12996

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BK/LSC/2017/0130**
Property	:	**Aldford House, Park Lane, London W1K 7LG**
Applicant	:	**K Group Holdings Inc (1)** **Aldford House (Park Lane) Maintenance Trustee Limited (2)** **Park Lane Holdings Inc (3)**
Representative	:	**Mr Michael Walsh of Counsel instructed by Stephenson Harwood LLP**
Respondents	:	**Oung Lin Chuan-Hui (1)** **Mbose Limited (2)** **Fordald Inc (3)** **Denton Property Holdings Limited (4)** **Lawrence Property Holdings Limited (5)** ~~**Omair Investments Limited (6)**~~ **(No longer a party)** **Aweer Property Limited (7)** **Kirama Properties Limited (8)** **Sylvia Sau Lan Eaborn (9)** **Tatiana Eropkina (10)**
Representative	:	**Mr Jonathan Upton of Counsel instructed by Forsters LLP**
Type of application	:	**For the determination of the reasonableness of and the liability to pay service charges**
Tribunal members	:	**Judge N Hawkes** **Mr C Gowman MCIEH MCMI BSc** **Mr O N Miller BSc**
Dates and venue	:	**The hearing took place from 3rd to 7th September 2018 at 10 Alfred Place, London WC1E 7LR and the Tribunal reconvened on 21st September 2018.**

Date of decision : **1 November 2018**

DECISION

Decisions of the Tribunal

(1) The Tribunal makes the determinations as set out under the various headings in this Decision.

(2) If the parties are unable to agree the sums which are payable by the individual respondents as a result of the determinations set out below, any party may apply to the Tribunal within 3 months of the date of this determination, explaining the nature of the dispute and providing proposed directions (to be agreed if possible) for its determination.

(3) The Tribunal directs that any application for an order under section 20C of the Landlord and Tenant Act 1985 should be made within 14 days of the date of this Decision and that the applicants should file and serve any response within 14 days thereafter.

(4) The Tribunal makes the directions set out below in respect of the proposed application under section 20ZA of the Landlord and Tenant Act 1985.

(5) Since the Tribunal has no jurisdiction over County Court costs and fees any party may request that this matter be referred back to the County Court when there are no further relevant matters to be determined by this Tribunal.

The application

1. The applicants seek and, following a transfer from the County Court the Tribunal is required to make, determinations under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to whether certain service charges are reasonable and payable.

2. The claim was transferred to this Tribunal by order of His Honour Judge Saggerson dated 24 March 2017. The proceedings were originally issued on 13 October 2016 seeking judgment in the sum of £1,093,644.50.

3. The Tribunal held case management hearings in the matter on 9 May 2017, 21 November 2017 and 2 July 2018, and the final hearing took place over five days, from 3 to 7 September 2018.

4. Certain relevant statutory provisions are set out in an appendix to this decision.

The hearing

5. The applicants were represented by Mr Michael Walsh of Counsel and, save for the sixth respondent who is no longer a party to the proceedings, the respondents were represented by Mr Jonathan Upton of Counsel at the hearing.

6. The Tribunal heard oral witness evidence of fact from:

   (i) Mr Calum Watson MRICS of D & G Block Management Limited ("D & G Block Management"). D & G Block Management is currently appointed as "the Surveyor" under the Residential Leases and is generally referred to by the parties as the managing agent. Mr Watson gave evidence for a full day on 4 September 2018.

   (ii) Ms Lauren Buck MRICS who is one of the two directors of the second applicant, Aldford House (Park Lane) Maintenance Trustee Limited ("the Maintenance Trustee"). Ms Buck gave evidence on the morning of 5 September 2018.

   (iii) Mr Richard Martin who is the other director of the Maintenance Trustee. Mr Martin gave evidence on the morning of 5 September 2018.

   (iv) Mr Kivork Mikailian, an accountant who has been the Secretary of the Aldford House Residents' Association since July 2013, representing 18 lessees (including the respondents to these proceedings). The Tribunal was informed that Mr Mikailian does not have any property interest in Aldford House. He gave evidence from around 11.20am onwards on 5 September 2018.

7. The Tribunal heard oral expert evidence from:

   (i) Mr Charles Seifert BSc (Hons) MRICS who prepared an expert report dated 14 August 2018 on behalf of the applicants. Mr Seifert gave evidence on the morning of 6 September 2018.

   (ii) Ms Claire Savill MIRPM AssocRICS of Savills (UK) Limited who prepared an expert report dated 16 August 2018 on behalf of the respondents. Whilst this report is headed "Expert Report by Claire Savill & Gail Lawrence as joint expert witnesses" and it is signed by both Clare Savill and Gail Lawrence, Ms Savill gave evidence that the report was hers alone,

Gail Lawrence having played no part in its preparation. Ms Savill gave evidence on the morning of 6 September 2018.

The background

8. Aldford House, Park Lane, London W1K 7LG ("Aldford House") is a purpose-built 1930s block on Park Lane comprising commercial units on basement, ground and mezzanine floors, two flats on the ground floor and twenty-eight flats on the first to eighth floors ("the Flats").

9. A BMW showroom is located on the ground floor and the Tribunal was informed that the landlord intends to develop the basement into a spa. Aldford House has two cores and entrances located on Park Street, which each have the benefit of 24-hour porterage. The Flats are accessed either by the four passenger lifts, of which there are two in each core, or by the enclosed service stairwells.

10. The Tribunal inspected Aldford House before the start of the hearing, on the morning of 3 September 2018. The inspection took place in the presence of Counsel for both parties, Andrew Bambury, Solicitor for the applicants, Callum Watson, Managing Agent, Natasha Rees and Lucy Zaremba, Solicitors for the respondents, and Kivork Mikailian, the respondents' non-lawyer representative.

11. Aldford House is clearly in need of maintenance. It is the applicants' case that the maintenance and management of Aldford House has been rendered extremely problematic by virtue of a long history of wilful non-payment of service charges on the part of the lessees. The applicants state that the current value of Flats at Aldford House is in the region of £7 million to £10.5 million; that some of the lessees do not have mortgages; and that some of the lessees own more than one flat. On this basis, the applicants submit that the respondents are likely to be well able to afford to pay the sums claimed.

12. The respondents strongly dispute that much of the service charges claimed are outstanding. They also state that lessees who are connected with the landlord are in arrears. The Tribunal does not have any conclusive evidence of the respondents' means and, in any event, does not consider the respondents' means to be relevant to the issues which fall to be determined in this application.

The terms of the Residential Leases

13. The Tribunal has been informed that, insofar as is material to these proceedings, the residential Leases are in common form.

14. Clause 1 provides for various defined terms used in the Leases. In particular:

(ii) "The Maintenance Trustee" means the maintenance trustee for the time being of the Maintenance Fund hereinafter defined in Clause 5(A)

(iii) "The Surveyor" means the Chartered Surveyor employed pursuant to paragraph 1 of the Fifth Schedule

(vi) "The Maintenance Date" is the 1st day of February 1978

(vii) "The Maintenance Period" shall mean the period beginning on the Maintenance Date and ending on the Perpetuity Date

(viii) "Maintenance Year" shall mean every twelve monthly period ending on the 31st day of March the whole or any part of which falls within the Maintenance Period

(ix) "The Maintenance Contribution" means a sum equal to the percentage proportion appropriate to the Flat (as specified in Part I of the Fourth Schedule subject to the provisions of Part II of that Schedule) of the aggregate annual Maintenance Provision for the whole of the Residential Premises for each Maintenance Year (as computed in accordance with the provisions of Part III of the same Schedule).

15. Clause 4 provides as follows:

4. The Tenant HEREBY FURTHER COVENANTS with the Maintenance Trustee and with the Lessor as follows:

(A) In respect of every Maintenance Year to pay the Maintenance Contribution to the Maintenance Trustee by two equal instalments on the 31st day of March immediately preceding the commencement of the Maintenance Year and on the 29th day of September in the Maintenance Year and also to pay a due proportion of any Maintenance Adjustment pursuant to paragraph 3 of Part III of the Fourth Schedule..."

