10757

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/43UC/LSC/2014/0052**
Property	:	**1 Christchurch Gardens, Christchurch Mount, Epsom, Surrey KT20 6EJ**
Applicant	:	**1 Christchurch Gardens (Epsom) Ltd**
Representative	:	**Mr J Ollech of counsel, instructed by Charles Russell Speechlys LLP, solicitors**
Respondent	:	**Patrick Brian Matier**
Representative	:	**In person**
Type of Application	:	**Liability to pay service charges**
Tribunal Members	:	**Judge M Loveday (Chairman)** **Lady J Davies FRICS** **J Dalal**
Date and venue of Hearing	:	**4 and 5 November 2014 and 14 January 2015 (reconvene) Sandown Park Racecourse, Portsmouth Road, Esher KT10 9AJ**
Date of Decision	:	**25 February 2015**

DECISION

INTRODUCTION

1. This determination concerns the liability of the Respondent to pay service charges to the Applicant under the terms of a lease of a flat at 1 Christchurch Gardens in Epsom. The dispute has taken two days of Tribunal time (with counsel and solicitors on one side), a further reconvene for the Tribunal to reach its decision, six lever arch files of documents, written submissions running to over 100 pages and extensive correspondence with the Tribunal about arrangements for hearings and directions. However, at heart the claim involved fairly limited sums and six agreed issues.

2. The matter arises in this way. The Respondent's flat is on the ground floor of a block on a small private estate. By a lease dated 28 October 1959, the flat was demised for a term of 99 years (less ten days) from 11 December 1935. The terms of that lease included service charge covenants. It appears that at some stage the freehold of the estate became vested in the Applicant, which is a company whose membership includes all or most of the lessees on the estate. Following this, the Applicant and the then lessee of the flat entered into a deed dated 14 August 1984, surrendering the 1959 lease and granting a new term of 999 years at a peppercorn ground rent. Clause 5 of the 1984 lease stated that it was made on the same terms as the 1935 lease. Although the relevant lease of Flat 1 is strictly speaking the 1984 lease, in reaching its decision the Tribunal is therefore largely concerned with the service charge provisions that appear in the 1959 lease. However, the 1984 lease included important (and highly relevant) additional provisions relating to payment of interim service charges.

3. From time to time the Applicant issued demands for payment. The demands which we are concerned with here are dated June 2011 (£156.00), March 2012 (£1,634.40) and March 2013 (£1,634.40). The June 2011 demand described it as being a payment for "service charge – contribution to the driveway works". The demands for March 2012 and March 2013 were in similar form. They referred to "service charges" of £1,592.40 for the years 1 April 2012 to 31 March 2013 and 1 April 2013 to 31 March 2014 respectively, and both included an "insurance surcharge" of £30 and garage insurance of £12. It is an important feature of all three demands that they concerned "interim" charges on account of the landlord's anticipated relevant costs to be incurred in the following service charge year. At the hearing this was expressly acknowledged by counsel for the Applicant and by the Respondent himself.

4. The Respondent disputes these demands, and on 29 August 2013 the Applicant issued a claim for payment in Northampton County Court, which included £3,001.50 for outstanding service charges and rent. The Respondent served a Defence and Counterclaim (drafted by solicitors). On 3 October 2013, the claim and counterclaim were transferred to Kingston County Court and allocated the case number 3YQ52975. On 19 March 2014, DJ Gold ordered that "the issues raised by the statements of case (excluding the counterclaim) in relation to the arrears of service charges be transferred to the" Tribunal.

Regrettably, there was some confusion about the matters remitted by that order and subsequent orders of the County Court dated 13 May and 22 May 2014 attempted to clarify matters. For example, notwithstanding the terms of DJ Gold's order, the court asked the Tribunal to deal with certain aspects of the Respondent's counterclaim. After a lengthy CMC on 8 July 2014 (attended by counsel for the Applicant and the Respondent in person), the Tribunal gave directions. During the course of this, the Tribunal identified (with the agreement of the parties) the following six issues:

a. Whether the charges set out in each of the three Service Charge Demands were reasonable under s.19(2) of the Landlord and Tenant Act 1985 ("LTA 1985").

b. Whether the Service Charge Demand dated March 2012 in the sum of £1,634 is payable, having regard to the contentions in paragraph 4 of the Defence.

c. Whether the agreement with Heritage Management dated 26 September 2010 was a qualifying long-term agreement within the meaning of LTA 1985 s.20, and if so, (i) whether the consultation requirements should be dispensed with under LTA 1985 s.20ZA and (ii) the effect of the limitation under LTA 1985 s.20(6). It should be noted that at the time of the CMC, the Applicant had not yet made any formal application under s.20ZA, but it indicated that it intended to do so shortly after the hearing.

d. Insofar as the Tribunal has jurisdiction to determine the issue, whether liability for any part of the service charges is limited by the company resolution referred to in para 7 of the Defence.

e. Whether the landlord has complied with the consultation requirements under LTA 1985 s.20 in respect of the relevant costs of external decoration undertaken between 2009 and 2011, and if not (i) whether the consultation requirements should be dispensed with under LTA 1985 s.20ZA and (ii) the effect of the limitation under LTA 1985 s.20(6).

f. Whether the external decoration works were of a reasonable standard under LTA 1985 s.19(1)(b) and if not, whether any limitation should be made on the amounts payable by the Applicant.

5. On 28 July 2014, the Applicant formally applied for dispensation under LTA 1985 s.20ZA. The substantive hearing was listed for 4 and 5 November 2014. Counsel for the Applicant provided a written opening and called evidence from Mr Paul Craigie and Mr Philip Cobb. The Respondent relied on extensive written submissions, gave evidence himself and called evidence from Mr Vardon Alaverde. By the second day, it was clear the matter would not be concluded within the estimated two days, and the parties were asked to return for a final day to deal with their closing submissions. In the event, the Respondent was unwell and indicated he would be unable to attend. To avoid a very prolonged adjournment of the hearing part-heard, the Tribunal directed the parties to conclude matters with written closing submissions, and the Tribunal reconvened on 14 January 2015 to consider its decision.

LAW: LEASE TERMS AND STATUTORY PROVISIONS

6. The material service charge provisions of the 1959 and 1984 leases are set out at Appendix A to this decision.

7. The material statutory provisions are set out in Appendix B to this decision.

THE PREMISES

8. The Tribunal inspected the premises on 4 November 2014. The estate is situated on a private road with communal parking and well cared communal grounds. There are three 3-storey blocks of flats (c.1930) arranged in a rough semi-circle which are smooth-rendered externally under a pantile roof covering. The ground floor flats on the estate have the benefit of private gardens. Within the communal grounds there is a small domed folly. Some of the windows have been replaced with UPVC double glazed units. We were advised that the old metal window frames for the windows are redecorated at the individual leaseholders' own expense.

9. Generally the exterior of the blocks were in reasonable condition for their age and the decorative order was reasonable considering the lapse of time since the last redecoration works were carried out. However defects noted to a greater or lesser extent on all three blocks include:
   a. Some horizontal and vertical hairline cracking to rendering.
   b. Some cracks had been filled and made good but were still evident.
   c. Some shadowing effects due to mixed coats of paint.
   d. The external access stairs were in poorer order probably due to inherent damp problems in the structure.
   e. There was some paint peeling, blistering and the stipple-effect to some paintwork was not maintained.
   f. There was some damp staining and algae.
   g. The paintwork to the folly was peeling and showing variations in colour with some damp staining.

