FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/21UD/LAM/2021/0001
Property	**:**	27-31 White Rock, Hastings, TN34 1JY
Applicant	**:**	Nicholas Peter Frembgen
Representative	**:**	Mr James Fieldsend of Counsel Instructed by Collins Benson Goldhill LLP,
Respondent	**:**	Leysdown Investments Limited
Representative	**:**	Mr Monty Palfrey of Counsel Instructed by Brachers LLP
Type of Application	**:**	Appointment of Manager- section 24 of the Landlord and Tenant Act 1987
Tribunal Member(s)	**:**	Judge J Dobson Mr M Woodrow MRICS Mr E Shaylor MCIEH
Date of Hearing	**:**	28th and 29th April 2021 and 7th May 2021 remotely as video proceedings
Date of Decision	**:**	16th July 2021

DECISION

Summary of the Decision

1. **The Applicant's application for the appointment of a manager for 27-31 White Rock, Hastings is refused.**

Background, titles and the Property

2. The Applicant made an application dated 4th February 2021, for an Order appointing a manager for 27-31 White Rock, Hastings, TN34 1JY ("the Property") in accordance with section 24 of the Landlord and Tenant Act 1987 ("the 1987 Act"). An application was also made, albeit not until the second day of the final hearing, pursuant to section 20C of the Landlord and Tenant Act 1985 ("the 1985 Act") that the Respondent's costs of these proceedings should not be included in the service charge.

3. The Applicant is the Lessee of Flat 4, 30 White Rock ("the Applicant's Flat"), or the Annexe, 29 White Rock as may be the case- see below. The Respondent is the freehold owner of the Property. The Respondent's title is registered with title number ESX51013. The Respondent purchased the Property in 2019, becoming registered as the owner on 28th June 2019. The Applicant and the other residential leaseholders (collectively "the Lessees" and singular "Lessee") who support the application hold long leases ("the Leases") of the flats ("the Flats" collectively or "Flat" singularly") within the Property. A sample lease ("the Lease") specifically of the Applicant's Flat has been provided with the application made.

4. There are ten Flats in total, nine in the main building and the Applicant's Flat. The other nine Flat leases are for 125 years from 29th September 2001. The Applicant's Flat is let for a 99 year term granted on 20th October 2014. The Respondent is also the owner of Flat 2, 30 White Rock, sold to the Respondent by a previous lessee in July 2019. However, the Applicant asserted that the titles had not merged, and the Respondent did not argue to the contrary. The Tribunal understands that the Leases of the other Flats are in largely the same terms, although it has been represented by the Applicant not in entirely the same terms. The Applicant identified the differences in its Statement of Case although no copies, or sample copy, of the other Leases were provided. That said, the Respondent has not asserted the Applicant's representations to be incorrect.

5. The ground floor of the Property comprises commercial units at 27-29 White Rock and at 30-31 White Rock. The unit 27, 28 and 29 is the subject of a commercial lease ("the Commercial Lease") to Parr and Bell Limited ("the Commercial Lessee"), granted on 11th October 2018 for some 999 years. That unit is stated to be divided into 3 parts a pet shop, a surf shop and a "nik-nak" shop although that has no relevance to this case. It is convenient at this point to mention that the Commercial

Lessee supported the appointment of a manager, although not all of the matters sought by the Applicant. The commercial unit at 30-31 White Rock is occupied by a company in the same group as the Respondent, called East Kent Leisure Limited, and operates an amusement arcade. The operation of amusement arcades is the principal business of this Respondent and/ or companies in the group. There is no lease drawn up in respect of unit 30-31.

6. It merits explanation that there was formerly an office to the rear of 30 White Rock, used by the previous freeholder, which has been converted by the Applicant to create a one bedroom, two storey dwelling, the conversion works being stated to have been completed in April 2016. The office was known as The Annexe, 29 White Rock and described in that manner in the Lease and so identified at the Land Registry on its title documents. The Applicant stated in evidence that he changed the address of the Flat on it becoming a dwelling to Flat 4, 30 White Rock and that the Royal Mail was so informed. The Applicant's Flat is accessed in a somewhat unconventional way. The tenant- for the flat is let on a tenancy- accesses the flat via communal stairs from the front door of the Property, an exit door at first floor level and then crossing an area of the roof of the commercial premises below to reach the Applicant's Flat. The walk across the roof is on decking laid down by or on behalf of the Applicant, the responsibility for the condition of which was one of the issues dividing the parties.

7. To that extent, this Property is a little unusual. So too the fact that the ground floor extends into caves in the cliff to the rear, although that has no impact on this case. The arrangement of commercial premises to the ground floor and residential flats on the floors above is, however, a frequently- encountered situation.

8. The Property was owned until mid- June 2019 by a company called Coastal Amusements Limited. It was plain that the Applicant and other lessees regarded the management of the Property by that company as highly unsatisfactory. The Tribunal does not consider it useful to discuss the historic issues described at length, given that they pre-dated the involvement of the Respondent, but it is, however, of some relevance that the historic issues partly created the unhelpful climate in which the Lessees and the Respondent engaged. Mr Palfrey referred to the Lessees tarring the Respondent with the same brush as the previous owner, and the Tribunal agreed that there was some, but not complete, merit in that submission.

9. Bridgeford and Co managed the Property for some years as agents of Coastal and were retained by the Respondent from July 2019 until January 2021 as managing agent until formal replacement with Cilec Limited t/a Tersons as from 1st January 2021, although Mr Crowley was himself involved a little sooner.