16. Clause 5(A), (B) and (E) provides as follows:

5(A) THE Maintenance Trustee shall retain out of the sums received by it in respect of the annual maintenance provision aforesaid and the maintenance adjustment its remuneration calculated in accordance with paragraph 2(b) of Part III of the Fourth Schedule and adjusted in accordance with paragraph 3 thereof and shall pay the balance into a bank having the status of a trust corporation in an account named

"the Aldford House Maintenance Fund" and shall hold such balance (hereinafter called "the Maintenance Fund" which expression includes the assets in the hands of the Maintenance Trustee for the time being representing such fund and the income thereof) upon trust (subject to the provisions of sub-clause (B) hereof) to apply the same from the Maintenance Date until the Perpetuity Date for the purposes specified in the Fifth Schedule and subject thereto upon the trust set forth in sub-clause (c) hereof

(B) If any time the Maintenance Trustee shall consider that it would be in the general interests of the tenants of the flats in the Building so to do the Maintenance Trustee shall have power to discontinue any of the matters specified in the Fifth Schedule which in the opinion of the Maintenance Trustee shall have become impractical obsolete unnecessary or excessively costly provided that in deciding whether or not to discontinue any such matter the Maintenance Trustee shall consider the views and the wishes of the majority of the tenants of the flats in the Building

(E) The statutory power of appointing a new Maintenance Trustee shall be vested in the Lessor who shall also have the power to remove and replace the Maintenance Trustee provided always that the Lessor shall not be entitled to appoint itself or any of its subsidiary companies as Maintenance Trustee and the said statutory power and further power aforesaid shall be limited and exercisable only in the circumstances and in the manner set out in the Eighth Schedule.

17. The 'Annual Maintenance Provision' is calculated in accordance with Part III of the Fourth Schedule to the Residential Leases and:

"2. ... shall consist of:-

(a)A sum comprising:-

(i) the expenditure estimated as likely to be incurred in the Maintenance Year by the Maintenance Trustee for the purposes mentioned in the Fifth Schedule together with

(ii) an appropriate amount as a reserve for or towards those of the matters mentioned in the Fifth Schedule as are likely to give rise to expenditure after such Maintenance Year being matters which are likely to arise either only once during the then unexpired terms of this Under Lease or at intervals of more than one year during such unexpired term or under Clause 4(c) including (without prejudice to the generality of the foregoing) such matters as the painting of the common parts and the exterior of the Building the repair of the structure thereof the repair of the drains and the overhaul renewal and modernisation of any plant or machinery (the said amount to be

computed in such manner as to ensure so far as is reasonably foreseeable that the Maintenance Provision shall not unduly fluctuate from year to year) together with

(iii) a sum equal to any maintenance contribution (or part thereof) payable in respect of any flat in the Building in respect of any preceding Maintenance Year which shall not have been paid at the date on which the computation is made Provided Always that no such sum shall be included unless the Surveyor is satisfied that the Maintenance Trustee has taken all reasonable steps to recover such sums from the person liable to pay the same but

(iv) reduced by any unexpended reserve already made pursuant to sub paragraph (ii) hereof in respect of any such expenditure as is mentioned in sub-paragraph (i) hereof and further

(v) reduced by any such sum by way of maintenance contribution which was included in the computation for any previous Maintenance Year pursuant to sub-paragraph (iii) hereof and has since been recovered by the Maintenance Trustee from the person liable to pay the same

(b) The remuneration of the Maintenance Trustee which shall be an amount equal to two per cent of the sum calculated in accordance with paragraph (a) hereof after deducting from the sum calculated in accordance with the said paragraph (a) the remuneration of the Surveyor

18. Paragraph 3 of the Fourth Schedule states that the Maintenance Adjustment is calculated and payable as follows:

3(a) After the end of each Maintenance Year (or in the case of the last Maintenance Year) after the Perpetuity Date (if this shall be earlier) the Surveyor shall determine the Maintenance Adjustment calculated as set out in the next following sub-paragraph

(b) The Maintenance Adjustment shall be the amount (if any) by which the estimate under paragraph 2 (a)(i) above shall have exceeded or fallen short of the actual expenditure in the Maintenance Year together with two per cent thereof in respect of the remuneration of the Maintenance Trustee under paragraph 2(b) of this Schedule Provided that in the case of a Maintenance Year part of which falls outside the Maintenance Period the estimate shall be reduced proportionately for the purpose of the above calculation

(c) The Tenant shall be allowed or shall on demand pay as the case may be against or with the next instalment of Maintenance Contribution falling due after the date of such determination the

percentage proportion appropriate to the Flat or of the Maintenance Adjustment expect that in the case of the last Maintenance Year the allowance or payment shall be made immediately following the date of such determination Provided further that if the Tenant was only liable for a proportion of the Maintenance Contribution then the Tenant shall be allowed or shall pay only a similar proportion of the Maintenance Adjustment such proportion to be calculated on an annual basis except in the case of a Maintenance Year part of which did not fall within the Maintenance Period when the proportion shall be calculated on the basis of the actual part of the year which fell within that period

The respondents' application to amend their Statement of Case

19. At the case management hearing which took place on 21 November 2017, Judge O'Sullivan directed the respondents to further particularise their case.

20. Following the case management hearing of 2 July 2018, Judge O'Sullivan granted the respondents permission to amend the further particulars of their case ("Statement of Case") so as "to include a case that the 2014 Lease of staff accommodation is a qualifying long-term agreement which required consultation and no consultation took place."

21. The respondents subsequently sought to make further late amendments to their Statement of Case.

22. On 23 August 2018, Judge Vance granted the respondents permission to amend row 2 of Table 1 of the Statement of Case in the manner identified on page 7 of a letter of 22 August 2018 from Forsters LLP. The applicants had consented to this amendment and the proposed amendment accorded with Judge O'Sullivan's order of 2 July 2018.

23. Judge Vance directed that the remainder of the respondents' application to amend their Statement of Case be determined as a preliminary issue at the commencement of the hearing on 3 September 2018.

24. At the commencement of the hearing on 3 September 2018, the respondents sought permission to make the following further amendments to their Statement of Case:

    (i) A proposed amendment to row 5 of Table 1, which concerns professional fees, to add the words: "The professional fees include legal fees of SNR Denton incurred by the Third Applicant (as landlord) totalling £181,345.82 in the appointment of a

manager proceedings and a further £4,808.26 in respect of proceedings to recover payment of a lessee's contribution to the cost of the Major Works. These costs were not incurred by the Maintenance Trustee and they are not costs which are recoverable as service charge expenditure under the Fifth Schedule under the leases. For the avoidance of doubt, it is not admitted that any legal fees (including those charged by Stephenson Harwood LLP and counsel at Falcon Chambers) are recoverable as service charge expenditure under the Fifth Schedule under the leases (save for those legal fees which are recoverable pursuant to the 2012 Order) or were reasonably incurred or are reasonable in amount. The fees of Ask Planning (£7,200) were incurred by PMT in September 2012. These fees are not recoverable by the Third Applicant.

(ii) A proposed amendment to row 7 of Table 1, which concerns the fees of the Maintenance Trustee, to add the words: "Further and/or alternatively, the agreement dated 1.7.13 appointing the Second Applicant as Maintenance Trustee is a QLTA on which the Applicants failed to consult; accordingly, the amount payable under the agreement by each lessee is capped at £100 per year."

(iii) A proposed amendment to Paragraph 7 to add a Sub-paragraph (h) providing: "The Applicants failed to consult on the cost of the Major Works. By Paragraph 6 of the 2012 Order the Major Works were to consist of the works set out in the Savills Specification with such variations or additions as the landlord (the Third Applicant) and the manager (Mr Calum Watson of D & G Block Management) considered to be appropriate, although no variations or additions were to be made to which the consultation requirements referred to in sections 20 and 20ZA of the 1985 Act apply unless those requirements have been dispensed with. The Savills Specification dated October 2010 specified Savills Commercial Ltd ("Savills") as the contract administrator. In fact, Knight Frank was appointed contract administrator without consultation. Further, the scope of the works actually carried out is significantly different to that specified in the Savills Specification. Accordingly, each lessee's contribution to the cost of the Major Works is capped at £250."

(iv) A proposed amendment which did not appear in the draft amended Statement of Case to the effect that:

(a) By clause 5(E) of the Residential Leases, the Lessor has power to appoint a new Maintenance Trustee only in the circumstances and the manner set out in the Eighth Schedule provided that the Lessor shall not be entitled to appoint itself or any of its subsidiary companies as Maintenance Trustee.

(b) The Tribunal is entitled to infer that all three applicant companies are held on trust for a Mr Khaireddine and that, by appointing the second applicant, the first applicant or (Mr Khaireddine) has effectively appointed itself in breach of clause 5(E) of the Residential Leases.

25. Upon carefully considering the parties' submissions and the Overriding Objective at rule 3 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 ("the 2013 Rules"), the Tribunal determined that it would exercise its discretion to allow some but not all of the proposed amendments.

26. As regards the proposed amendment to row 5 of Table 1 of the respondents' Statement of Case, the Tribunal accepted submissions on the part of the respondents to the effect that the professional fees in question are already in issue; the proposed amendment essentially provides further detail of the respondents' case; and the proposed amendment is unlikely to cause significant prejudice to the applicants. Accordingly, the Tribunal determined that it would be fair and just to exercise its discretion to permit the respondents to make this amendment.