10. Flat 1 is on the ground floor of Block A. There was evidence of hairline cracking and peeling paintwork to the soffit above the flat. The red tiled windowsills had been repainted by the Respondent and decorations made good at the back of a shed adjacent to the external wall.

THE EVIDENCE

11. Mr Craigie. Mr Paul Craigie was a director of the Applicant between 2010 and 2014. He relied on a witness statement dated 31 August 2014, gave oral evidence at the hearing and was robustly cross examined by the Respondent. His evidence related to the appointment of managing agents, the service charge budgets and the painting contract.

12. As far as Heritage Management was concerned, Mr Craigie explained that prior to 2010, the Applicant had 'self-managed' the premises, but it became

increasingly difficult to encourage people to be involved in the estate. Following the resignation of the Applicant's company secretary in February 2010, the directors decided the time had come to appoint managing agents. The board met with five potential agents, and (having considered matters such as price, benefits and distance) they eventually selected Heritage Management Ltd as the best. A management agreement was signed by the board and Heritage on 28 September 2010. The directors then circulated a report about the appointment at the AGM on 23 October 2010, discussed the report at the meeting and wrote to the lessees on 3 November 2010 about the decision. Mr Craigie considered the Management Agreement was for a period of 12 months, and could then be cancelled or renewed by the Applicant.

13. As far as service charge budgeting was concerned, Mr Craigie referred to two spreadsheets showing the 2012/13 and 2013/14 budget calculations. Whilst he was a director, the board set the service charge budgets annually by looking at expenditure over the previous year, considering any anticipated increase in continuing costs (based on information the board had as to definite anticipated increases or previous increases) and any additional costs that might need to be incurred in the next service charge year. The 2013/14 budget was however prepared before actual expenditure in 2012/13 was available. The relevant costs were then apportioned equally amongst the 34 flats to produce the service charge for each lessee. He had not previously been aware of the resolution of the AGM on 2 December 1992, but that was not a matter which affected the leases. In any event, later AGMs had approved service charge budgets without regard to the Retail Price Index. In cross-examination, Mr Craigie said he was not aware of the budgetary process before he joined the board. He accepted the 1992 AGM resolution had not been expressly overturned at any shareholder meeting that he attended. The Respondent asked Mr Craigie about the provisions for 'legal and professional' fees of £1,924.40 which appeared in both budget spreadsheets. Mr Craigie referred to a breakdown of legal and professional costs dated 10 August 2011. This gave the costs for three years taken from the Applicant's 2009, 2010 and 2011 statutory accounts, and which amounted to £1,790.23, £3,462.98 and £1,277.76 respectively. The board's provision of £1,924.40 was made in the light of the actual expenditure on these items in previous years, and based on the "knowledge and experience of the board".

14. After previous reviews of the paintwork on the estate, it was decided that external decoration would take place in 2009. The board appointed a project manager, Mr David Golland of Building Surveying and Project Management Ltd. Mr Golland then prepared a Specification of Works. The board sought advice about statutory consultation procedures, and a Notice of Intention was served on lessees on 9 March 2009. Some lessees responded by nominating contractors, and the board sought and reviewed tenders. This process was a lengthy one, partly because a number of lessees (including the Respondent) baulked at the costs involved. However, the directors eventually selected Simon & Dylan of Tooting as the painting contractor. They sought references, examined the financial reports of the business and met with the chosen

contractor and Mr Golland to discuss the project. On 5 July 2009, the Applicant sent the lessees a 'paragraph (b) statement'[1] and accompanying documents. At this stage, the board was very concerned that the works would not start before the winter weather set in – and there was also concerns that VAT rates were due to rise on 1 January 2010 from 15% to 17.5% and that the existing paintwork was deteriorating. Accordingly, the board felt they should shorten the consultation period in the notice accompanying the paragraph (b) statement from 30 days to 7. The covering letter to lessees explained the reason why. The paragraph (b) statement included a reply slip for lessees to complete. Some 31 out of 34 of the lessees confirmed they agreed to accept the estimate form Simon & Dylan. One of these was the Respondent. A JCT Minor Works Building Contract was signed with Simon & Dylan on 22 May 2009 with a contract price of £44,860 + VAT.

15. Mr Craigie dealt with the works which were carried out by Simon & Dylan, and accepted there were "issues" with the quality of their work. The works started late, as a result of delays in obtaining the right paint. Work started on 7 September 2009, and issues became apparent with the quality of the paintwork. There were widespread reports of paint bubbling, cracking and deterioration of paint once it was applied. The Applicant therefore commissioned reports from a coating consultant Mr Brian Blue dated 20 January 2010 and from Wolsey Erricker & Associates dated May 2011. There was also a brief technical analysis from the paint supplier Bostik dated 6 May 2011. Mr Craigie referred to these three reports, which essentially identified the causes of the paint problems as (i) damp (ii) underlying structural issues with the buildings which permitted damp ingress (iii) poor preparation in parts. He then referred to a paper presented to the Applicant's 2011 AGM on 27 October 2010 which set out subsequent events in some detail. The Applicant made a retention on the painting contract. Towards the end of the project, a very detailed "Final Snagging List" was compiled (an undated copy was provided to the Tribunal). However, Simon & Dylan refused to complete the snagging without the release of half the retention, amounting to about £1,200. This final snagging included isolated peeling to Block B and remedial works to the external staircases. As a result, the Applicant employed Kevin Weller Decorations to complete the snagging, and he presented his invoice for £890 on 3 August 2011. The works were 'signed off' as being completed and the retention more than covered Mr Weller's bill. As far as Mr Craigie was aware, two coats of paint had been applied throughout the estate. In cross-examination, Mr Craigie was referred to the report of Mr Blue, which concluded that there were defects to the wall and coping areas to the access staircases, and that these had been caused by inadequate inspection of surfaces to determine the appropriate type of preparation. Mr Craigie agreed with these conclusions, and the conclusions in the other reports, but Mr Weller had completed everything that was outstanding. In response to questions from the Tribunal, Mr Craigie stated that the combined amount

[1] This is frequently called a "Statement of Estimates" or a "Stage 2 notice". However, the Consultation regulations specifically (if rather clumsily) describe it as a "paragraph (b) statement".

paid to the original contractor and the remedial work "came in less than that budgeted for originally".

16. Mr Cobb. Mr Philip Cobb is the sole director of Heritage Management Ltd. He relied on a witness statement also dated 31 August 2014, gave oral evidence at the hearing and was cross examined by the Respondent. His evidence related to the appointment of managing agents and the service charge budgets.

17. As far as Heritage's appointment was concerned, Mr Cobb confirmed the evidence of Mr Craigie. There had been a period of due diligence when Heritage had made a presentation to the Applicant's board, and he was aware there had been other agents tendering for the work. There had then been a further period of investigation and he provided references. Mr Cobb considered the Management Agreement dated 28 September 2010 was for a 12 month period, but that the contract could be terminated on 2 months' written notice by either party before the next renewal, or it could be renewed on the expiry of the 12 month term.