10. The Applicant served a section 22 Notice dated 25th November 2020 via agents on the Respondent landlord. That met the relevant

requirements. The period in which the notice required steps to be taken had expired by the date of this application. Nine separate breaches were set out- in relation to disrepair to the Property, accounting for contributions from adjoining or neighbouring properties, fire risk assessments, electrical equipment, safety hazards, inspections and programmes of works, provision of insurance, service of notices and notice of purchase. The matters relied on in Schedule 2 provide fourteen paragraphs of further details. Schedule 3, in relation to remedies, listed eight steps required to be taken (the two alleged breaches in relation to notices producing one remedial step). Schedule 4 required the steps to be undertaken in, variously, two, four and eight weeks.

11. The Applicant nominated Mr Scott James Baker ANEA MARLA of Scott Estates Management Limited, 17 Havelock Road, Hastings TN34 1BP as the proposed manager, who prepared a management plan.

The History of the case

12. Directions were issued on 16th February 2021 setting out the steps to be taken in preparation for the final hearing. The hearing was to be heard remotely as video proceedings. No matters arose within the proceedings ahead of the hearing itself.

The Hearing

13. The hearing proceeded remotely as video proceedings as envisaged and, in the event, across some three days, being the whole of the 28th and 29th April 2021 and the afternoon of Friday 7th May 2021. The Tribunal subsequently met to discuss the case and to determine the outcome. The Applicant was represented at the hearing by Mr James Fieldsend and the Respondent by Mr Monty Palfrey, both of Counsel. The Tribunal is grateful to both for assistance in this complex matter.

14. In addition, the hearing was attended by the five witnesses from whom the Tribunal heard oral evidence and had received written evidence, namely Mr Nicholas Frembgen, the Applicant; Mrs Janice Campbell, a further Lessee (of two Flats); Mr Scott Baker, the proposed Manager; Mr Jordan Godden, a director within the group of companies which includes the Respondent and who had for a time, it was established, been a director of the Respondent but was now described as the asset manager for the group of companies; and Mr Simon Crowley, of the current managing agent Cilec Limited t/a Tersons. The Tribunal is also grateful to them for their evidence.

15. In general terms Mrs Campbell and Mr Crowley came across well when giving evidence. Mr Godden rather less so. Although most of his evidence was found by the Tribunal to be correct, there were instances where Mr Godden apparently did not know the answer but rather than saying so came up with answers which were not correct. Those matters were easily identifiable, and the Tribunal considered more likely to

arise from nervousness or being misguided rather than premeditated dishonesty. Mr Frembgen's evidence was not always balanced, lacking an ability to accept any fault on his part in relation to any matters and he was prone to deny receipt of communications which the Tribunal did not entirely accept. Mr Baker's evidence was not compelling insofar as relevant to matters in relation to the making of an appointment of a manager in general. His evidence in relation to the question of his individual appointment as that manager was not relevant in the event.

16. The Applicant produced a bundle in PDF form, of some 1137 pages. Mr Fieldsend also provided a Skeleton Argument and case authorities. Amongst the many other documents, the parties had provided a draft management order. Both Mr Fieldsend and Mr Palfrey made closing submissions. The contents of those submissions and Skeleton Argument, insofar as they relate to matters of evidence and law which the Tribunal found relevant to the basis for its decision, are referred to below. Unsurprisingly, the thrust of Mr Fieldsend's submissions were that the Tribunal should decide to appoint a manager, whether the proposed manager or otherwise. Variation of the apportionment of service charges between all owners of premises within the Property was sought, amongst other matters. Equally unsurprisingly, the thrust of Mr Palfrey's submissions was that the Tribunal should not appoint.

17. No other Lessee attended or was represented. The Commercial Lessee did not attend and was not represented at the hearing, although its solicitors, Gaby Hardwicke Solicitors provided correspondence making written representation as to variation of apportionment, which did not need to be considered in the event.

The Law

18. The relevant statutory provisions in respect of this application are found in s24 of the 1987 Act. The provisions read as follows:

> **24 Appointment of a manager by [a .....tribunal]**
> (1) [The appropriate tribunal] may, on an application for an order under this section, by order (whether interlocutory or final) appoint a manager to carry out in relation to any premises to which this part applies-
> (a) Such functions in connection with the management of the premises, or
> (b) Such functions of a receiver,
> or both, as [the tribunal] thinks fit.
>
> (2) [The appropriate tribunal] may only make an order under this section in the following circumstances, namely-
> (a) Where [the tribunal] is satisfied-
> (i) that [any relevant person] either is in breach of any obligation owed by him, to the tenant under his tenancy and relating to the management of the premises in question or any part of them or (in the case of an obligation dependent on notice) would be in breach of any such obligation but for the fact that it has not been reasonably practicable for the tenant to give him the appropriate notice, and
> (ii) .....

(iii) that it is just and convenient to make the order in all the circumstances of the case;
(ab) where [the tribunal] is satisfied-
(i) that unreasonable service charges have been made, or are proposed or likely to be made, and
(ii) That it is just and convenient to make an order in all the circumstances of the case;
(aba) where the Tribunal is satisfied-
(i) That unreasonable variable administration charges have been; and
(ii) That it is just and convenient to make an order in all the circumstances of the case made, or are proposed or likely to be made,
(abb) where the tribunal is satisfied-
(i) That there has been a failure to comply with a duty imposed by or by virtue of section 42 or 42A of this Act, and
(ii) That it is just and convenient to make the order in all the circumstances of the case;]
(ac) where [the tribunal] is satisfied-
(i) that [any relevant person] has failed to comply with any relevant provision of a code of practice approved by the Secretary of State under section 87 of the Leasehold Reform, Housing and Urban Development Act 1993 (codes of management practice), and
(ii) that it is just and convenient to make the order in all the circumstances of the case;]
or
(b) where [the tribunal] is satisfied that other circumstances exist which make it just and convenient for the order to be made.

19. Certain of the words and phrases are explained or expanded upon in subsequent subsections of section 24 of the 1987 Act. Later subsections address the extent of the premises and the extent of the powers of the manager.