27. As regards the proposed amendment to row 7 of Table 1 of the respondents' Statement of Case, the Tribunal determined that it would allow this amendment on the basis that it would be relatively straightforward to determine whether or not a statutory consultation took place; beyond this, the issue to be determined by the Tribunal was likely to be wholly or primarily an issue of law; and (in response to concerns raised by the applicants concerning potential delay) the Tribunal could give tight directions and seek to expedite the hearing of any application for dispensation. The Tribunal determined that, in all the circumstances, it would be fair and just to allow this amendment.

28. As regards the proposed amendment to Paragraph 7 of the respondents' Statement of Case to add a sub-paragraph (h), the Tribunal considered

there to be force in submissions made on behalf of the applicants to the effect that respondents' prospects of succeeding in respect of this issue did not meet the requisite threshold.

29. Further, the Tribunal was concerned that if it were to allow the respondents to introduce this new issue, in addition to the amendments which the Tribunal had allowed and which the Tribunal considered to be more meritorious, there was a real risk that it would not be possible to hear the case within the five days which had been allocated. Accordingly, the Tribunal declined to exercise its discretion to allow this amendment.

30. The Tribunal notes that its concerns regarding the trial timetable ultimately proved to be well founded. Despite on occasion sitting late, it was only just possible to complete the hearing within the five days which had been allocated.

31. As regards the proposed amendment to the respondents' Statement of Case concerning clause 5(E) of the Residential Leases, the Tribunal considered that the proposed amendment was insufficiently particularised even in the draft amended Statement of Case.

32. The Tribunal was informed by the respondents that it was common ground that this matter was in dispute because it had been included in a statement of issues which was not before the Tribunal. However, it was not the applicants' view that the matter was before the Tribunal and the Tribunal considered that the applicants were entitled to have regard to the pleadings as defining the issues.

33. Further, the Tribunal accepted the applicants' submissions that this issue is not purely a point of law and that the applicants would have sought to adduce further witness evidence of fact had the issue been clearly pleaded.

34. Finally, the Tribunal was concerned that were it to allow this further amendment (in addition to the other amendments which it had allowed which it considered to be more meritorious), it would not be possible to hear the case within the five days which had been allocated.

35. In all the circumstances, the Tribunal declined to exercise its discretion to allow this amendment.

36. The Tribunal is grateful to Counsel for both parties for clearly identifying and agreeing the issues which remained to be determined following the determination of the respondents' application to further amend their Statement of Case.

37. Having heard evidence and submissions from the parties and having considered the documents to which it was referred during the course of the hearing, the Tribunal has made determinations on the remaining issues as follows.

The Tribunal's determinations in respect of the substantive issues

A. Are the service charge arrears owed to the second applicant?

Service charges falling due prior to the appointment of the second applicant as Maintenance Trustee

38. The Particulars of Claim allege that, in breach of covenant, the respondents have failed to pay to the second applicant the Maintenance Contribution as detailed in the statements of account. The respondents dispute that the second applicant is entitled to recover service charges falling due prior to its appointment as Maintenance Trustee.

39. In their Skeleton Argument, the respondents list the persons who have been responsible for carrying out works and providing services at Aldford House and who have been entitled to collect the service charges over time as follows:

(i) Up to 7.7.11 Pembertons Maintenance Trustee (Aldford House) Ltd ("Pembertons") as Maintenance Trustee under the Residential Leases.

(ii) Mrs Jane Munro or such other person appointed from time to time of D & G Block Management as a manager "and receiver" appointed by the Leasehold Valuation Tribunal pursuant to s.24 of the Landlord and Tenant Act 1987 ("the 1987 Act") by an order dated 6.7.11 ("the 2011 Order"). In fact, Mrs Munro left D & G Block Management on 15.7.11 (i.e. only 9 days after she was appointed) and so never managed Aldford House pursuant to the 2011 Order or otherwise. Instead, Mr Calum Watson (who took over from Mrs Munro as Head of Block Management at D & G Block Management) started acting as manager.

(iii) Mr Watson as a manager "and receiver" appointed by the Leasehold Valuation Tribunal pursuant to s.24 of the 1987 Act by an order dated 23.1.12 ("the 2012 Order") for the period from 23.1.12 to 30.6.13 (save in relation to the Major Works, which the third applicant was to undertake because of the inability of the manager to collect the necessary funds).

(iv) The second applicant as, on the respondents' case, Maintenance Trustee by a Deed of Appointment dated 1.7.13 for the period from 1.7.13 until terminated in accordance with the Residential Leases.

40. In their skeleton argument, the respondents state:

"A2 relies on the Deed of Assignment dated 10.8.16 ("the Deed of Assignment") as the basis on which it is entitled to recover service charge arrears for the period prior to the date of commencement of its appointment as Maintenance Trustee (1.7.13). This is wholly misconceived for the following reasons.

The Deed of Assignment is made between (1) Mr Callum Watson; and (2) A2. It purports to assign, inter alia, the right to payment of the Arrears (as defined) and the right to demand and sue for and to take such other proceedings as may be necessary to enforce payment of the Arrears.

Recital (iii) in the Deed of Assignment states that "Mr Watson's tenure as receiver and manager under the Order expired on 30 June 2013." Thus, it appears the basis on which Mr Watson believed he was entitled to assign the arrears was in his capacity as the former tribunal appointed receiver and manager.

In fact, notwithstanding the terms of the 2012 Order which purports to appoint Mr Watson as manager "and receiver", Mr Watson could not have been appointed "receiver" because the tribunal does not have jurisdiction to make such an appointment: see PC Residents (Finchley Road) Ltd v Abiloa [2013] UKUT 0165 (LC). It is unlikely that anything turns on this because the 2012 Order does not give Mr Watson any powers (e.g. a power of sale or any right to dispose of or deal with the freehold interest) which might ordinarily be regarded as exercisable by a receiver as opposed to by a manager.

It is, however, critical to determine the extent of Mr Watson's powers as manager and whether they extended to assigning the right to recover service charge arrears.

The purpose of Pt II of the 1987 Act is to provide a scheme for the appointment of a manager who will carry out the functions required by the tribunal. That manager carries out those functions in his own right as a tribunal-appointed official. He is not appointed as the manager of the landlord, management company or maintenance trustee (as the case may be) or even of the obligations of the landlord, management company or maintenance trustee under the lease. The manager acts in a capacity independent of the landlord, management

company or maintenance trustee. It is the management order itself (not the leases of the flats) which forms the entire basis of the manager's functions and powers: see Maunder Taylor v Blaquiere [2003] EWCA Civ 1633; [2003] 1 WLR 379.

In the instant case, the rights and duties laid down in the 2011 and 2012 Orders are defined by reference to the Residential Leases, but do not alter the manager's capacity.

Those rights and duties were time limited. They ceased on 30.6.13 when Mr Watson's appointment as manager ended. As a matter of general principle, after that date, Mr Watson had no right to collect any service charges (regardless of the date on which payment of the service charge fell due). If necessary, as much is confirmed by the terms of the 2012 Order, para 2 of which provides that Mr Watson shall have all the powers conferred on Mrs Munro by the 2011 Order. By para 3 of the 2011 Order the power to collect the service charge and any arrears was limited to the "period of her appointment". Accordingly, after 30.6.13 Mr Watson had nothing to assign.

If support for that proposition is necessary it can be found in Kol v Bowring [2015] UKUT 530 (LC). ...

Further and/or alternatively, Mr Watson had no power or authority to assign the right to recover service charge arrears. As explained above, as an officer of the tribunal, his rights and duties were derived from the 2012 Order. He was not given any power by the tribunal to assign the right to recover service charge arrears.

The 2011 and 2012 Orders do not make satisfactory provision about what should have happened upon the termination of the manager's appointment.

...

In the absence of such an order from the tribunal, Mr Watson ought to have applied for further directions pursuant to para 22 of the 2012 Order and/or s.24(4) of the 1987 Act. He certainly had no right to transfer to A2 any surplus service charge funds he held (on trust for the tenants) as at 30.6.13 without the tribunal's express authority.

It follows that the Deed of Assignment is of no effect and A2 has no right to recover service charges (if at all) prior to the commencement of its appointment as Maintenance Trustee (1.7.13)."

41. The applicants submit that this point has never been pleaded by the respondents. They state that the closest the respondents come to raising this issue is at Paragraph 27(vii) of the Defence which provides:

"The Second Claimant has no entitlement to claim such sums it being noted that it does not plead or set out any facts or matters giving rise to such entitlement. The Defendants reserve the right to plead further in the event that the Claimants feel able and/or choose to plead the facts and matters on which they rely."