18. Since its appointment, Heritage had undertaken "a more formal budgeting process which has been approved by the board". He referred to the budget spreadsheets. The items detailed in the budget spreadsheets were all items recoverable pursuant to the terms of the estate leases, necessary for the maintenance and management of the estate, and the estimated cost of those items was reasonable. In cross-examination, Mr Cobb accepted that he did not send all the shareholders the budget details before the budget was set, although there had been a lot of correspondence about the budget with individual lessees.

19. Mr Alaverde. Mr Vardon Alaverde is a former joint lessee of 24 Christchurch Gardens. He relied on a witness statement dated 7 August 2014, gave oral evidence at the hearing and was cross examined by the Applicant's counsel. Most of his witness statement corroborates the Respondent's evidence and supports the arguments advanced by the Respondent, and the Tribunal need therefore only set out a few matters raised during the course of the oral evidence.

20. As far as the appointment of Heritage Management is concerned, Mr Alaverde confirmed the shareholders were not informed that the Management Agreement of 28 September 2010 had been signed until the Applicant circulated its letter of 3 November 2010. The Management Agreement had been concluded without consultation. Although it stated it was for 12 months, the agreement had 'rolled on' ever since. The agreement also "breached the minutes of the 1992 AGM pertaining to increases".

21. In cross-examination, Mr Alaverde was pressed about the prejudice suffered by the lessees of flat 24 which resulted from the shortening of the consultation period in the notice accompanying the paragraph (b) statement. He said:

"Personally I was not prejudiced. But the short notice gave the impression that it was a foregone conclusion. Had the notice specified 28 days [sic], I could have investigated the contractors who were referred to in the notice. I might have been able to get a reduction. I can show actual loss because of the subsequent failings by the contractors."

22. Mr Matier. The Respondent is the lessee of Flat 1 and he is a former Director of the Applicant. He relied on a witness statement dated 17 August 2014 in the form of a "Case Summary", which in effect combined a Statement of Case and witness statement. The points made in the witness statement are dealt with below under "The Respondent's Case" part of this decision, and need not be repeated here.

23. The Applicant gave oral evidence at the hearing and was cross examined by counsel for the Applicant. In relation to each of the issues before the Tribunal, this evidence can be summarised as follows:

a. Issue 1. At one stage of his cross-examination of Mr Craigie, the Tribunal interrupted the Respondent's questioning and asked him to identify the elements of the March 2012 and March 2013 service charges that he objected to. The Respondent stated that "I agree the budgetary process [in the 2012/13 budget] except the legal and professional fees of £1,924.40" which appeared in the budget spreadsheets. He indicated that he was not going to rely on any evidence that these estimated costs were excessive. Counsel for the Applicant returned to this in cross-examination of the Respondent, and the latter confirmed he only objected to the sums of £1,924.40 for legal and professional fees. He accepted the budget for legal and professional fees had been prepared on the basis of previous years' expenditure, but the lessees had not been told what went into the earlier years' expenditure. The process was a reasonable one, but "it was not reasonable for the budget to be prepared without allowing the lessees access to the individual items of expenditure in previous years, upon which the budget was set". As far as the demand for £156 for the roadway works was concerned, there was a great deal of discussion in cross-examination about when the demand dated June 2011 had been served. However, the issue came to nought, since the Respondent's case was that a copy had been handed to him by Mr Cobb on 17 October 2013 (i.e. before proceedings were issued). In response to questions from the Tribunal, the Respondent stated that he was not questioning the amount of the invoice, but disputed it because the roadway works had not been approved in advance by the shareholders.

b. Issue 2. During the course of the hearing, the Respondent accepted that this issue was covered by issues 3 and 4 below.

c. Issue 3. In cross-examination, the Respondent stated that "I have nothing against the use of a managing agent". What he objected to was the appointment process. At a General Meeting in April 2010, the lessees were informed by the then Chairman of the board, Ms. Minter,

that they would research the appointment of a managing agent and report back to the shareholders on the results of that research. This was repeated several times by board members in 2010, but the appointment of the agents was never discussed with the shareholders. "If it had been properly discussed with shareholders, I would have absolutely no objection to the appointment of Heritage Management, if that was what the shareholders had determined."

d. Issue 4. In cross-examination, the Respondent accepted that between 1992 and 2010, budgets had sometimes been presented to Annual General Meetings of the Applicant, but sometimes they were not.

e. Issue 5. In cross-examination, the Respondent agreed that the consultation requirements had been met apart from the consultation in relation to the notice accompanying the paragraph (b) statement. As far as prejudice was concerned, he accepted the lessees had been given an opportunity to submit their own contractors and that they had not suffered any prejudice in this respect. He also accepted the choice of Simon & Dylan had not caused any financial detriment to lessees and that they had not suffered any prejudice in this respect. Moreover, he accepted he had approved the choice of Simon & Dylan on 6 July 2009, although he had felt they were the only viable option at the time.

f. Issue 6. In cross-examination, the Respondent stated that when he visited in 2009, there was no cracking and bubbling on the walls, but there were such defects now. In response to a question form the Tribunal, the Respondent said the estate had been painted in 1991, 1998 and then it had been decided to have a 10 year painting cycle. It was put to him that the record showed the landlord had actively sought an input from the lessees, updated them repeatedly with the progress of the works, prepared a snagging list and found someone to complete the job. However, he did not accept this – "the job had failed" and the works were not of a reasonable standard.

ISSUE 1: WERE THE CHARGES REASONABLE?

24. The first issue is whether the amount of the service charges was "reasonable" within the meaning of LTA 1985 s.19(2).

25. The Applicant's case. The Applicant submitted that as interim service charges, the test for reasonableness was that in s.19(2) of the Act. It relied on Mr Cobb and Mr Craigie's evidence of the budgeting process, which it contended was a rational and reasonable one. As far as the March 2012 and March 2013 service charge demands were concerned, the Respondent had indicated that he was only challenging those elements relating to the estimated costs of 'legal and professional fees'. The 2012/13 and 2013/14 budgets both showed anticipated annual expenditure of £1,850 for these costs across the estate, of which the Respondent's contribution was 1/34th (£54.41). 'Legal and professional fees' covered a wide range of costs and these had been explained by Mr Cobb. As to the "June 2011" service charge demand, this was a one-off claim for £156 to

cover the cost of road surfacing works. The demand was in fact raised in June 2012 and the date was a typographical error. The Applicant relied on Mr Cobb's evidence about the way in which the figure of £156 had been arrived at. This was again a rational and reasonable process.

26. The Respondent's case. In his closing submissions (p.35), the Respondent stated that:

> "Mr Cobb in his statement speaks a lot about the forming and presentation of budgets and why he believes they are reasonable. This, frankly, is irrelevant. It is not in dispute."

However, during the course of the hearing the Respondent challenged certain aspects of the 2012/13 and 2013/14 interim service charges (namely the provision for legal and professional fees of £1,924.40) on the basis that it was unreasonable for the budget to be prepared without allowing the lessees access to the individual items of expenditure from previous years. As to the driveway costs, the Respondent stated in his closing submissions (p.45) that he did not pay the invoice "because there had been no shareholder approval for the work".