20. Accordingly, there is essentially what is often described as "a threshold criterion" for the making of an order that there is a breach made out, although equally there can be an order if relevant "other circumstances" have arisen. The breach can be only one of many alleged and can be a modest one. The fact of there being a breach or there being other circumstances does not mean that an order must be made, simply that one then may be made. It then falls to the Tribunal to consider whether the making of an order is just and convenient. The principle of appointing a manager and the question of the appointment of a specific proposed manager are separate issues. The opening provision of section 24 of the 1987 Act enables the Tribunal to give to the manager such powers as it considers appropriate, not limited to those given to the freeholder under the Lease.

21. Mr Fieldsend cited three case authorities. The first and second were *Maunder Taylor v Blaquire* [2002] 1 WLR 379 and *Queensbridge v Lodge* [2015] UKUT 635 (LC). Relevant elements of those emphasise the point stated in the preceding paragraph. The cases are regularly cited in that regard.

22. *Maunder Taylor* also makes it clear that the manager acts pursuant to his or her appointment and independently of the landlord. The manager's powers stem from the order appointing and not from the termsof the Lease. The powers which may be granted are not limited by the provisions of the Lease. It has separately been said that the aim is to produce a coherent scheme of management.

23. *Queensbridge* related to mixed residential and commercial premises and explained that the manager can be given powers extending to both sets of premises, notwithstanding that the application is brought by a residential lessee against his or her freeholder and not by a commercial lessee. That includes the manager being given power to receive the rent for the commercial premises and power to collect the equivalent to a service charge from the freeholder for premises not leased to another. Mr Fieldsend cited the case in respect of those propositions. The powers granted in *Queensbridge* were wide and were upheld. The judgment in *Queensbridge* was of obvious relevance given the commercial premises within the Property and the parts of the Property, both residential and commercial, not leased.

24. Mr Fieldsend also cited the fairly recent case of *Chuan- Hui v K Group Holdings Inc* [2021] EWCA Civ 403 which is authority that the manager derives his or her powers from the management order, which is "superimposed on the existing contractual framework". The Tribunal regards that as now uncontroversial.

25. Mr Palfrey did not refer to any other case authorities and made no comments disputing the effect of the caselaw cited by Mr Fieldsend. The Tribunal treats the legal position as accepted.

26. For the avoidance of doubt, section 21 of the 1987 Act enables an application by only one qualifying lessee with a flat contained in the premises. There was no dispute that the Applicant was able to so apply. Similarly, whilst the Applicant's premises are two-storey and somewhat separate from the other residential parts of the Property, no point was taken as to the premises not being a flat for these purposes.

27. The relevant code of practice referred to in section 24 of the 1987 Act is the Royal Institution of Chartered Surveyors Service Charge Residential Management Code 3rd Edition ("the Code"). The Code provides for a range of matters relevant to the management of a property such as this one. The Code states, and in this regard the Tribunal simply sets out some relevant examples of provisions, that (Part 4.1) "You should manage the property on an open and transparent basis", (4.2) You should respond promptly to reasonable requests from leaseholders for information or observations relevant to the management of the property indicating a timescale by which the request will be dealt with. Relevant information may be provided, if the lease/tenancy agreement obliges or if it is reasonable" and "You should send communications by whatever means are appropriate so that they reach the intended

recipients promptly and in compliance with any legislative or lease requirements."

28. With particular regard to financial matters, the Code addresses that in detail in Part 6. Service charges are covered in Part 7. Advice is included that the manager of a property should consider an application to the Tribunal for a variation of the lease if the lease deals inadequately with the payment of service charges, although weighed towards addressing problems which may arise from an inability to collect payments on account. Part 7.8 provides for there to be "an efficient system to monitor service charges received when due and those that go into arrears, and issue leaseholders with timely reminders" but otherwise advises as to best practice if arrears are pursued.

The Lease provisions and other, including commercial, relevant lease provisions

29. The Respondent's property as defined in the Lease is (the whole of) 27-31 White Rock. Under the Lease, the Respondent is responsible to the Lessees of the flats to provide the "Property Services", defined in 1.13 as those services listed in Schedule 4 to the Lease. The obligations on the Respondent within Schedule 7 are said (paragraph 5) to be subject to the Lessee complying with his or her obligations, which include paying sums towards the Property Expenses as provided for. However, the Tribunal determined that the Lease is not worded in such a manner as to create a condition precedent.

30. The obligation includes the provision of the Property Services which are listed in Schedule 4. Those include that the Respondent will keep the "Structural and External Parts and the Communal Areas in good and substantial repair and condition" (paragraph 1). The Respondent is also required to paint, decorate and treat such areas (paragraph 2). Other usual obligations follow. Paragraphs 7 and 8 of Schedule 4 require the Respondent to insure the Property against the usual risks.

31. The Respondent is also responsible for the preparation of annual accounts (Schedule 7, paragraph 5) of the Property Expenses. The Respondent is required to employ a qualified accountant to audit and certify the accounts (paragraph 13) and provide copies to the Lessees.

32. The Property Expenses as defined in 1.11 include the sums expended to provide the Property Services, sums required for any reserve (and a management fee in the absence of a managing agent, the agent's fees otherwise forming part of the Property Services). The "Tenant's Share of the Property Service Expenses" as defined in 1.20 is "a rateable proportion". That was originally to be determined by the freeholder's surveyor. However, Schedule 5 allowed for recalculation if "necessary or fair to do so".

33. However, it is common ground that a recalculation took place and in a Deed of Variation dated 20th April 2018, the amount payable by the individual Lessees was varied. That reflected the incorporation of the Applicant's Flat into the service charge regime. The Applicant's Flat bears 9.95% of the "Property Expenses" as defined, provided for in Schedule 1 of that Deed of Variation. There was no other change to the provisions of the Lease. As an aside, it was established in the hearing that the Applicant had not been required by the previous freeholder's agents to pay, and had not paid, any service charges prior to April 2018.