42. The applicants state that, reading the pleading as a whole, "such sums" are exclusively in the context of major works and that, in any event, the pleadings do not come anywhere near referencing the type of points raised in the respondents' skeleton argument for the first time.

43. The applicants state that the respondents have litigated for two years; have pleaded the unreasonableness of the service charges in the period during which the manager was appointed (without stating that this was without prejudice to the case currently put); and have incurred the cost of instructing two experts to give evidence in relation to the service charges in respect of the period of the manager's appointment; and have prepared for trial on the basis that the reasonableness of these charges is in issue, all without stating that, from July 2011 to June 2013, the applicants' case "cannot even get off the ground".

44. They state that if the respondents seriously took issue with the termination of the appointment of the manager, which happened five years ago, the respondents ought to have raised this in the proceedings pursuant to the 1987 Act, to which the respondents were also parties.

45. The applicants submit that this is nothing more than a tactic to frustrate the proper management of Aldford House and that the point is raised for the first time in the respondents' skeleton argument, which does not and cannot have the status of a pleaded case.

46. If, contrary to the applicants' case, this matter is before the Tribunal, the applicants state that legal title to the debts does not disappear because the manager ceases to be manager. The debts still remain vested in the manager and the assignment is potentially voidable rather than void.

47. Alternatively, the applicants state that, if the respondents are granted permission to raise this issue notwithstanding the state of the pleadings, a similar indulgence must be afforded to the applicants. The applicants therefore should be permitted to make an application under section 24 of the 1987 Act, preferably orally at the hearing, in order to regularise the position.

48. The respondents deny that there is a pleading point to be taken and state that they are simply replying to the applicants' case that the deed of assignment is the answer.

49. They state that the applicants' proposed application pursuant to section 24 of the 1987 Act has not been pleaded and that it was not, in any event, one of the matters which was transferred to this Tribunal for determination.

50. The respondents submit that the Tribunal does not have all the necessary information before it to make the order now sought by the applicants and that the applicants should have made a proper application pursuant to section 24 of the 1987 Act, joining all of the lessees in Aldford House. Further they submit that it is now too late for such an application to be made.

51. The context in which the issues concerning the pleadings fall to be considered is as follows. This is a high value case in which complex issues have been raised and (although the respondents have changed their legal representatives) all parties have been legally represented throughout. There have been three separate Tribunal case management hearings in this matter and the respondents were given the opportunity to further particularise their case in November 2017.

52. The Tribunal has been informed, and accepts, that the applicants' legal representatives spent two full weeks preparing for the final hearing in this matter at very considerable expense. For the reasons set out above, the Tribunal permitted the respondents to make some extremely late amendments to their pleadings at the commencement of the final hearing.

53. The Tribunal is of the view that, following the late amendments which the respondents were permitted to make, the entirety of the case which the applicants have to meet in these proceedings should be clear on the face of the pleadings and that, if the respondents take issue with an assertion made by the applicants, they should plead their reasons for doing so.

54. The Overriding Objective at rule 3 of the 2013 rules provides that dealing with a case fairly and justly includes ensuring, so far as practicable, that the parties are able to participate fully in the proceedings.

55. The Tribunal considers that this includes ensuring that the applicants are not forced, in complex litigation of this nature, to attempt to meet a case which is not clearly set out in a pleading. The applicants considered the issues to be defined by the pleadings and the Tribunal is of the view that they were entitled to do so.

56. Further, pursuant to the Overriding Objective, the limited resources of the Tribunal are a relevant factor. The Tribunal commenced its pre-reading prior to receipt of the respondents' skeleton argument on the

basis that the issues which fell to be determined were those which had been pleaded (subject to the outcome of the respondents' late application for permission to amend their Statement of Case). The Tribunal should also have been able to place reliance upon the pleadings when carrying out its pre-reading.

57. The Tribunal is not satisfied that either the applicants or the Tribunal could reasonably be expected to understand from the respondents' pleadings that the issues set out in the respondents' skeleton argument were to be raised. If this had been apparent to the applicants, they would have issued an application under the 1987 Act (without prejudice to the case that the assignment was not void).

58. In all the circumstances, the Tribunal accepts the applicants' submission that it is not open to the respondents to seek to argue that the second applicant is not entitled to recover service charges falling due prior to its appointment as Maintenance Trustee because the point now taken has not been pleaded and is not before the Tribunal.

The reversal of credits

59. Mr Watson states that, when the management of Aldford House was handed over from Pembertons, a very limited documentary record was received. Whilst acting as manager, he did not consider, bearing in mind the limited information available, that it would be appropriate for him to take action in respect of the arrears that had accrued under Pembertons' management.

60. Mr Watson's evidence is that, once the Maintenance Trustee was appointed, there were various discussions concerning what should be done in respect of these arrears and it was suggested that those concerned should seek to create a situation whereby all leaseholders would be given a 'zero balance', after which they would be able to 'properly support any accrued arrears'.

61. In 2016, consideration was given to whether the zero balance should be applied from 6 July 2011, when Jane Munro was appointed as manager, or from 28 September 2011, which was the day before the first maintenance contribution was due after the manager was appointed.

62. On 24 February 2016, the Maintenance Trustee approved 6 July 2011 as the 'write off date' and relevant credits were applied to leaseholders' accounts on 7 March 2016.

63. On 7 March 2016, a letter was sent to leaseholders stating:

"... the Maintenance Trustees have concluded that it is improbable that any further information can be obtained from the previous agents,

Pembertons, and accordingly any lessee balances due at the time of hand over should be credited back to the account concerned. If this was the case your invoice includes a line to this effect."

64. However, at a meeting which took place on 27 July 2016, a decision was made to reconsider the 'write off date' because there were concerns that monies paid towards the arrears pre-dating 6 July 2011 were in effect now reducing arrears which had accrued post 6 July 2011, and this was considered to be unfair.

65. Following the meeting of 27 July 2016, Mr Watson was instructed to reverse the credits which had been applied in March 2016 and to apply a credit to lessees' accounts only in respect of relevant arrears as at 28 September 2011.

66. The applicants state that the Tribunal should bear in mind that the credits were applied in 2016, and not in 2011. Therefore, if any of the respondents made a payment between July and September 2011, such payments would have been made on account of the arrears as at 6 July 2011, and was applied to reduce these arrears.

67. The applicants submit that the respondents should not now be entitled to recover the sums which they paid in 2011 (without any knowledge that a decision would subsequently be made in 2016 to write off arrears), simply because they would like to apply those payments to the significant arrears on their accounts at today's date.

68. The respondents plead at Paragraph 19 of their Statement of Case, after setting out facts and matters said to give rise to an estoppel:

"In the case of all five respondents, the Applicants were attempting unlawfully and unjustly to renege on the promise to give a credit which they were estopped from reneging from for the above reasons."

69. In closing submissions, Mr Upton accepted, as he was bound to do, that the only evidence which the respondents had of detrimental reliance was evidence given by Mr Eaborn (whose wife is currently the lessee of Flat 25 Aldford House) at Paragraph 12 of his witness statement. Mr Eaborn states: "My wife and I therefore arranged our financial affairs accordingly".

70. The applicants note that Mr Eaborn is not the lessee; that he did not attend the hearing in order to be cross-examined; and they question why the respondents would have changed their position in 2016 on the basis of something which they did years earlier. The applicants submit that any monies paid in respect of Flat 25 between July and September 2011 must have been paid on account of service charge arrears then outstanding.

71. The evidence given by Mr Eaborn is very limited; he was not available to be cross-examined; and the precise nature of the detrimental reliance contended for by the respondents is unclear. In all the circumstances, the Tribunal is not satisfied, on the balance of probabilities, that the respondents have made out their case in respect of detrimental reliance. Accordingly, the Tribunal is not satisfied that they have made out their case in relation to estoppel.

72. The respondents submit, in the alternative, that because the Tribunal has jurisdiction to determine the payability of service charges pursuant to section 27A of the 1985 Act, it can and should determine that a zero balance should be applied from 6 July 2011.

73. Upon requesting clarification of the parties' positions at the hearing, the Tribunal was informed that it is agreed that the applicants are not seeking to claim any sums in respect of year 2011 and that the parties agree that there should be a 'write off' and that a zero balance should be applied on either (i) 6 July 2011 or (ii) 28 September 2011. The issue between the parties is which of these two dates is applicable.

74. Notwithstanding what is said in the respondents' skeleton argument concerning determining an opening balance, the Tribunal is not being asked to make a finding as to what the opening balance should be based upon a determination in respect of the service charge years which pre-date the years currently under consideration.

75. If the issue had been of this nature, the Tribunal would have been of the view that an application under section 27A 1985 Act would need to be made to ascertain what was payable in respect of earlier service charge years which are not currently under consideration, in order to arrive at an opening balance. However, the respondents accept that a zero balance should be applied on either 6 July 2011 or 28 September 2011 and contend that 6 July 2011 is the fairer date.