27. The Tribunal's decision. The test for whether interim charges are "reasonable" in LTA s.19(2) is not necessarily the same as the test for whether relevant costs have been "reasonably incurred" in s.19(2). However, the Tribunal will apply the two stage test suggested for s.19(2) in *Forcelux v Sweetman* [2001] 2 EGLR 173. First, was the decision-making process by which the landlord arrives at the interim charge reasonable? Secondly, is the sum charged a reasonable one in the light of any other evidence?

28. As far as process is concerned, the Respondent stated that he had no objection to the procedure adopted in arriving at the interim charges. The Tribunal accepts the evidence of Mr Cobb and Mr Craigie that the March 2012/13 and 2013/14 interim service charge demands were arrived at through a budgetary process which took into account actual and budgeted expenditure in previous years. This process is self-evidently a reasonable one, and is in accordance with professional guidance: see for example Part 8 of the *Service Charge Residential Management Code* (2nd Ed, RICS 2009). The only specific items of objection in the 20012/13 and 2013/14 demands relate to 'legal and professional fees'. Again, the Tribunal accepts they were estimated on the basis of previous years' experience and budgets for such costs. Mr Craigie's evidence of the spreadsheet and the details he gave of previous years' expenditure on legal and professional fees was not challenged by the Respondent, and was convincing. The process was (in the words of counsel) "a rational and reasonable one", and when pressed in cross-examination, the Respondent conceded the process was a reasonable one. What the complaint came down to was that it was not reasonable for a budget to be prepared without allowing lessees access to the individual items of expenditure in previous years, upon which the budget is set. The Tribunal does not accept this. The lease does not require the Applicant to consult about individual line items in the budget before setting an interim service charge, and it would in

practice be unnecessarily bureaucratic and unworkable to require prior approval for such routine expenditure.

29. The Tribunal was not given any 'market' evidence about the reasonableness or otherwise of the overall costs or the provision for legal and professional fees. It is clear from the Applicant's company accounts for 2012 and 2013 that actual expenditure on legal and professional fees incurred between 2011 and 2013 varied from £1,278 to £2,958. A provision of £1,924.40 falls well within this bracket. The Respondent accepted he was not submitting evidence that the legal and professional fees were excessive, and the Tribunal therefore finds these elements of the charge were reasonable.

30. As far as the road surfacing costs are concerned, once again the process for arriving at the charge cannot be faulted. The Tribunal accepts that this sum was derived from an estimate of £5,316 obtained for proposed roadway works, which in turn followed a tender process. Ultimately, the Respondent's objection is based on a failure by the board to consult about this work in advance. However, the sums involved for these works were below the threshold of £250 per flat set by reg.6 of the Consultation Regulations, and the roadway works did not therefore require any statutory consultation with lessees under LTA 1985 s.20. Moreover, the Tribunal considers it is reasonable to incur such relatively modest costs without seeking prior approval from the lessees. Again, it would in practice be unnecessarily bureaucratic and unworkable to require prior approval for such routine expenditure.

31. For the above reasons, the Tribunal rejects the suggestion that the service charges are not reasonable under LTA 1985 s.19(2).

32. Finally, it should be noted that the demands for service charges in this matter did not follow the contractual machinery set out in clause 7 of the 1984 lease. However, the timing of the demands is not an issue in these proceedings. That matter is neither raised in the Defence filed by the Respondent in the County Court nor is it something remitted by the court to this Tribunal.

ISSUE 2: IS THE MARCH 2013 DEMAND PAYABLE?

33. This issue was formulated by the Tribunal at the CMC as being "whether the Service Charge Demand dated March 2012 in the sum of £1,634.40 is payable, having regard to the contentions in paragraph 4 of the Defence". It was accepted at the hearing this should have referred to the March 2013 demand for £1,634.40.

34. The matter related to a covering letter from Heritage Management to the Respondent dated 13 February 2013. This stated:

> "As with previous years, service charges may be paid monthly by cheque, direct transfer or standing order. If you have chosen to pay by

monthly standing order previously and have set one up, then you only need to ensure that it is set to the correct amount (£132.70pcm)...."

The Tribunal was shown evidence that the Respondent paid sums of £112 in cash on three occasions between 26 April 2013 and 26 June 2013, and these credits were reflected in the balance of £3,001.50 claimed in the County Court claim.

35. The Applicant referred to the March 2013 claim for interim service charges of £1,634.40, and to clause 7 of the 1959 lease which required interim service charges to be paid quarterly in advance. Its first argument was that whatever the effect of the above letter, the full charge of £1,634.40 ought to have been paid by no later than 31 March 2014. Secondly, it could be seen that the difference between the £132.70 per month claimed and the £112 per month paid was only £20.70. This difference was made up of the Respondent's objection to Heritage Management's fees (£20.70pm) and the 1992 AGM resolution issue below (£6pm). These points were therefore covered by issues 3 and 4 below. During the course of the hearing, the Respondent accepted this, and consequently did not address issue 2 in his closing written submissions. The Tribunal need not therefore make any determination on issue 2.

ISSUE 3: s.20 CONSULTATION: MANAGING AGENTS' FEES

36. This issue arises from the Management Agreement dated 26 September 2010. A copy of the Agreement was included in the bundle and both sides referred to it in some detail. Under the express terms, Heritage agreed to undertake certain listed "standard services" listed on page 2 of the agreement. The agreement specified a management fee of £5,000 plus VAT per annum which was expressed to be "fixed for twelve months and payable quarterly in advance only". There was provision for additional charges which stated that Heritage provided services "for an all-inclusive annual fee", but that additional charges might have to be made for matters "such as are not included in the fixed annual fees". On the third page was the following clause:

> "We hereby agree to the terms and conditions set out in this Management Agreement for the period of 12 months from the 'Appointment Date'. Thereafter it shall be automatically renewed annually unless terminated by either party giving two months prior written notice before the anniversary of the renewal date. Management fees may be reviewed and any increases will be notified to the client prior to the anniversary of the renewal date...."

The agreement specified the "Date of Appointment" as 1 November 2010 and the "Date of Renewal" as 1 November 2011.

37. The Applicant's case. The Applicant referred to Mr Craigie's evidence about the appointment of Heritage and to the terms of the agreement itself. Its primary case was that the Management Agreement was not a Qualifying Long-Term Agreement ("QLTA") within the meaning of LTA 1985 s.20ZA. Counsel referred to *Paddington Walk Management Ltd v Peabody Trust*

[2010] L&TR 6. The Management Agreement fell squarely within the parameters set out in *Paddington Walk*.