34. The Applicant agreed by clause 4 to comply with his obligations under the Lease as detailed in Schedule 6, including paying the share of the Property Expenses (paragraph 2) payable by equal instalments in advance on 25th March and 29th September in the amount estimated by the Respondent (2.1).

35. Paragraph 6 of Schedule provides that the Respondent will use its best endeavours to recover contributions from the Lessees.

36. Notices are provided for being able to be served personally, by first class post, by facsimile or by leaving them at the Applicant's Flat (clause 7). The address for service is that in the Lease or as last notified but is in all cases to be an address in England and Wales (7.2). That last element is relevant because the address of the Applicant is overseas.

37. As touched upon above, the Applicant explains in his Statement of Case that there are differences between his Lease and Leases of other Flats. The apportionment of service charges also varies between the Flats and the shares of the service charges payable by Lessees of the Flats adds up to 100%. Certain other leases of flats within the Property are said by the Applicant, and it has not been disputed, to provide that the Respondent must pay for service charge costs for residential parts of the Property not let (on long leases) and for non-residential part of the Property. Paragraph 13 of the Applicant's Statement of Case quotes provisions said to be found in seven of the ten Flat Leases, within Schedule 7 of those.

38. The provisions are different for the residential and non-residential parts. Paragraph 4.1 is said to provide that the Respondent will pay the Tenant's Share of the Property Expenses apportioned to that Flat where it owns the Lease or there is none. That is simple. Paragraph 4.2 is said to provide that the Respondent will pay in relation to the non-residential parts, "such sum as the Landlord may in its absolute discretion deem to be fair and appropriate having regard to the extent to which (if at all) such parts benefit from the Property Services". The Tribunal treats the above wording as being correct despite the absence of the particular Leases in the bundle, given that the Respondent did not assert otherwise.

39. The Commercial Lessee must pay service charges in respect of 27-29 White Rock. The "Building" as defined in that Lease (1.1) and in respect

of which service charges are payable is therefore not all of the Property. There is a consequent difference between the Property, in relation to which the Lessees have to pay service charges, and the Building as defined in the Commercial Lease, in relation to which the Commercial Lessee must pay service charges. That difference makes sense on the Respondent's case as discussed below. The provision of the Commercial Lease states that the Commercial Tenant shall pay a Service Charge of "a fair proportion" of the Service Costs, insofar as that relates to 27-29 White Rock. The Services and the Service Costs are detailed further in clause 6 and payments are to be made on the usual quarter days of the Service Costs estimated for the given Service Charge Year.

Approach to Evidence and Submissions received

40. The Tribunal does not attempt to set out all of the evidence received and makes passing or no reference to such matters as it considered did not weigh one way or the other in relation to an appointment. As noted above, the bundle was some 1137 pages and the notes taken by the Judge fill 5 notebooks. The hearing was recorded.

41. The Tribunal instead seeks to set out the key elements of the evidence and submissions which it considered of particular relevance to the determination made, including resolving any notable disputes as to evidence, and to touch upon some of the other issues between the parties. The principal, albeit not the only, themes of the dispute related to the undertaking of works to the property and to financial and accounting matters. The Tribunal makes it clear that it has considered all of the several matters in dispute but whilst some were significant in considering whether or not an appointment is just and convenient, others were of little or no significance.

Admissions

42. It was admitted in closing by Mr Palfrey on behalf of the Respondent that:

    i) The Respondent was in breach of the terms of the Lease in relation to the repair of the roof to the Property and clearing the gutters to the Property after July 2019 (breach 1 in the Notice);
    ii) The Respondent was in breach of paragraphs 8.4 and 9.1 of the Code in relation to a hazard for failing to fix loose carpet to the communal hallway, although Mr Palfrey said that the evidence demonstrated that it had more recently been removed and that it would be replaced in the course of the major works (breach 5)- Mr Fieldsend observed that occurred only very shortly before the hearing and there had been a denial of any failing until closing;
    iii) The Respondent was in breach of paragraph 12.2 for failing to provide insurance documents for the Property, the managing agents of the Respondent having provided an invoice for the cost rather than a copy of the documents themselves (breach 7).

43. It necessarily follows that the threshold for the making of an order has been cleared and therefore the question for determination by the Tribunal was one of whether the appointment of a manager was just and convenient. However, that is not a decision resting solely on the matters admitted. There were disputes the resolution of which were also relevant to the wider situation and where those were significant in determining whether an appointment was just and convenient.

44. It is appropriate to record that the Respondent made only one admission in advance of those above, that in relation to the loose carpet. The Respondent's Statement of Case denied either or both of the factual basis of the other breaches or that matters constituted a breach of the Lease or the Code, although even the one breach previously admitted was enough to clear the low threshold.

Evidence and Findings in relation to matters in dispute

45. As matters admitted were only a portion of those in issue, the Tribunal turns to the key matters in dispute and its findings in relation to those insofar as relevant to the determination made. Those findings are principally ones of fact, although they encompass terms of the Lease as and where relevant. The Tribunal seeks to divide that from the question of whether it is just and convenient to appoint a manager as far as practicable, albeit incompletely.

Extent of the breach by Respondent in respect the major works and other relevant circumstances in respect of works

46. Whilst the Respondent has admitted a breach in relation to Schedule 4 of the Lease and works to the Property that was not wholly in the manner or to the extent asserted by the Applicant. The Applicant said at the start of his oral evidence that "disrepair over a large time" was the chief motivation for the application.

47. It was common ground that as at the time of the hearing, works were well underway and nearing completion. They were expected to be completed by mid-May or a little after according to the evidence of Mr Crowley, which was not challenged on that point. No apparent issue arose with the undertaking of the works and no difficulty was anticipated with their completion. That undertaking of the works was a major step forward. To the extent that the Applicant's case asserted the Property to be in a "lamentable" condition, the Tribunal found that was no longer correct as at the date of the hearing. The Respondent's case was that this predominant issue was largely in hand.