76. The applicants submit that the respondents are again taking a point for the first time which has not been pleaded. On questioning of whether the word 'payability' in section 27A gives the Tribunal the power to potentially substitute its own view of the most appropriate 'write off date' for that of the Maintenance Trustee, the Tribunal reviewed the pleadings and it became apparent that this was not a question which the applicants could reasonably be expected to have considered in advance of the hearing.

77. For the reasons set out more fully above, the entirety of the case which the applicants have to meet in these proceedings should be clear on the face of the respondents' pleadings. The Tribunal accepts the applicants' submission that, in relation to the reversal of credits (save for the case relating to estoppel), the issues which the respondents seek to raise have not been sufficiently pleaded and are not before the Tribunal.

B The amount owing

Whether the Maintenance Fund has been operated in accordance with the Residential Leases

78. The respondents state that the higher the amount held in reserve, the less money needs to be demanded from the lessees by way of service charge (for expenditure in the current year or as a contribution towards the reserve fund). Thus, the amount of money held in a reserve fund may be relevant to the amount of service charge payable and is, therefore, a matter in respect of which the Tribunal has jurisdiction.

79. The respondents state that any credits in the statements of account should have been carried forward to the opening balance on the date of commencement of the manager's appointment. Paragraph 5(a) of the 2011 Order provides that:

"Any monies received from the current Maintenance Trustee ring fenced pursuant to the 2005 Consent Order shall remain ring fenced and utilised only in accordance with the terms of the 2005 Consent Order."

80. The respondents state that it is implicit that the then Maintenance Trustee, Pembertons, would transfer all service charge funds (including the reserve fund) to the manager. The respondents question whether Pembertons did in fact transfer all service charge funds which they held to the manager.

81. The applicants note that the actual cash in the bank recorded in the March 2011 accounts was £175,948, as at 31 March 2011 (Pembertons did not operate separate reserve and service charge accounts). They state that by 6 July 2011, the date of the 2011 Order, this sum would have been reduced by virtue of "the non-payment campaign being conducted by many of the tenants". The applicants submit that, in the circumstances, the fact that Pembertons transferred approximately £100,000 to the manager in 2011 and 2012 is not surprising.

82. Mr Watson gave oral evidence that Pembertons informed him that they had transferred what funds they had and that he accepted that this was likely to be correct. When asked in cross-examination whether this corresponded with what the accounts showed, Mr Watson stated that the cash in the bank recorded in the March 2011 accounts was "just shy of £176,000"; that the running costs of Aldford House are £40,00 to £50,00 per month; and that the figures therefore did tally. The Tribunal accepts Mr Watson's evidence and it is not satisfied, on the balance of probabilities, that any further sums are due from Pembertons.

Whether rent for staff areas is payable under the 2014 Lease

83. By a lease dated 10 September 2014 ("the 2014 Lease") made between (1) the first applicant and (2) the second applicant, part of the ground floor, part of the basement and part of the roof and airspace of Aldford House were demised to the Maintenance Trustee for a term from 1 January 2005 to 1 January 2020 at an initial rent of £32,400 per year.

84. The internal areas demised by the 2014 Lease are used by staff and the airspace houses a gantry on which a communal television aerial has been installed.

The staff areas

85. In support of its case that rent is payable under the 2014 Lease in respect of the staff areas, the second applicant relies on Paragraph 8 of the Fifth Schedule to the Leases. This provides that the purposes for which the maintenance fund is to be applied by the Maintenance Trustee (by virtue of clause 5A) include:

"Staff Premises

8. To repair maintain and decorate any premises in the Building used by any staff and to pay any rent rates taxes or other outgoings in respect thereof."

86. The respondents' primary case is that the second applicant is not entitled to recover any rent. They submit that the reference to rent and rates means that what is contemplated is a caretaker's flat. Further, they contend that the rent is purportedly payable to the landlord in order to allow the Maintenance Trustee to occupy part of the common parts of Aldford House in order to carry out its functions under the Leases and that such an arrangement is wholly inconsistent with the scheme of the Leases.

87. The respondents state that it is implicit that any staff employed to maintain Aldford House are entitled to access, use and occupy the common parts for the purposes of performing their obligations and that it is therefore unnecessary for the Maintenance Trustee to be granted a lease of such parts.

88. Further, they submit that the areas demised cannot be let separately and, thus, have no market value. As such, any rent payable under such a lease cannot have been reasonably incurred for the purposes of section 19 of the 1985 Act.

89. The applicants state that Paragraph 8 of the Fifth Schedule clearly envisages that rent will be payable for staff areas. They state that this clause would cover both a caretaker's flat and commercial premises, in respect of which business rates would be payable, and that this is why the clause refers to any rates and taxes.

90. The applicants dispute that the areas in question are common parts and note that this is a question of fact that the Tribunal will determine, having seen the property.

91. The applicants referred the Tribunal to *Cadogan v Panagopoulos and another [2010] EWHC 422 (Ch)*, a case concerning the Leasehold Reform, Housing and Urban Development Act 1993, in which Roth J stated at [43] in respect of common parts:

"I consider that it is intended to include those parts of the building that either may be used by or serve the benefit of the residents in common (using that expression in a non-technical sense), as opposed to those parts of the building that are for the exclusive benefit of only one or a limited number of the residents or for none at all. Thus, I consider it will cover the boiler room or room housing the lift machinery, although those rooms may be kept locked and no resident ever goes into them. It will encompass a covered atrium that all the residents can use, and also a sunken garden in the centre of the building to which the residents do not have access but which is a common amenity that is to be regarded as part of the building; or a banked rockery at the front of the building over which the residents do not pass but which is maintained for their common benefit and should be considered as part of the 'exterior' although not part of the structure. Furthermore, there is no requirement that the part must actually be used by all the residents: for example, the fact that the residents on the ground floor may never use the lift does not prevent it from being a common part."

92. The applicants rely upon oral evidence given by Mr Seifert that there is a potential market in the area in which Aldford House is situated for lessees and others to rent space. They state that BMW, which has a showroom on the ground floor, and the spa which will occupy parts of the basement, are also potential tenants as regards the areas which are demised by the 2014 lease. The applicants pointed to the fact that plant relating to the spa is currently being stored in part of the space demised under the 2014 Lease.

93. The applicants submit that, save for the lift and a basement storeroom which contains the landlord's plant, the relevant areas are (i) not integral to the use of the building by the tenants; and (ii) are lettable by the landlord.

94. Having inspected Aldford House, the Tribunal accepts this submission and finds as a fact that the areas demised under the 2014 Lease are not common parts and are capable of being let separately. Further, the experts agree that some rent is payable in respect of these areas and Tribunal is satisfied that the areas in question have a market value.

The airspace

95. As stated above, the areas demised by the 2014 Lease include a gantry on which a communal television aerial has been installed. Paragraph 4 of Part II of the First Schedule of the Residential Leases provides that the rights granted to the lessees include:

"Television, telephone etc.

4. The right for the Tenant in common with all other persons entitled to the like right to use any common television aerial ... from time to time installed in the Residential Premises subject to the tenant complying with the relevant provisions of any agreement from time to time made between the Lessor or the Maintenance Trustee (as the case may be) and the person or corporation installing supplying or maintaining the same and any rules which the Maintenance Trustee may from time to time make in respect thereof and also paying to the Maintenance Trustee or any such corporation such rent or charge as the Maintenance Trustee or such person or corporation may require in respect hereof."

96. The respondents state that the residential tenants have the right to use the television aerial and submit that any costs incurred for the purposes of exercising this contractual right is plainly unreasonable.

97. The applicants point to evidence given by Mr Watson to the effect that, before the gantry was installed, there were approximately 30 satellite dishes on the building. The applicants contend that the most convenient way to provide a communal television aerial is by fixing it to a gantry on the roof and that the first applicant is entitled to charge for the use of this valuable airspace.

98. The gantry was pointed out to the Tribunal during the course of its inspection. The Tribunal does not consider that the evidence goes as far as establishing that fixing the communal television aerial to the gantry is the most convenient way of providing a communal television aerial. The Tribunal heard no evidence that other potential means of providing a communal television aerial were explored. The Tribunal is not satisfied on the balance of probabilities that the costs incurred in renting the airspace which is demised by the 2014 Lease were reasonably incurred.

The rent under the 2014 Lease

99. The Tribunal prefers Mr Seifert's evidence to that of Ms Savill on this issue. It became apparent during Ms Savill's oral evidence that she had been afforded a very limited period of time in which to prepare her report and the Tribunal considers Mr Seifert's evidence to be more thorough.