38. Alternatively, if the agreement was a QLTA, counsel accepted that the Applicant had not complied with any of the consultation requirements of LTA 1985 s.20 and the Service Charges (Consultation Requirements) (England) Regulations 2003 ("the Consultation Regulations") Sch.1. However, the Applicant sought dispensation under LTA 1985 s.20ZA. The Tribunal should apply the principles in *Daejan Investments v Benson* [2013] UKSC 14; [2013] 1 WLR 854 and any failure to consult had not caused actual prejudice to the tenant. Counsel relied on a number of matters:
    a. The tenants had from time to time been invited to participate in management of the estate and reminded of the possible need to appoint managing agents.
    b. The Respondent himself had at one stage suggested to residents that the time had come to "consider using a management company": letter 23 January 2010.
    c. The matter had been placed on the agenda for an AGM in February 2010.
    d. However, the matter became more pressing following the resignation of the Applicant's Company Secretary in March 2010. The Board informed lessees on 28 April 2010 that it was researching whether to appoint an external company secretary or professional managing agent.
    e. The Applicant had initially sought comments on different tenders for the role of managing agents, and had taken up references from more than one agent. This had been confirmed by Mr Cobb in his evidence to the Tribunal.
    f. Eventually, the agreement was signed by the board members on 28 September 2010.
    g. The appointment was discussed by members at the Respondent's Annual General Meeting on 23 October 2010, and the lessees were told in a letter dated 3 November 2010.
    h. The Respondent accepted in cross-examination that he had seen these documents. The tenants (including the Respondent) had had an opportunity to engage informally in the appointment of the managing agent.

39. The Respondent's case. The Respondent's contentions appear in his Case Summary (paras 18 and 19) and his closing written submissions (pp.18-21 and 51-54). The Respondent argued that the element of the 2012/13 and 2013/14 interim charges that related to the estimated managing agents' fees should be disallowed. He assessed this element as £14.70 a month, based on the budget estimates provided by the Applicant.

40. The primary argument was that the contract with the managing agents was a QLTA. It was misleading to suggest the agreement was merely "for a period of 12 months". The minutes of the AGM on 23 October 2010 stated that the

contract was "to be reviewed automatically unless terminated by either side by two months' notice". The agreement itself said that it "shall" be renewed annually, rather than it "can" or "may" be renewed annually. The agreement was open-ended and had no termination date. It was "obvious" that the intention of the board was not for a twelve month contract, but for a long term one. It was therefore a QLTA. Since there had been "no consultation of any kind ... prior to the signing of this agreement", it followed that the limitation in LTA 1985 s.20 applied and the Applicant could not recover a contribution towards the management services of more than £100: Consultation Regulations reg.4(1).

41. In response to the application to dispense with the consultation requirements under LTA 1985 s.20ZA, the Respondent argued that the lessees had been caused "real" prejudice. The lessees had been told as early as April 2010 that they would be advised of the Applicant's research into managing agents. The lessees were not in fact informed until after the appointment of Heritage had been made. The Applicant then refused to produce a copy of the management agreement for a year. The Respondent therefore had no opportunity to nominate other agents. He had also suffered real prejudice, namely incurring a liability to contribute to Heritage's fees at the rate of £176.40pa. The Respondent also had to employ a solicitor to obtain the Management Agreement.

42. The Tribunal's decision. The primary issue in relation to the QLTA is essentially a matter of law. In *Paddington Walk Management Ltd v Peabody Trust* [2010] L&TR 6, HHJ Hazel Marshall Q.C. dealt with an agreement between a landlord and a firm of managing agents:

> *"(3) Is the Pembertons contract a "qualifying long term agreement"?*
>
> 44 The next issue then is whether the Pembertons contract was also a qualifying long-term agreement. This agreement was entered into on June 1, 2006:
>
> > "for an initial period of one year from 1 June 2006 and will continue on a year-to-year basis with the right to termination by either party on giving three months' written notice at any time"
>
> The short point, therefore, is: is this an agreement "for a term of more than 12 months" within the meaning of s.20ZA(2) of the Act?
>
> 45 Neither counsel has been able to find any relevant authority, perhaps quite surprisingly. Ms Holland says that the agreement is not within the definition because it is for a term of exactly 12 months even though it might in practice continue. It is not for a term of more than 12 months because that is the only certain term for which it is granted. Mr Bhose says it is for a term of more than 12 months because it is capable, according to its terms, of continuing for more than 12 months, and it will in practice continue beyond 12 months unless something more is done.

46 This is a matter of impression and I have found it quite a difficult one despite being short.

47 The point of the provision is of course to bring major periodic contracts into the consultation regime, where it is proportionate to do so. It seems to me, though, that the question of what is a "qualifying long-term agreement" cannot depend simply on the fact that the agreement could continue beyond the stated period if unabated. For example it would then apply to an agreement for six months and thereafter until terminated on one month's notice because such an arrangement could clearly continue beyond 12 months. So, even, could a contract for one month that was then continued on a month-by-month basis until terminated on a week's notice. Mr Bhose's argument appears to me to apply equally to contracts in those terms, and it seems to me that it therefore proves too much.

48 In my judgment an agreement for a year certain and then from year-to-year to continue subject to not being terminated is not "an agreement for a term of more than 12 months" (emphasis added) within the meaning of this part of the statute. I reach this conclusion with a little hesitation, but it is still a conclusion that Ms Holland's argument is correct. In other words, the structure of the Act is that the definition of qualifying long-term agreement is to apply to a contract in which the tenants would definitely have to contribute in respect of a period of more than 12 months.

49 In my judgment the whole flavour of the provisions extending to these agreements is "long-term". I cannot see how a periodic contract for, for example, a month and thereafter from month to month, could be regarded as long term as a matter of impression, even though on Mr Bhose's analysis it would be caught. What seems to me to be the deciding factor is the length of the commitment. A line has to be drawn somewhere, and it has been drawn at a commitment which exceeds 12 months. A commitment of 12 months only is on the non-qualifying side of the "long term" line.

50 A contract initially for one year and thereafter on a year-to-year basis subject to a right to terminate on three months' notice is terminable at the end of the initial period or any subsequent year on three months' notice, and does not entail a commitment for more than 12 months. There is thus no such commitment in this case and I conclude therefore that the Pembertons contract is not a qualifying long-term arrangement."

43. The decision in *Paddington Walk* is a County Court decision which is not binding on this Tribunal, although it is cited with approval in *Service Charges & Management* (3rd Edition) at para 15-009. However, the

reasoning of the learned County Court judge is persuasive. For essentially the same reasons given by HHJ Marshall, the Tribunal considers that the words "for a term of more than 12 months" in s.20ZA do not apply to an agreement for a year certain and then from year-to-year, which merely continues subject to not being terminated. Moreover, the Tribunal considers that the 2010 Management Agreement in this case is such an agreement. The expression "for the period of 12 months from the 'Appointment Date'" indicates the agreement is for a year certain. The words "thereafter it shall be automatically renewed annually unless terminated by either party" indicate that it is then to continue from year-to-year to continue subject to not being terminated. The periodic nature of the agreement is reinforced by the words "management fees may be reviewed and any increases will be notified to the client prior to the anniversary of the renewal date", which indicate that the fees are expressly not set for more than a year at a time.

44. The Tribunal has considered the Respondent's argument that the word "shall" is mandatory, and that it indicates the management agreement was intended to be for more than a year. It should be noted that the management agreement in *Paddington Walk* used the words "will continue", which might also been seen as mandatory. However, the Tribunal considers that the use of the word "shall" is not determinative in this case, since the word is regularly construed by the courts in a permissive sense, as opposed to a mandatory sense. Moreover, the Tribunal does not agree that the agreement itself showed it was always intended to be a long term agreement. The agreement expressly stated it was for a period of 12 months and it gave a "Date of Renewal" of 1 November 2011. This unambiguously meant the agreement terminated on 31 October 2011 unless renewed.