48. The major works comprised repairs including to the roof, external walls, parapets, rendering and rainwater goods and redecoration.

49. The live issues in dispute in respect of the major works insofar as relevant to the future management of the Property, were firstly, whether they had only been undertaken because of institution of

proceedings before the Tribunal and the related question of whether the Respondent had taken a proper approach to the works from purchase and until late 2020. Secondly, there was another related issue of whether the lack of earlier work and the timing of the works reflected failings predominantly of the Respondent or of the previous agents, Bridgeford and Co.

50. In addition to the evidence of witnesses, the Tribunal had the considerable advantage of several photographs of the Property which illustrated various aspects of inadequate historic maintenance of the Property. It was apparent from the nature of the condition shown that the inadequate maintenance was not just a recent occurrence but rather had arisen well before purchase of the Property by the Respondent.

51. The previous freeholder had commenced consultations in relation to major works through its agent, in both 2015 and in 2017/ 2018. The second had progressed further and to the point of a statement of estimates but had not progressed to work actually being undertaken. The Respondent also commenced a further consultation in February 2020. Mr Godden said that it was agreed by him with Bridgeford and Co that there should be a new section 20 process and that he had been told 60% of the anticipated funds required were held. That was followed up with a Statement of Estimates in July 2020. A tender report was prepared. The estimate for the costs of the works given by the Respondent's preferred contractor was £105,000, excluding VAT, to which any fees applicable should be added. An overall figure was given of £144,540. There was some comment about the particular contractor, although only one Lessee had queried them in response to the section 20 consultation and that on the last day. Mr Godden said that the contractor gave the cheapest quote with the best timescale and had worked on properties for his family previously. Mrs Campbell said in evidence that she was unhappy that the estimates were more expensive than earlier ones from earlier consultations. However, the Tribunal did not consider that point to go anywhere due to passage of time between estimates being given.

52. There was a point made about how the Lessees would know the identity of the contractor appointed. Certainly, the Applicant said he did not. The only time at which Mr Crowley's evidence became rather unclear was when explaining how the Lessees had been told. He said that he understood Bridgeford and Co had told the Lessees, but Mr Fieldsend was able to make points as to whether they had and, if so how and when.

53. The Respondent had not attended to any of the outstanding works by the time of the section 22 Notice or by the time of the issue of these proceedings in February 2021. The Tribunal accepts some merit in the Respondents' argument that the Covid-19 pandemic caused difficulties with works, that argument commonly being advanced in recent months and often well- evidenced. The Applicant's letting agent had also noted and accepted that position in July 2020. The Tribunal accepts the likely

impact in Spring 2020 and to a lesser extent beyond that. The Tribunal also accepted cogency in Mr Godden's evidence that a surveyor had advised in mid-2020 that external rendering works should not be undertaken in winter months, the Tribunal accepting that not to be the best time for such.

54. Overall, however, the Tribunal did not find the above to be a complete answer covering the period of over eighteen months from purchase of the Property to the issue of these proceedings. The Respondent was right to admit that it was in breach of the Lease in that regard.

55. Mrs Campbell complained of no start date being given to her for the major works. Mr Palfrey put to her that work had been ongoing since January/ February. It transpired that she relied on what her tenant last told her. It was an odd feature of the case that Mrs Campbell said that she had not visited the Property since December and that the Applicant had not done so for two and a half years.

56. That said, Mr Godden stated on behalf of the Respondent- and was not challenged on the point- that the Respondent had only been able to fund the works by contributing £35,000 to £40,000 or thereabouts, or whatever sum it became allowing for contingencies, of its own funds. Mr Palfrey referred to £56,000 but that included general service charge arrears (and see below as to Flat 2 arrears). There was a significant shortfall of service charge contributions as compared to the cost of the works. The Respondent needed to contract with a building contractor in a situation in which the Respondent was unable to pay the contractor from the service charge account. Mr Baker accepted that having funds was most important. It was raised with Mr Baker by the Tribunal as to what he could do if the Respondent did not fund matters, to which he replied that the work would have to stop. Mr Godden could not say whether the appointment of a manager would affect the Respondent's approach to funding expenses, which was not his decision. Whilst such an approach by the Respondent would be disappointing, in itself the point was simple.

57. The Applicant and at least some other of the Lessees were in breach of their obligations under the Lease in relation to service charge payments, the Applicant to the tune of £2321.75 according to the December 2020 statement of account. Such arrears were also abundantly clear from the accounts prepared on behalf of the Respondent, discussed further below. It was also admitted in the Applicant's reply to the Respondent's case, which said that the Applicant and other Lessees deliberately withheld payment of service charges from April 2020 in protest at the service charges increasing and poor performance of management functions. The Applicant said £2000 was required in March 2020 but accepted when cross-examined that the service charges other than for major works were £890 and the balance was a shortfall from previously. The Applicant last paid, he admitted, in September 2019. He had not paid any service charge from 2014 until the 2018 variation and whilst he said it was agreed that he

would pay on an ad hoc basis and that he "would like to have done", the Tribunal did not find that plausible, given that the simple reality was that nothing had been paid by him.

58. Mrs Campbell also accepted that she was in arrears of service charges, both for major works and generally Those were, she agreed, in the region of £16,500. She said that she could not afford to clear those.

59. Mr Godden said in evidence that the Commercial Lessee was also in arrears.

60. Aside from the breach itself, that was at best unhelpful to the wider situation and the Tribunal finds that the arrears had an obvious and inevitable effect on the undertaking of the major works. The calculation by Bridgeford and Co dated 21st December 2020 stated there was some £17,388.60 of unpaid service charges for general costs and £39, 532.01 for the reserve account from which the major works would be funded.