100. The Tribunal has been informed that the annual rent of £32,400 is comprised of the sum of £26,400 for the 'landlord's areas' and a further £6,000 for the satellite/tv aerial. Mr Seifert considers that a rent of £12,210 per annum would be reasonable for the landlord's areas. The Tribunal finds that, of this sum, £1,320 should be excluded because it relates to a basement storeroom which contains landlord's plant. The Tribunal has found that the costs incurred in renting the airspace were not reasonably incurred. Accordingly, the Tribunal finds that the rent payable is £10,890 per year.

The sum payable for years ending 2013 to 2015

101. The Tribunal accepts the applicants' contention that the term of the 2014 Lease was from and including 1 January 2005 and that rent is payable pursuant to the 2014 Lease in respect of the entirety of these service charge years.

Failure to consult

102. Section 20 of the 1985 Act provides that where costs are incurred under a qualifying long term agreement, the relevant contribution of tenants are limited unless the consultation requirements have been complied with or dispensed with.

103. By section 20ZA(2) of the 1985 Act, a qualifying long term agreement means "an agreement entered into, by or on behalf of the landlord or superior landlord, for a term of more than 12 months".

104. The definition consists of three elements: (i) an agreement; (ii) entered into, by or on behalf of the landlord or a superior landlord, where "landlord" bears the extended meaning given by s.30; (iii) for a term of more than 12 months.

105. By s.30 "the landlord' includes any person who has a right to enforce payment of a service charge. Accordingly, the respondents state that, for these purposes, the second applicant is "the landlord". The fact that the agreement is a lease does not affect the position: see *Paddington Basin Developments Ltd v West End Quay Estate Management Ltd* [2010] EWHC 833 (Ch); [2010] 1 W.L.R. 2735.

106. The respondents state that it follows that the 2014 Lease is a qualifying long term agreement. The consultation requirements that apply in relation to qualifying long term agreements are contained in Schedule 1 to the Service Charge (Consultation Requirement) Regulations 2003 ("the Regulations"). It is common ground that no consultation took place. The respondents submit that, accordingly, each lessee's contribution to the costs incurred under the agreement is capped at £100 per year (the Tribunal was referred to regulation 4 of the Regulations).

107. The applicants submit, relying upon *Dejan v Benson* [2013] 1WLR 854, that the premise of the basis on which *Paddington Basin* was decided is no longer good law.

108. The Tribunal considers that it is bound by the decision in *Paddington Basin*, it accepts the respondents' submissions, and it finds that each lessees contribution to the costs incurred under the 2014 lease is capped at £100 per year.

109. However, as agreed at the hearing, the Tribunal will now give directions for a proposed application for dispensation from the consultation requirements to be determined.

110. The Tribunal directs that any application for an order under section 20ZA of the Landlord and Tenant Act 1985 ("section 20ZA application") shall be made in writing, as soon as possible and in any event within 21 days of the date of this decision. The application shall be served on all lessees, together with a copy of this decision.

111. Any lessee who opposes the section 20ZA application, shall send the applicant a statement of case setting out their response to the application together with copies of any documents upon which they wish to rely within 14 days of the date of service of the application. Any request for an oral hearing should be included in the statement of case.

112. The applicant may, if so advised, serve any statement of case in reply together with any documents relied upon within 14 days thereafter. The applicant should, at this stage, confirm whether or not it requests a paper determination.

113. The applicant shall, within 7 days thereafter, file and serve a bundle of documents for the determination of the section 20ZA application (to be agreed, if possible). The bundle must contain all of the documents on which the applicant relies, and copies of any replies from the lessees. The applicant shall send four copies of the bundle to the Tribunal and one copy to each lessee who opposes the application.

Set off

114. The respondents contend that purported rent arrears and other sums have been wrongly set-off against service charge arrears owed by flats connected with the landlords and that, as a result, the balance of the reserve fund is significantly less than it ought to be.

115. The respondents state:

"It is accepted that the Ft-T does not have jurisdiction to determine whether there has been a breach of trust (although R expressly reserve their right to bring such a claim in the appropriate court). The issue is, however, relevant to the Ft-T's jurisdiction to determine the amount of service charge payable towards the reserve fund."

116. In the respondents' closing submissions, it was initially stated that "this is principally a breach of trust argument" but that the Tribunal could determine whether or not there has been a breach of trust where this was relevant to a determination as to whether reserve fund contributions are reasonable.

117. However, upon it being accepted that the respondents' pleadings do not make reference to any breach of trust, it was stated in the alternative that the respondents are not inviting the Tribunal to make any finding as to whether there has been a breach of trust but rather they are inviting the Tribunal to find that sums have been set off against 'the landlord's arrears' which should not have been set off.

118. The applicants submit that the matters raised have not been pleaded and that an allegation that the reserve funds have been misapplied must be a breach of trust argument.

119. The Tribunal considers that the issues raised either involve a determination that there has been a breach of trust (in the course of determining whether or not the reserve fund contributions are reasonable) or a determination which potentially substantially trespasses upon the ground which would be covered by the breach of trust proceedings which the respondents expressly reserve the right to bring.

120. In the circumstances, the Tribunal considers that the two alternative cases currently advanced by the respondents should have been clearly pleaded, making express reference to "breach of trust" and both (i) setting out the respondents' case that the Tribunal can make a finding that there has been a breach of trust in the course of determining whether the reserve funds contributions are reasonable; and (ii) in respect of the alternative case, clearly setting out why, notwithstanding that the allegation is that reserve funds have been misapplied, no breach of trust issues arise.

121. Accordingly, the Tribunal finds that the issues raised have not been sufficiently pleaded and are not before the Tribunal.

Staff costs

122. Mr Mikailian accepted, when giving oral evidence, that an eight-person porters' rota is reasonable. Accordingly, the only years in respect of which the staff costs are currently disputed are the years 2012 and 2013.

123. In respect of these years, the respondents challenge the use of agency staff and state that eight full time staff should have been employed at a cost of £220,000 per annum. The staff costs were £232,532 in 2012 and £263,077 in 2013.

124. Mr Watson gave evidence that agency staff were used in addition to permanent staff because, due to the lessees' failure to pay the service charges, he could not guarantee that there would be sufficient funds in the day to day service charge account to ensure the payment of the wages of eight permanent members of staff on an ongoing basis. He did not want to commit to employing a full complement of permanent members of staff, with commitments of their own, who would be at risk of being made redundant.

125. In response, the respondents state that, whilst there were very limited funds in the day to day service charge account, the reserve fund was significant and that Mr Watson could have used the reserve fund to pay the staff wages under the terms of the Leases.

126. The Tribunal accepts that the use of the reserve fund to defray costs where there are insufficient funds in the service charge account is permissible under the terms of the Leases.

127. Paragraph 19 of the Fifth Schedule provides (emphasis supplied):

"19. To place on deposit at a bank or with a local authority or building society sums representing the reserve created pursuant to paragraph 2(a)(ii) of Part III of the Fourth Schedule hereto and to withdraw the same from deposit as required in order to meet the expenses referred to in that paragraph or to meet any ***temporary deficiency*** *in the moneys available to meet the expenditure referred to in paragraph 2(a)(i) of that Part of that Schedule"*

128. Having regard to the on-going failure of lessees to pay service charge contributions (set against a long history of service charge arrears) and to the extent of the margin of difference between the cost of employing eight full time porters and the costs actually incurred, the Tribunal considers that Mr Watson acted reasonably in his prudent management

of the staff costs. In all the circumstances, the Tribunal finds that the sums claimed under this heading are reasonable and payable.

Electricity costs

129. In Mr Seifert's opinion, "an annual electricity charge in the region of £20,000 - £25,000 does not feel unreasonable for a building of this nature". The figures for 2011, 2015 and 2016 are within that range. However, the costs for 2013 and 2014 are £62,243 and £60,585 respectively.

130. The respondents initially contended that the 'spike' in the electricity costs was attributable to works carried out by the first applicant to the 6th and 7th floors of Aldford House (where new flats have been constructed). However, the increase in charges was explained by Mr Watson as being the result of a reconciliation which was carried out to the electricity account following years of estimated bills.

131. The respondents accept, in light of Mr Watson's explanation, that it is not possible to look at any of the years in isolation. However, they maintain that it is likely that the first applicant used the communal electricity supply when carrying out works to the 6th and 7th floors and invite the Tribunal to deduct 2.5% from the electricity charges to reflect this (based on Mr Seifert's evidence that a 2.5% deduction should be applied in these circumstances).

132. In support of their assertion that the first applicant used the communal electricity supply when carrying out work to the 6th and 7th floors, the respondents sought to rely upon evidence of fact contained in a letter from John Souster, an electrician, who inspected Aldford House in March 2015.