45. For essentially the same reasons given by HHJ Marshall, the Tribunal therefore concludes that the Heritage contract was a periodic agreement of one year, and that it is not a QLTA.

46. If the Tribunal is wrong on the above, it is common ground that the landlord has not satisfied the requirements in Sch.1 to the Consultation Regulations. Subject to the application for dispensation under LTA 1985 s.20ZA, the limitation in reg.4 of the Consultation Regulations applies.

47. As far as dispensation is concerned, the principles have of course been established by the Supreme Court in *Daejan v Benson* (supra). In that case, Lord Neuberger dismissed the contention that the 'seriousness' of any failure to comply with the consultation requirements of s.20 was material to the exercise of the Tribunal's discretion under s.20ZA (at paras 46-49 of the judgment). He went on to state that that "the main, indeed normally, the sole question for the [Tribunal] when considering how to exercise its jurisdiction under s.20ZA(1)" was the "real prejudice" caused to the lessee as a result of the failure to consult (at para 50). The factual burden of proving the relevant prejudice lies on the tenant (para 67). This requires "credible evidence" and "rational argument" that relevant prejudice has been suffered (para 83).

48. The Tribunal concludes that the Respondent has failed to show any relevant or "real" prejudice as a result of any failure to consult in relation to the QLTA. There is no evidence that if the lessees had been given the opportunity to nominate other agents, that an alternative managing agent would have provided the same services more cheaply than Heritage. Indeed, the Respondent did not suggest any reduction in charges should be made to reflect the fact that the agent's fees were excessive. Both parties of course gave evidence and made extensive submissions about the history of the appointment of Heritage and the opportunities (or lack of opportunities) to influence the choice of agent. The Tribunal considers these arguments simply go to the 'seriousness' of the breaches rather than the central question of 'real prejudice' caused to the lessees.

49. For the sake of completeness, one of the issues identified at the CMC was the effect (if any) of the limitation under LTA 1985 s.20(6). Section 20(6) only operates by limiting "relevant costs incurred ... which may be taken into account in determining" the Respondent's service charges. It is far from clear that this would 'bite' on elements of an interim charge where the relevant costs have not as yet been "incurred". In the light of the above, the issue become irrelevant, and the parties did not in any event address this issue in their submissions. The Tribunal therefore makes no determination on this point.

50. In short, the agreement with Heritage Management Ltd dated 26 September 2010 was not a QLTA within the meaning of LTA 1985 s.20, and the Tribunal is in any event prepared to dispense with consultation under LTA 1985 s.20ZA. The service charges are not therefore limited by LTA 1985 s.20(6).

ISSUE 4: THE AGM RESOLUTION

51. The next issue relates to a resolution made at the Applicant's Annual General Meeting on 2 December 1992. The minutes of this meeting record the following:

> "6. Any other business - Mr Matier addressed the meeting on the subject of maintenance payments. He proposed that these should be increased annually in line with the retail price index. The meeting agreed by a majority that this proposal should be adopted with the proviso that rises should be restricted to a maximum of 10% per annum."

52. The Applicant's case. The Applicant accepted that the 1992 AGM resolution had been made, and that recent service charge demands did not comply with that resolution. Instead, it advances eight arguments:

a. The Tribunal does not have jurisdiction to decide the issue under LTA 1985 s.27A.

b. The resolution did not affect the legal rights and obligations terms of the lease of the flat. The Tribunal's jurisdiction is limited to determining those rights and obligations.

c. There has been no breach of ss.171 or 172 of the Companies Act 2006. Company directors are not bound to follow resolutions agreed by members.

d. The resolution was meaningless in the context of landlord and tenant relationships governed by the terms of a lease. The landlord's obligations to provide services were enforceable under the terms of the lease, and the relevant costs of providing those services did not vary according to RPI. It was patently absurd to try to cap the service charges in this way.

e. In any event, the resolution did not purport to cap the increases, but to provide a minimum uplift.

f. Whatever the effect between shareholders and directors, the resolution did not affect the contractual relationship between landlord and tenant.

g. Arguably, there were further resolutions which superseded the 1992 AGM resolution. For example, on 19 November 2009, members approved an increase in "maintenance fees" from £103 to £110 per month.

h. There was no evidence of RPI levels before the Tribunal.

53. The Respondent's case. The Respondent argued in his Case Summary (paras 25 and 33) and Closing Submissions (p.22-25) that the Applicant was in breach of ss.171 and 172 of the Companies Act 2006. The Respondent objected to part of the service charges amounting to £6 a month.

54. The argument was that the service charge had been linked to RPI between 1992 and 2010 in compliance with the 1992 AGM resolution. Between 1992 and 2010, the company's accounts were sometimes in deficit, and sometimes in surplus, but the effect balanced out over time. This system was breached by the board in 2010 without any further mandate from the shareholders, when it decided to appoint Heritage to manage the property. The figure of £6 per month reflected the amount by which the service charges claimed exceeded the RPI-increase figure agreed by the 1992 AGM. In essence, the extra £6 a month was contrary to the 1992 AGM resolution.

55. The Tribunal's decision. The Tribunal is a creature of statute. Irrespective of the matters that a court may remit to it under s.176A of the Commonhold and Leasehold Reform Act 2002, its primary jurisdiction in relation to service charges is given by LTA 1985 s.27A. The jurisdiction is to determine "whether a service charge is payable". In turn, the words "service charge" are defined by s.18 as "an amount payable by a tenant of a dwelling as part of or in addition to the rent". It is plain enough that the Tribunal's jurisdiction is limited to the consideration of service charges payable by a tenant to a landlord under the terms of a tenancy or lease.

56. It is of course true that this liability to pay may be limited by statute (for example, under LTA 1985 ss.19, 20, s.20B and 21B, or under the Landlord

and Tenant Act 1987 s.48) and that the Tribunal will have power to decide these statutory limitations as part of its jurisdiction under LTA 1985 s.27A.

57. In this case, the Respondent has not suggested that the effect of the 1992 AGM resolution was to vary his lease, which could not of course be done without a formal deed of variation. Instead, he relies on the 'general duties' set out in s.171-2 of the Companies Act 2006. In the express words of s.170 of the 1986 Act, those obligations are "general duties ... owed by a director of a company to the company". It follows that the 'general duties' relied on by the Respondent do not affect the relationship of landlord and tenant under his lease or his obligations to pay the sums demanded by way of service charges.

58. Moreover, even if it is correct that the AGM resolution imposed a general duty on the directors to act in a particular way, any failure by those directors is enforceable (i) by a resolution to remove the directors at a company meeting under s.168 of the 2006 Act or (ii) by a claim in court to remove the relevant directors. This Tribunal plainly does not have jurisdiction to do either of these things.