61. The Applicant's case was that he did not appreciate that important aspect of the situation. As to whether he ought to have done is addressed in relation to financial matters below. Nevertheless, the Applicant and others apparently took the approach of not paying despite the clear statement by email of Bridgeford and Co to the Applicant by email 23rd September 2020 that: "If leaseholders paid their contributions……. we would have the money to be able to instruct contractors". Objectively, the Applicant cannot have failed to understand the simple point.

62. Mr Palfrey also made the point in cross-examination that if the Lessees didn't pay who would meet the insurance and other costs? The Applicant said he had not paid because he hadn't understood the increases, although he accepted that even if he was dissatisfied, he ought to pay something. The Applicant said that he would pay when the works were done, which the Tribunal took to indicate that, unless the Applicant did not understand the point expressed by Bridgeford and Co after all which seemed unlikely, he did not wish to accept it.

63. As an aside, the Applicant stated that he did not know what major works meant at that time and had only recently found out. He did not accept that the email referred to above indicated such works were to be undertaken, or indeed that the email to him from Bridgeford and Co of 17th July 2020 which referred to such works did so either. He said that he did not respond because of that lack of understanding. The Tribunal found the Applicant's evidence about that unsatisfactory.

64. Mr Fieldsend submitted that the tenor of the Respondent's case (that the Applicant and the Lessees had brought matters on themselves) overlooked that good management instils the right relationship and avoids such problems, whereas poor management had put the Lessees under financial pressure, so that it could not be said that the Lessees were the cause of the poor management in relation to lack of works.

However, that was largely an issue with the previous freeholder and the disrepair of the Property was in any event not a complete answer to the arrears of service charge and was in danger of remaining if service charges were not paid. Albeit that the Tribunal accepted the impact of disrepair on ability to let Flats in the Property, and their rental value, it is fundamental that service charges are paid.

65. Mrs Campbell in particular said that there was loss of income from rental and an impact on ability to pay service charges. However, all else aside, that did not entirely accord with her own oral evidence. She said that her personal circumstances had changed with a need to reduce work hours due to caring for an elderly relative and that caused financial strain.

66. The Tribunal finds that the Respondent did not attempt to make progress with the major works in the manner that it ought. The time period from July 2019 to February 2020 to reach the service of the Notice of Intention was too long. The time period from February 2020 to July 2020 was not unreasonably long in the context of the Covid-19 pandemic but the time period from July 2020 onwards was unacceptably long, notwithstanding the impact of winter some months into the period. However, that is tempered considerably by the fact that if the Respondent had been unable itself to fund the shortfall in the cost of the works as compared to the amount in the service charge account, the works could not have been undertaken. Another lessor might well have sought to recover unpaid service charges and delayed the works until sufficiently in funds, which the Respondent did not do.

67. Nevertheless, the Respondent's obligation to deal with the repair works was not determined to be contingent on the Applicant and other Lessees having paid all of the service charges such that payment was a condition precedent- and so the Lessees' breach did not relieve the Respondent of its obligations to repair under the Lease.

68. That said, in practice, payment of service charges or lack of it will invariably be very relevant because of the inevitable need for funds. The Tribunal had some sympathy for the position in which the Respondent was placed where the Lessee demanded works but did not provide sufficient funds from service charges due. Albeit that a breach has been found, the context was very relevant as to it being just and convenient to appoint a manager.

69. Notwithstanding the degree of sympathy to the Respondent, there is a different but not unrelated point as to whether the Respondent ought to have more vigorously pursued non-payers of service charges and so ensured that the unpaid funds unpaid were recovered. There was no evidence provided that the Respondent had, through its agents, made its best endeavours to recover sums owed. However, that was not addressed by either party and so is not a point about which the Tribunal considers it appropriate to comment further.

70. The Tribunal is not persuaded by the Applicant's argument, raised in both the Skeleton Argument and in closing, that the undertaking of the works was a consequence of the proceedings. The application is dated 4th February 2021. Erection of the scaffolding commenced Mr Crowley said in unchallenged evidence, on or about 25th January 2021- as his email a week before that had stated. That scaffolding could not simply be conjured up The Tribunal therefore infers that a scaffolding contractor must have been contacted on behalf of the Respondent somewhat earlier and finds it very unlikely that a contractor was able to deliver at just a few days' notice.

71. The Tribunal therefore accepts the most likely situation to be that the Respondent was prompted to act by the service of the section 22 notice at the end of November 2020. which the Applicant appeared to assert, save that in closing it was said the notice did not have any effect. Mr Palfrey said that following the Notice the Respondent was all systems go: Mr Fieldsend asserted all systems were not go until the application. The Tribunal did not entirely agree with either but determined as stated above. There is no evidence of action between July 2020 and the Notice. There was activity after that, albeit that there was an initial lack of communication of that by the Respondent- see further below. The evidence of Mr Godden that he did not consider it important to engage with the Lessees, as Mr Fieldsend summarised it and the Tribunal considered fairly, as to the action being taken was disappointing.

72. The Tribunal infers that the threat of proceedings prompted the Respondent to act despite holding insufficient service charge funds, because its officers the threat of proceedings outweighed in the Respondent's officers' minds any potential ability to argue that they could continue to wait for the service charge account to be brought sufficiently up to date to provide the funds required.

73. One aspect raised by the Applicant was that Mr Crowley did not have the specification of works in January 2021 and asked for a copy. The Tribunal did not find that fact to be of great note. It would plainly have been better for him to have already held one but the absence of that does not affect the outcome of this application. Requesting one from the Lessees was not an unreasonable approach of wider significance.