133. Mr Souster did not attend the hearing to be cross-examined. Further, the applicants note that the respondents had the opportunity to ask for permission to rely upon expert evidence in relation to the electricity charges and the meter layout but elected not to do so. They also state that the provenance of the information contained in the letter is unknown. The Tribunal accepts that there is force in these submissions and it did not place any significant weight on Mr Souster's letter.

134. Mr Mikailian gave oral evidence that he believed that the landlord used the communal electricity supply when carrying out work to the 6th and 7th floors.

135. Mr Mikailian accepted that he is not an expert in this field and, when asked in cross examination whether he had any evidence to support an assertion that a meter which he referred to as "the check meter" was monitoring the 6th and 7th floors, he responded "You could ask Mr

Souster to explain." Accordingly, it appeared that Mr Mikailain was to a significant extent relying upon Mr Souster's evidence. When it was put to Mr Mikailian that the first applicant could have used a generator or batteries he stated that he was not qualified to express an expert opinion but that he considered the use of batteries to be very unlikely.

136. Having viewed the nature and extent of the work which was carried out by the first applicant to the 6th and 7th floors of Aldford House, the Tribunal put to the parties that in its expert knowledge and experience it was unlikely that a battery and or generator would have been used by the first applicant. In response, the applicants submitted that a mains supply could have been used which was unconnected to the communal meter.

137. The first applicant has failed to provide any electricity bills showing that it used an alternative mains supply for the work which it carried out to the 6th and 7th floors. The applicants accept that it is open to the Tribunal to infer that the communal electricity supply was used but they submit that that no such inference should be drawn, pointing to the respondents' failure to adduce expert evidence on this issue.

138. The Tribunal carefully inspected the 6th and 7th floors of Aldford House and considers it likely, on the balance of probabilities, that a mains supply was used in order to carry out work of the nature and extent observed. The Tribunal was not made aware of any circumstances which would have prevented or made it difficult for the first applicant to produce electricity bills if a separate mains supply had been used.

139. In all the circumstances, the Tribunal finds that it is likely on the balance of probabilities that the first applicant used the communal electricity supply in order to carry out work to the 6th and 7th floors of Aldford House. The Tribunal accepts Mr Seifert's evidence that, in these circumstances, the electricity costs should be reduced by 2.5%.

Professional Fees

140. The sums claimed in respect of professional fees for the period 2012-2016 total £379,501. The reasonableness of the professional fees was a matter which the experts were instructed to consider and the respondents' expert accepts that, of this sum, professional fees in the sum of £352,113.07 are reasonable.

141. The parties agree that the sum of £648 incurred for copying documents on behalf of the landlord in respect of its planning application for the spa is not a recoverable service charge item.

142. The respondents contend that fees for the year ending 2016 include legal fees of Guillaumes LLP in the sum of £8,473.40 in relation to

defending service charge proceedings brought by the lessee of flat 80 (Mr Shammas) against D & G Block Management. In fact, D & G Block Management was the wrong party and proceedings should have been issued (if at all) against the second applicant.

143. The respondents state that these costs were costs incurred by D & G Block Management in its own right, not as the agent of second applicant. Guillaumes LLP are D & G Block Management's solicitors and the invoices are addressed to D & G Block Management.

144. The respondents state that, as such, there is no basis for D & G Block Management seeking to recover these costs from the second applicant and the second applicant passing them on to the lessees. Further, if the proceedings against D & G Block Management were misconceived, an order for costs would have been made against Mr Shammas. D & G Block Management should then have recovered the costs pursuant to any such order, not through the service charge.

145. The applicants state that D & G Block Management were only sued because of their role acting as agent for the second applicant and, in those circumstances and in proceedings that concerned the service charge at Aldford House, it is reasonable for the costs to be recovered through the service charge.

146. The applicants also state that the Maintenance Trustee was contractually obliged to indemnify D & G Block Management for such costs under the terms of the Management Agreement. However, the applicants do not point to a provision of the Leases pursuant to which the costs of this dispute are recoverable.

147. Accordingly, the Tribunal finds that these costs are not payable. For the same reason the Tribunal finds that D & G Block Management's own costs of dealing with this dispute in the sum of £3,096 and costs in the sum of £2,700 charged by Stephenson Harwood LLP in relation to this matter are irrecoverable from the respondents.

148. As regards the remainder of the professional fees, the respondents seek to depart from the evidence of both experts and invite the Tribunal to apply its own knowledge and experience. They contend that Mr Seifert did not appear to have considered whether the legal costs, in particular, were reasonably incurred or reasonable in amount.

149. The respondents submit that it is common for legal costs to be assessed down by 65-80%. They rightly state that it would be difficult for the Tribunal to carry out a detailed assessment of the disputed litigation costs on the basis of the available material where it did not hear the cases. They invite the Tribunal to depart from the evidence of both experts and to essentially carry out a summary assessment, based on

the points taken in the respondents' skeleton argument and in cross-examination.

150. The applicants state that the Tribunal cannot go behind what the experts have said and that it is unacceptable for the respondents, having attended case management hearings and instructed experts to consider the professional fees, to now seek to depart entirely from the expert evidence on this issue.

151. The applicants state that they have been taken by surprise by the respondents' position and they note that the respondents have failed to put forward specific alternative figures in respect of each item. Further, they submit that the professional fees are not disproportionate to the value of the building, the sums involved, and other aspects of the dispute.

152. Having carefully reviewed the parties' submissions, the Tribunal does not consider that it would be fair and just for the Tribunal to disregard the expert evidence and to substitute its own expertise when it comes to assessing the legal costs (or any aspect of the professional fees).

153. As regards the legal costs, this Tribunal did not hear the litigation in question, the respondents have not provided detailed points of dispute and alternative figures in respect of each item, and the Tribunal does not consider that it could in all the circumstances fairly and justly assess professional fees of this nature and magnitude applying a broad-brush approach. Had the respondents sought an assessment akin to a detailed assessment at the case management stage, it is likely that different directions would have been given.

154. Neither party sought to significantly challenge Ms Savill's evidence on this issue and the Tribunal prefers Ms Savill's expert evidence as regards the reasonableness of the professional fees, save insofar as it has found that they are not payable.

Maintenance Trustee's Fees

155. The respondents state that, in the event that the service charges claimed are reduced in the light of the arguments advanced by the respondents in these proceedings, a further reduction should be made to reflect the fact that the management services have not been provided to a reasonable standard. In this regard, the respondents state, in particular, that the second applicant demanded unreasonably high service charges.

156. The Maintenance Trustee's fee is set at 2% and it will, of course, therefore decrease in accordance with the reductions to the service

charge which fall to be made pursuant to this Decision. The Tribunal does not consider that any additional reduction is warranted.

157. As stated above, the Tribunal heard oral evidence from the two directors of the second applicant. Mr Martin did not appear to be active in terms of his involvement and the Tribunal considers that Ms Buck very much takes a leading role. However, the Tribunal is satisfied that the second applicant's fee is reasonable having regard to the nature and extent of the work carried out by the second applicant, wholly or primarily through Ms Buck. The Tribunal is not satisfied in all the circumstances that the limited reduction which it has made to the sums claimed justifies any additional reduction in the Maintenance Trustee's fee.

158. The respondents submit that further and/or alternatively, no Maintenance Trustee fee would be payable if the second applicant had not been appointed. They contend that the agreement dated 1 July 2013 appointing the second applicant as Maintenance Trustee is a qualifying long-term agreement in respect of which there was no consultation. Accordingly, the respondents contend that the amount payable under the agreement by each lessee is capped at £100 per year.

159. In response, the applicants accept that no consultation took place but state that no costs are incurred under the agreement. The applicants point to the fact that the provisions concerning the Maintenance Trustee's fees are expressly contained in the Leases. The applicants state that the agreement simply appoints the second applicant as the trustee; it does not give rise to any charges which are a relevant contribution or an amount which the tenant may be required to contribute by way of service charge.

160. The Tribunal accepts the applicants' submission that no costs are incurred under the agreement and that the Maintenance Trustees fees are therefore not capped at £100 per year per lessee.

The Management Fee

161. The respondents, submit that in the event that the service charges claimed are reduced in the light of the arguments advanced by the respondents in these proceedings, a further reduction should be made to reflect the fact that the management services have not been provided to a reasonable standard.

162. In response, the applicants invite the Tribunal to consider the reasonableness of the fees charged in the context of the difficulties in managing Aldford House. Further, the applicants note that for the period 7 July 2011 to 30 June 2013 the fees charged for management by

the Tribunal appointed Manager were pursuant to the Tribunal's 2011 order, which is not open to challenge in these proceedings.