59. These conclusions are sufficient to dispose of the arguments relating to the company resolution. However, with respect to the additional submissions made by the Applicant, the Tribunal concludes as follows:

a. There is nothing in the general duties mentioned in s.170-174 of the 2006 Act which required the directors to comply with the 1992 AGM resolution. It may well be that there are other obligations for the directors to comply with the 1992 AGM resolution, but the parties have not drawn the Tribunal's attention to them (and we note that counsel was acting against a litigant in person and would ordinarily have been expected to draw the Tribunal's attention to any such statutory provisions).

b. The Tribunal accepts the 1992 AGM resolution did not follow the service charge provisions of the lease. It also accepts the resolution may have been a poor strategy for the Applicant to adopt over any long period of time. However, that does not in itself render the AGM resolution ineffective.

c. The Tribunal does not agree that the 1992 AGM resolution provided only a minimum uplift rather than a "cap". The Tribunal considers the words of the resolution plainly meant there would be an automatic RPI-linked annual increase in the service charge payable by each lessee - subject to a maximum annual uplift of 10%.

d. The 19 November 2009 resolution was not inconsistent with the 1992 AGM resolution and it did not purport to revoke or rescind the earlier vote.

e. The Respondent did put forward some evidence of RPI levels, but he did not properly establish the excess ought to be £6 a month.

60. However, for the reasons given above, the Tribunal concludes (i) it does not have any jurisdiction to determine matters relating to the resolution at

the Applicant's Annual General Meeting on 2 December 1992 and (ii) no part of the service charges in this case are limited by the AGM resolution.

ISSUE 5: s.20 CONSULTATION: MAJOR WORKS

61. The issue here is whether the Applicant complied with the LTA 1985 s.20 consultation requirements in respect of the external decoration works. The point arises in connection with a payment of £1,100 made by the Respondent to the Applicant. The payment was made in response to an earlier demand from the Applicant dated 5 July 2009 which sought a contribution to the anticipated cost of the decoration works. The Respondent argues that the effect of LTA 1985 s.20 is that any contribution paid by him under the July 2009 demand should have been capped at £250, and that he is therefore entailed to repayment of £850. This argument properly therefore forms part of the Applicant's counterclaim in the County Court.

62. The Applicant's case. The Applicant accepts that it did not complete the consultation process for major works required by LTA 1985 s.20 and Schedule 4 Pt.2 to the Consultation Regulations. However, the admission is limited to a single aspect of the consultation, namely an error in the notice accompanying the 'paragraph (b) statement' dated 5 July 2009. The notice stated that "observations must be made within the consultation period which will end on 13 July". However, para 11(10)(c)(iii) of Sch.4 to the Consultation Regulations required the notice to state the date "the relevant period ends", which means "30 days" after the notice (reg.2(1) of the Consultation Regulations). The effect was to curtail the consultation period for the estimates by over three weeks.

63. As a result, the Applicant again applied for dispensation under LTA 1985 s.20ZA. It repeated its submissions on the law, and relied on the following:
    a. It had substantially complied with the regulations. Only one (final) step in the process had not been followed.
    b. The Applicant had served an initial notice of intention on all the lessees dated 9 March 2009. Attached to that notice were three suggested contractors. As a result, at least two lessees (including the Respondent) nominated alterative contractors. It appeared another lessee suggested Simon & Dylan, which was thr contractor that was eventually chosen for the project.
    c. There were reasonable grounds to curtail the consultation to 7 days. The Applicant wished to authorise the work in the summer of 2009 "to avoid problems with the autumn weather" (letter 5 July 2009).
    d. No prejudice was caused to the Respondent. Indeed, he signed a response slip on 6 July 2009 saying "I approve the appointment of Simon & Dylan to provide external redecoration ..."
    e. In fact, the Applicant waited until 4 August 2009 before closing the consultation (letter 4 August 2009). By this time, 31 out of 34 tenants had responded positively to the suggested contractor.

f. There was no evidence curtailing the consultation meant a higher cost.

64. The Respondent's case. The Respondent addressed the question of prejudice as follows:

a. In his Case Summary (para 11), the Respondent argued that the shareholders had been caused significant losses as a result of the poor performance of the painting contract. These included £2,204 paid from shareholder funds for patch up repairs and surveys, £902 for legal fees and £1,647.03 paid in office administration. In addition, the Respondent himself had personally paid £425 for repairs to his own wall and windowsills. Had the requisite 30 day consultation period been given one of the lessees "may have spotted a problem [with the tender documents] which "might have prevented the subsequent painting failure".

b. In his closing submissions (p.14 and 50-51), the Respondent said he had "been deprived of the opportunity to review the tender documents which was the objective of the law". He also stated (p.7), that "I would most definitely have inspected the tender documents, but various business matters during the truncated Notice period prevented my doing so. If enough time had been given, it is possible that some shareholder may have noticed something which might have prevented the subsequent failure of the painting".

65. The Tribunal's decision. The Tribunal refers to the test in *Daejan v Benson* (supra) set out above. It has no hesitation in exercising its discretion to dispense with the consultation requirements. The Respondent has produced no evidence that the curtailing of the consultation period in the notice accompanying the paragraph (b) statement caused any 'real' prejudice to him at all, such as evidence that the work would have been carried out more cheaply. Indeed, the Tribunal accepts the Applicant's evidence that the consultation remained open until 4 August 2009 and, significantly, that the Respondent expressly approved the identity of the painting contractor in writing. In such a situation, it is hard to see that any prejudice has been caused to the Respondent.

66. The Respondent's Case Summary relies on a number of alleged losses which are said to amount to the kind of 'real' prejudice referred to in *Daejan*. However, the Tribunal considers that none of these losses can be attributed to the curtailing of the consultation period in the notice. These losses essentially flow from the contractor's later performance of the painting contract. This may well be relevant to the question whether costs were reasonably incurred under LTA 1985 s.19(2) (see below), but they are not a prejudice suffered as a result of the notice stating that the consultation period was limited to a week. The point was perhaps best made by Mr Alaverde in cross-examination, when he accepted that his loss was down to the "subsequent failings" of the contractor.

67. The Respondent's written closing submissions rely on a further argument, namely that he lost the "opportunity [to] review the tender documents which was the objective of the law". However, this is exactly the kind of theoretical prejudice specifically rejected by the Supreme Court in *Daejan* as being a material consideration. There is no evidence the lessees would have proposed a contractor other than Simon & Dylan, had they been given a longer period of time to consider the shortlisted contractors. The Respondent says only that it was "possible" that someone "may" have noticed something wrong with the tender documents, and Mr Alaverde said he "could" have investigated the contractors. These statements were of course made with hindsight in the light of problems which later emerged with the painting contract, but they are in any event heavily qualified. As it turned out, the Applicant did not feel bound by the strict timetable in the notice, since he himself replied to the consultation outside the 7 day consultation period on 6 July 2009 – and the consultation did not in fact close until 4 August 2009. The fact remains that the Respondent has not been able to show he would have sought to urge the Applicant to choose another contractor, let alone that another contractor would have been selected and that the choice of another contractor would have resulted in some saving for the lessees. One should bear in mind the evidence that Simon & Dylan would have in any event been selected as contractor – namely that the overwhelming majority of lessees approved the choice in writing.

68. For the above reasons, the Tribunal dispenses with the consultation requirements in relation to the painting works. In particular, it dispenses with the requirement that the notice accompanying the paragraph (b) statement dated 5 July 2009 must specify the date on which the relevant period ends.

69. Finally, the Tribunal notes the demand for payment dated 5 July 2009 related to an interim service charge. The Tribunal repeats its observations above about whether the limitation in LTA s.20 would 'bite' on such a demand before the "relevant costs" of works has been "incurred". Once again, the point has become irrelevant, and the parties did not in any event address this issue in their submissions.