74. The Tribunal noted the point made by Mr Palfrey in closing that the time for remedy of a breach provided in the section 22 notice does not of itself make that time the reasonable one for compliance with the requirements in the notice. That is unquestionably correct in itself and in as far as it goes. The party serving a section 22 notice is able to state the date(s) by which the recipient should take the stated steps. In principle, that party could set any date. However, there is also an opportunity for the recipient to reply to the notice and assert the date not to be a reasonable one. The Respondent's position was not helped at all by a lack of response within the time indicated.

75. The Tribunal is mindful that works of the nature involved in the major works to the Property would necessarily take some time. More pertinently the Respondent was required in the notice to schedule the works to start in late March/ early April (Schedule 2), which the Respondent did. There was no specific compliance time limit in Schedule 4. The particular point taken did not, the Tribunal considered, go anywhere.

76. Despite generally poor communication in response to the notice, the Tribunal accepts that correspondence was written on behalf of the Respondent stating that scaffolding for the purpose of the works was to be erected imminently on 18th January 2021 and that further correspondence was sent on 18th February 2021. The Applicant nevertheless proceeded with the case. The major works continued, as they must have been programmed to do, to the point of being mostly complete as at the hearing date.

77. In terms of whether the failure to make progress with repairs more swiftly reflected a failing by the Respondent specifically or by its agent, the responsibility under the Lease to the Lessees lay with the Respondent. The point was relevant as to whether identification of the principal culprit assisted with the question of whether the management of the Property would be undertaken appropriately in the future by the Respondent in conjunction with its new agent.

78. There was, and it was not a great surprise to the Tribunal, contradictory information given in communications from Bridgeford and Co to the Lessees as compared to the witness evidence of Mr Godden. Bridgeford and Co said in emails that they were awaiting instructions and had to chase Mr Godden. Mr Godden said in evidence that the fault lay with Bridgeford and Co and that he had been chasing them and been frustrated by them. Mr Fieldsend criticised a lack of disclosure of communications between Bridgeford and Co and Mr Godden which might have shed further light.

79. The Tribunal did not have the advantage of hearing from anyone at Bridgeford and Co and hence was only able to read the contents of particular emails disclosed stating that the Respondent had been chased about certain specific matters. Those emails were not direct evidence given to this Tribunal and there was no ability to test whether the comments made would have stood up to challenge in questioning. It would hardly be the first time that someone on the frontline of communication with dissatisfied parties sought to blame another more distant party, irrespective of the accuracy of that. The Tribunal considered it appropriate to apply some caution in respect of the comments in the emails for those reasons but could not be entirely confident as to Mr Godden's account either.

80. The Tribunal finds on balance that Bridgeford and Co were not as proactive as they ought to have been. However, the Tribunal also finds that the Respondent was slow to get to grips with the position following

its purchase of the Property and that there were times when Bridgeford and Co were without specific instructions required which could and should have been provided sooner. The Tribunal infers that the lack of any other relationship between Bridgeford and Co and the Respondent did not assist communication between the two. The Tribunal finds some, but not all, of the fault lay with the Respondent.

81. Whilst dealing with the managing agent for the Property, it is convenient to address the reason for the change of agent from Bridgeford and Co to Tersons. The Applicant's case was that it was only in consequence of the section 22 Notice and threat of proceedings, that the Respondent finally got around to addressing failings of the previous agent. The Applicant's solicitors so asserted when first contacted by Mr Crowley by his email 21st December 2020, at which time they were very firm that proceedings would be issued in the New Year.

82. The Respondent's case as given in the evidence of Mr Godden, was that Mr Godden had previously contacted Tersons about taking over management of the Property as the Respondent had previously instructed Tersons as its managing agent in relation to other properties owned by the Respondent or other companies controlled by the Godden family. Mr Godden said that in November 2020 the person at Bridgeford and Co who had dealt with the Property, Julie Hansford, would be ceasing to do so and there were other changes, so there was a need for someone new to get to grips with it. He said it was therefore a suitable time to transfer management to Tersons.

83. The Tribunal noted that Mr Crowley, by email dated 18th February 2021 to the Applicant's solicitor gave a different explanation, namely that there was a problem with water ingress into Flat 2 preventing letting of that and Bridgeford and Co had not dealt with it, causing frustration to Mr Godden. The Tribunal can understand why the Applicant and others of the Lessees might be doubtful as to the reason for the change of agent, compounded by that discrepancy.

84. However, on careful balance of the evidence as a whole, the Tribunal accepted the explanation given by Mr Godden as being essentially correct, whilst finding that of Mr Crowley in his email to also be correct- in effect, the Respondent was frustrated at loss of letting but the staff change tipped the balance. The Tribunal does accept the point made that the failure of the Respondent to explain in advance that it was changing managing agents and its reasons was at best unhelpful against the background of poor historic management-.

85. For completeness and whilst addressing the above point, the Tribunal did not consider it illogical for the Respondent to have retained Bridgeford and Co for at least a period after the Respondent purchased, given the company's experience of the Property.

Breaches and other relevant circumstances in respect of financial matters/ accounting

86. It should be said at the outset that there was no suggestion that Lessee money had not been held appropriately or that any had been misappropriated by the Respondent or its agents. There were no other issues about the day to day dealings with the money received and held on trust for Lessees.

87. A number of points were raised on behalf of the Applicant, including misleading accounts, contributions other than from the Lessees, reasonableness of contributions provided for by the Respondent, the appropriateness of apportionment and the opaqueness of financial dealings, in addition to reasonableness of charges.

88. Whilst it was argued on the part of the Applicant that the accounts were unclear- indeed it was suggested they were misleading- as to there being a shortfall in terms of service charge funds, the Tribunal did not find them to be. It was apparent that the sum accounted for as the service charge amount in the accounts dated 24th March 2020 consisted on the one hand of money actually received and on the other hand service charge arrears.