163. Having regard to all the circumstances and, in particular, to the nature of Aldford House, to the history of extensive service charge arrears, and to the difficulties which have undoubtedly been encountered in managing the block, the Tribunal is satisfied that, insofar as they are open to challenge in these proceedings, the management fees are both reasonable and payable.

Apportionment

164. The respondents submit that, on the landlord having constructed new flats on the 6th and 7th floors of Aldford House (and notwithstanding that the new flats may not be habitable) it is inequitable not to recalculate the service charge proportions.

165. Further and/or alternatively, they submit that the Tribunal has a jurisdiction to exercise the power to vary in Part II of the Fourth Schedule on the landlords' behalf (by analogy with the jurisdiction it has to determine "a fair and reasonable" proportion where a provision is void by reason of s.27A(6) of the 1985 Act, as in cases such as *Windermere Marina Village Ltd v Wild* [2014] UKUT 163 (LC); *Gater v Wellington Real Estate Limited* [2014] UKUT 0561 (LC); and *Oliver v Sheffield City Council* [2017] EWCA Civ 225). The respondents state that the Tribunal should exercise this power so as to vary the proportions with effect from the date on which the leases of the new flats were granted.

166. By Paragraph 18 of the 2012 Management Order, Mr Watson was ordered to appoint a chartered surveyor to act as "the Surveyor" for the purposes of Part II of the Fourth Schedule and Paragraph 7(b) of the Sixth Schedule in order to determine:

(i) Whether it is necessary or equitable to recalculate the percentage proportions to take account of the works being undertaken by the landlord to expand flats 60 and 70 and then to divide them into four flats and, if so, in what amounts and with effect from what date; and

(ii) Whether, if such recalculation is necessary or equitable, it is also appropriate to adjust the due proportion payable under Paragraph 7(b) of the Sixth Schedule in respect of the Commercial Premises.

167. Mr Watson appointed Mr Matt Fletcher MSc and Mr Peter Smith MRICS of Smith Baxter Limited as the Surveyor pursuant to Paragraph 18 of the 2012 Order. By a letter dated 2 July 2013 Smith Baxter recalculated the service charge percentages by allocating a contribution to the new flats and reducing the service charges paid by the existing flats.

168. The letter recommended that the new service charges take effect once the new flats were in a habitable condition, which would allow for the new flats to be fitted with a kitchen, bathroom and associated sanitary ware. It was apparent to the Tribunal on inspecting the new flats that they are not currently in a habitable condition.

169. The applicants state that this is yet another point which has not been properly pleaded. They also state that the Smith Baxter report was sanctioned by the Tribunal and that, in any event, the use of any services is very limited as a result of the new flats being unoccupied.

170. Whilst any owner of the new flats will benefit from any improvements in the fabric of the building, service charge contributions are in fact currently being paid as if the flats which were in existence prior to the construction of the new flats were still in existence. The applicants submit that, in these circumstances, it is equitable not to recalculate the service charge proportions.

171. The Tribunal finds that the respondents' case has not been sufficiently pleaded and that this matter is not before the Tribunal. Further, the Tribunal accepts the applicants' submissions that, in any event, in light of the service charge contributions which are being paid as if the flats which were in existence prior to the constructions of the new flats remain, it is not inequitable not to recalculate the service charge contributions.

The applicants' application pursuant to rule 36 of the 2013 Rules

172. At the conclusion of the hearing, the Tribunal was informed that, in respect of the service charge year 2017, the reasonableness and payability of service charges in the sum of £418,484 is undisputed.

173. Upon requesting clarification, the Tribunal was told that, whilst not disputed, this sum has not been agreed or admitted by the respondents within the meaning of section 27A(4)(a) of the 1985 Act, so as to deprive the Tribunal of jurisdiction.

174. The applicants then requested an immediate oral decision that this sum is payable (with reasons to follow) pursuant to rule 36(1) of the 2013 rules. Rule 36(1) provides: "The Tribunal may give a decision orally at a

hearing" and the respondents accepted that the Tribunal could give the oral decision sought.

175. Having had regard to the unqualified nature of the words "a decision" in rule 36(1) of the 2013 rules and to the fact that the parties were in agreement that the Tribunal could give the decision sought, the Tribunal gave an oral decision that, in respect of the service charge year 2017, service charges in the sum of £418,484 are reasonable and payable.

176. The reasons for this decision are that it was not disputed that the relevant sums were reasonable and payable and therefore it was clear that the sums found to be due in respect of the 2017 service charge year would be either equal to or in excess of this figure.

177. The applicants then requested an immediate order/written decision in the terms of the Tribunal's oral decision. The parties were aware that it would be necessary for the Tribunal to reconvene to determine the issues in dispute, following which the Tribunal's written decision would need to be drafted and approved. On the applicants' case there is a lack of funds available for the day to day management of Aldford House and it was on this basis that the applicants sought an immediate order/written decision that the sum of £418,484 is outstanding.

178. The respondents submitted that the Tribunal does not have jurisdiction to issue an immediate order/written decision prior to issuing its written reasons for the decision which finally disposes of all issues in the proceedings.

179. The parties and the Tribunal considered rule 47 of the 2013 rules which provides:

47.— Interim orders

(1) This rule applies where an enactment relating to a residential property case allows the Tribunal to make an interim order—

(a) suspending, in whole or in part, the effect of any decision, notice, order or licence which is the subject matter of proceedings before it; or

(b) for the time being granting any remedy which it would have had power to grant in its final decision.

(2) The Tribunal must provide notice of the order to each party as soon as reasonably practicable after making an interim order and, except in the case of an order made with the consent of all parties, giving reasons for the order.

(3) A party may request that the interim order be varied or set aside, if the Tribunal has made an interim order without first giving the parties the opportunity to make representations.

(4) Any such request may be made—

(a) orally at a hearing;

(b) in writing; or

(c) by such other means as the Tribunal may permit.

(5) This rule does not apply to an application for an urgent IMO authorisation [...]

180. The applicants confirmed that they were not seeking an interim order.

181. The parties and the Tribunal also considered the wording of rule 36(2) of the 2013 rules which provides:

(2) Subject to rule 17(8) (prevention of disclosure or publication of documents and information), the Tribunal must provide to each party as soon as reasonably practicable after making a decision (other than a decision under Part 6) which finally disposes of all issues in the proceedings or of a preliminary issue dealt with following a direction under rule 6(3)(g)—

(a) a decision notice stating the Tribunal's decision;

(b) written reasons for the decision or, in cases relating to rents, notification of the right to request written reasons under paragraph (4); and

(c) notification of any right of appeal against the decision and the time within which, and manner in which, such right of appeal may be exercised.

182. The rules expressly contemplate the making of interim orders, case management decisions under rule 6 of the 2013 rules, determinations of preliminary issues and decisions which finally dispose of all issues in the proceedings. The applicants confirmed that the issue in respect of which they were seeking an immediate order/decision was not a preliminary issue and it was clearly not a case management decision or a decision finally disposing of all issues in the proceedings.

183. The Tribunal has noted that rule 36(3) of the 2013 rules provides:

(3) The Tribunal may provide written reasons for any decision to which paragraph (2) does not apply.

184. The Tribunal considers that it may have jurisdiction pursuant to rule 36 of the 2013 rules and its case management powers to provide the written reasons requested by the applicants for the decision delivered orally at the hearing, prior to issuing its final decision.

185. However, whilst the respondents and the Tribunal were on notice that the application was going to be made, the grounds for the application for the Tribunal to provide an immediate order/written decision were not fully particularised in a pleading or written application.

186. Further, following the applicants' full and helpful closing submissions (which were significantly longer than estimated in the trial timetable) it was not possible to hear full argument concerning this matter. In particular, it is it not clear whether in disputing that the Tribunal has jurisdiction the respondents dispute that the two decisions are entirely distinct in nature with separate rights of appeal.

187. In all the circumstances, the Tribunal declines to exercise any jurisdiction which it may have to issue the immediate order/written decision requested by the applicants in advance of this determination.

Section 20C of the Landlord and Tenant Act 1985

188. At the conclusion of the hearing, it was agreed that any application under section 20C of the Landlord and Tenant Act 1985 would be made after the Tribunal had determined the substantive issues in the case.

189. The Tribunal directs that any application for an order under section 20C should be made within 14 days of the date of this decision and that the applicants should file and serve any response within 14 days thereafter.

Name: Judge Hawkes **Date:** 1 November 2018

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
   (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
   (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
   (a) only to the extent that they are reasonably incurred, and
   (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

   and the amount payable shall be limited accordingly.

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

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
   (a) the person by whom it is payable,
   (b) the person to whom it is payable,
   (c) the amount which is payable,

(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal.

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20C

(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 the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—
(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
(aa) in the case of proceedings before a residential property tribunal, to that tribunal;
(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.