ISSUE 6: EXTERNAL DECORATIONS

70. The issue formulated by the parties is whether the painting works carried out were of "a reasonable standard" under LTA 1985 s.19(1)(b). This argument forms part of the Respondent's counterclaim in the County Court, although it is formulated as a breach of a covenant in clause 4(5) of the lease for the landlord to carry out works "in a proper and workmanlike manner": see paras 10-11 of the Defence dated 3 October 2013. The parties have not suggested that the test in clause 4(5) of the lease differs from that in LTA 1985 s.19(1)(b), so it matters not whether we are considering a breach of covenant or the statutory limitation.

71. The Applicant's case. The Applicant relied on the evidence of Mr Craigie about the works. Mr Craigie had very frankly accepted that there were a number of issues with the works which took time and effort to resolve. Eventually, Simon & Dylan were removed from the project and the works and snagging were completed by Kevin Weller Decorations in mid-2011. The evidence of Mr Craigie was that the total cost of the works came in under budget. The Tribunal could rely on its own inspection to assess whether the works were carried out to a "reasonable standard" within the meaning of LTA 1985 s.19(1)(b).

72. The Respondent's case. In his Case Summary (para 5) the Respondent argued that although some patching up was done, the "painful process" dragged on until July 2011 when the board declared the job had been completed in accordance with the Specification of Works. However, "it had not, and the deterioration continues to this day". The Respondent concluded that:

> "The job, which they had been told would last ten weeks, lasted twenty two months and was, and is, a failure."

The Respondent relied in his Case Summary (section 6) on the reports of Mr Blue, Wolsey Erricker & Associates and Bostik Paints which confirmed that the reason for the painting failure were inadequate preparation and insufficient application of paint. The Respondent also relied on a survey report by Mr Vic Bellamy of CV Decorators dated 15 November 2010, which had been commissioned by Mr Alaverde and sent to the committee. The Respondent had himself been obliged to spend £425 to remedy defective decorations to the render and windowsills outside his flat and he provided a breakdown of these costs dated 28 December 2011. The Respondent repeated these points in his written closing submissions (p.8-13).

73. The Tribunal's decision. In approaching this issue, the Tribunal is conscious that the standard imposed by s.19(1)(b) is that works should be "of a reasonable standard". It is common experience that the best-run works contracts will frequently involve snagging issues, and standard-form JCT contracts (such as the one adopted in this case) include provisions for retentions. Moreover, the painting contract in this case was plainly a complex one, involving several period blocks constructed in a mix of materials.

74. In assessing the standard of work carried out, the Tribunal essentially has four reports carried out before the works were allegedly completed, namely from Mr Blue (20 January 2010), Mr Bellamy (15 November 2010), Wolsey Erricker & Associates (May 2011) and Bostik (6 May 2011). The two earlier reports appear to have pre-dated the "Final Snagging List". There is then the invoice from Kevin Weller Decorations for the snagging items (dated 3 August 2011) which was completed shortly after the alleged completion of the works. To this must be added the Tribunal's inspection on 4 November 2014.

75. Of this evidence, the Tribunal relies on the Wolsey Erricker report and the Kevin Weller Decorations invoice, since these were undertaken immediately before and after the painting works were allegedly completed. Although the

Bostik technical analysis was also carried out in May 2011, it is limited in scope and does not purport to give a survey of the overall decorative condition of the estate. The reports form Mr Blue and Mr Bellamy were made much earlier, and appear to pre-date some of the main snagging works. As to the Tribunal's inspection, this has the disadvantage that it was carried out some 5 years after the main works and 4 years after the date of the alleged completion. However, this disadvantage is outweighed by the advantage that an inspection half way through the painting cycle should disclose any defective decorations that were insufficient to stand the test of time.

76. The Wolsey Erricker report stated at para 4 that:

> "Visual inspection of the external common areas confirmed failure of the decorative coatings. Various problems, blisters, peeling, checking and cracking being evident. The problems being most prevalent to the external staircases but also to the garden 'folly' as well as areas of the main building façade."

Moisture saturation was unlikely to be the cause of this failure (apart from the staircase leading to flats 2, 3, 5 and 6, where there was a problem with the asphalt covering of a storage area). The expert concluded that the problem was a failure of the original coatings beneath the fresh paint layers. This suggested that the contractors had simply painted over "... previously defective, hollow and otherwise unsound areas ..." Cracks also should have been treated before painting. The Tribunal should observe that neither party challenged these conclusions, and the Tribunal finds the report presents an accurate picture of the standard of work as at the start of May 2011.

77. Mr Weller's invoice is fairly brief. However, it included work to "rake out all loose/flaking paint to 7 no. ext. staircases apply bullseye primer to areas. Make good as required and redec with bedec elastomeric black paint and white weathershield paint." The Tribunal finds these works were carried out.

78. The Tribunal's visual inspection is set out above. The Tribunal concludes from the inspection that:

a. The outstanding items identified in the Wolsey Erricker report were all attended to (by Mr Weller or others) shortly after May 2011.

b. The standard of the external decorations in November 2014 was consistent with works being carried out to a reasonable standard between 2009 and 2011. There were of course fresh defects which had become evident by 2014, but these were no worse than one would expect to see some 5 years after the main part of the decorations were carried out, and at the mid-point of a 10-year painting cycle.

79. In the light of this, the Tribunal is satisfied that although there were admittedly difficulties with completion of the painting contract in this case, the "works" which were eventually completed or "carried out" by the Applicant between 2009 and 2011 were "of a reasonable standard".

80. Finally, mention should be made of the effect of any finding in s.19(1). If works are not carried out to a reasonable standard, the Tribunal is given a measure of discretion about any limitation on the service charge payable. In this case, the Applicant's evidence is that the relevant costs incurred by the Applicant on the works turned out to be less than the amount budgeted, because the retention exceeded the cost of employing Mr Weller to complete the snagging. In such circumstances, the Tribunal would not be inclined to place any limitation on the service charge payable by the Respondent.

CONCLUSIONS

81. For the reasons given above, the Tribunal concludes that:
    a. The service charges are reasonable under LTA 1985 s.19(2).
    b. The agreement with Heritage Management Ltd dated 26 September 2010 was not a Qualifying Long Term Agreement within the meaning of LTA 1985 s.20. In any event, the Tribunal would dispense with the consultation requirements under s.20ZA. The service charges are not therefore limited by LTA 1985 s.20.
    c. The Tribunal (i) does not have any jurisdiction to determine matters relating to the resolution made at the Applicant's Annual General Meeting on 2 December 1992 and (ii) no part of the service charges are limited by that resolution.
    d. In relation to the painting contract, the Tribunal dispenses with the requirement in para 11(10)(c)(iii) of Sch.4 to the consultation regulations for the notice accompanying the paragraph (b) statement dated 5 July 2009. The Respondent's service charges are not therefore limited by LTA 1985 s.20.
    e. Although there were admittedly difficulties with completion of the painting contract in this case, the works which were carried out by the Applicant between 2009 and 2011 were "of a reasonable standard" within the meaning of LTA 1985 s.19(1) and no limitation should be placed on the service charges payable by the Respondent.

Judge MA Loveday (Chairman)
25 February 2015

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.