explanation given by Mr Baines is that he anticipated significant extra cost in connection with the eradication of Japanese Knotweed – which is well-known to require difficult and potentially expensive treatment. There is some evidence that the need for such treatment was drawn to the attention of lessees in advance: see item 4 of the “Budget Possibilities” document and that the landlord obtained oral estimates for this work. The Tribunal accepts Mr Baines’s explanation and finds that this element of the interim charge was reasonable.
43. Accountants. The estimated cost for accountants in 2010 was £350, a modest increase on the actual relevant costs in 2008 and 2009. The Tribunal accepts that Mr Baines acted reasonably in anticipating an increase in 2010 – and in asking Mr Bott what he might charge in 2010. Mr Froude’s evidence of the cost of accounting for a staff social club cannot really be compared to the requirements for preparing and certifying service charge accounts. The Tribunal’s own experience is that a sum of £350 is not wholly excessive for such accounting services. This element of the interim charge is reasonable.
44. Section 20C. There is no obvious provision in the lease which enables the landlord to recover its costs of or in connection with proceedings before the Tribunal. Both paragraph 6 and 8 of the Fourth Schedule allow the landlord to employ agents, but in each case those agents may be employed for limited specified purposes. Those services are to perform “*the Lessor’s services*” (para 6), to act as “*Managing Agent of the Property*” (para 8) or to “*carry out or supervise all or any of the Lessors Services*” (para 8). The conduct of proceedings before the Tribunal does not clearly and unambiguously fall into any of these categories.
45. The application is not ‘vexatious’ (as argued by the landlord). The claim was not misconceived and the applicant succeeded in part. However, the test under s.20C is

not whether the claim is vexatious but whether it is "*just and equitable*" to make the order and there is no presumption that the lessee should be entitled to an order (as argued by Mr Froude): see *Tenants of Langford Court v Doren* LRX/37/2000.

46. Applying this test, the Tribunal is satisfied that it is not just and equitable to make an order under s.20C of the Act. The landlord's conduct before the proceedings were issued was not unreasonable. The agent consulted informally by way of the "Budget Possibilities" document in September 2009 before arriving at any estimate interim service charges for the following year. It promptly corrected a known error in the first interim service charge demand. Against this, the interim charge did (as it turned out) include a significant element which the Tribunal has found was not recoverable as a matter of law. However, the error was not wholly culpable, given that the provisions of the lease in this case were unusual and the issues of construction were not easy ones. Furthermore, the lessees must share some element of responsibility for the inclusion of this provision in the interim demand since they did not challenge the "Budget Possibilities" document in 2009, a document which clearly spelt out that external decorations would be included in the landlord's works in 2010. Once proceedings were started, there was nothing unusual or unreasonable about the landlord's conduct and it was reasonable for her to incur the costs of an agent in defending the application.
47. Other matters. The Tribunal raised the point that the demands for service charges dated 26 March 2010 did not on their face appear to comply with the requirements of either LTA 1985 s.21B or Landlord and Tenant Act 1987 s.47. Any liability to recover the interim charges for 2010 set out above is subject to the landlord issuing proper demands for payment which contain the information prescribed by these provisions.

CONCLUSIONS

48. It was reasonable for the landlord to include the following estimated relevant costs in the interim service charge for 2010:

1	Gardening:	£2,000
2	Accountant:	£350

3 Sinking fund for External Decorations: £1,000.

The undisputed estimated relevant costs also include anticipated managing agents' fees of £1,175 (which are not disputed), which brings the figure for estimated relevant costs to £4,525. The applicant's contribution to this is one fifth, or £905. In addition, the applicant does not dispute the estimated proportion of building insurance included in the demand dated 26 March 2010 (£213.71). The Tribunal therefore finds under LTA 1985 s.27A that the sum of £1,118.71 is payable by the applicant to the respondent in respect of interim service charges for 2010.

49. Liability to recover the interim charges for 2010 set out above is subject to the landlord issuing a demand for payment which contains the information prescribed by the Landlord and Tenant Acts of 1985 and 1987.

50. Although there is no obvious provision in the lease which entitles the landlord to recover its costs in connection with the application to the Tribunal, no order under s.20C is made.

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Mark Loveday BA(Hons) MCI Arb
Chairman
17 November 2010