89. It was clear to the Tribunal that the total assets shown in the 2020 accounts including those sums due but unpaid was £113,411.00. However, in cash terms, the account had as at 24th March 2020 stood at £72,239.00. Mr Crowley and Mr Baker understood that, their evidence indicated. The £41,172 difference was the sum stated to be arrears, i.e. unpaid money which was owing and due and was set out in the accounts accordingly. There was no failing on the Respondent's part in that regard. There was plainly a significant shortfall in service charges paid by the Lessees. As noted above that sum unpaid had the effect that the service charge fund could not pay for the major works. The Lessees were pressing for work but had not complied with obligations to pay service charges to fund it.

90. Mr Fieldsend submitted that if the Lessees had been asked what funds were available, they would have been likely to say £108,000, being the figure given for the sinking fund. However, that would have required them to ignore how the figures shown as funds were represented by assets on the same page of the accounts and to ignore the figure for service charge arrearswhere Lessees in arrears would plainly be aware of their arrears. To any extent that Lessees who may have failed to pay service charges due did not realise that their failure to pay was relevant, that is no excuse for their failure.

91. The Tribunal also observes that even if the fund had actually held £108,000, that would still have been insufficient to pay for the major works if the Respondent did not top up with its own money.

92. The principal points as to financial matters raised in the Notice and that identified in the Skeleton Argument, and at the heart of the Applicant's actual case, were that the Respondent (and the previous

freeholder), had failed to ensure that all Lessees plus the freeholder contributed to the costs incurred and as to contributions relating to adjacent or neighbouring properties. The Notice referred to the accounts for the years ending March 2017, 2018, 2019 and 2020, although plainly there could be no breach by the Respondent at the time of production of the first three sets of accounts, which pre-dated its ownership.

93. The Tribunal agreed with Mr Palfrey's interpretation of clause 4 of Schedule 5 of the Lease, namely that any adjustment in contributions to take account of money received from owners or occupiers of "adjoining or neighbouring properties" means properties outside of 27-31 White Rock and not adjoining or neighbouring the given Flat owned by any Lessee.

94. Therefore, any adjustment which would be required would only be relevant in the event of there being any such adjacent properties from which any contributions were received for a relevant service. Such properties to be adjoining or neighbouring the "Landlord's Property" i.e. the whole of 27-31 White Rock, rather than any part within it. It is apparent from the Notice that the Applicant's case treated the ground floor commercial units as such properties, when in fact they formed part of the Property. The Applicant could not gainsay the Respondent's case that there had been no such contributions from neighbours of the Property. There was no breach by the Respondent found by the Tribunal on the point.

95. The Applicant's position was that the Applicant and the Lessees were concerned because their cumulative contribution to service charges pursuant to the provisions of their Leases was 100%, on the face of it leaving nothing left to be paid and hence it was perceived that no contribution was made by the commercial units. The Applicant argued in his Statement of Case that there was no allowance made for any sum received from the Commercial Lessee or the benefit retained by the Respondent from occupation of 30-31 White Rock. The Notice had said that no payments were shown in the accounts. Accordingly, the Lessees considered that they were being charged unreasonable sums.

96. A question arose as to whether or not the Respondent was obliged to contribute to the service charge funds and whether any lack of such requirement was relevant to the question of appointing a manager. As noted above, the provision said to be contained in certain of the Flats' leases, albeit not the Lease, was that the Respondent must contribute the sum in its "absolute discretion" deemed to be "fair and appropriate".

97. Mr Palfrey argued that there was a requirement on the part of the Respondent to contribute pursuant to other Flat Leases, albeit not that for the Applicant's Flat, such that there was no deficiency and nothing else needed to be done to address any perceived, by the Applicant, issue as to that. He submitted that the relevant provisions provided that the

Respondent would determine its contribution and that the Lessees would pay their percentage contribution of the balance remaining after that.

98. The evidence of Mr Godden was that the Respondent would be happy to pay service charges on an ongoing basis and had considered that the appropriate level of contribution by the commercial units in total was 20% of the overall service charge budget sum (although his more precise figures totalled 19.9% save in relation to insurance). 9.95% was charged to Parker and Bell as being the contribution the Respondent considered fair: the same sum was charged to East Kent Leisure. Consequently, the Lessees contributed 80% of the overall sum. That contribution was then divided between the Lessees in the agreed varied proportions, totalling 100% of that 80%. Hence, whilst the Lessees between them pay 100% of the contribution to service charges paid for the Flats, that was not 100% of the overall total.

The Tribunal pauses to mention that Mr Godden also gave evidence that the percentage contribution was varied in relation to cost of insurance. He said that the Lessees had been charged 72% of the cost of the insurance, explaining that as the commercial units had a higher potential draw on the insurance, the Respondent had considered it appropriate for them to pay more, although split 10% to units 30-31 and 18% to Parker and Bell. The distinction between the two was said by Godden to reflect the terms of the Commercial Lease but principally the fact that there was presence on site at 30-31 twenty four hours each day and so, it was said, the risk in respect of that unit was deemed lower. Mr Godden was pressed about those matters but the Tribunal considered the approach a logical one and does not consider the point significant provided that it does not impact on the Lessees. That same overall split had been provided to the Applicant in the email to him from Bridgeford and Co dated 23rd September 2020 mentioned above. In itself, that demonstrated that the Lessees were not funding the entirety of costs.

99. Mr Palfrey also contended that the manner in which the commercial units fed into the overall payments towards the service costs was that the Respondent, being obliged to make a contribution to service charges- or equivalent- for the Property, was then able under the terms of the Commercial Lease, to recover "a fair proportion" of that contribution from the Commercial Lessee. That is consistent with the Commercial Lessee being required to pay in respect of 27-29 White Rock, such part of the overall commercial premises as it occupied.

100. He asserted that made no difference to the amount payable by the Lessees, whose individual contribution remained the agreed percentage, as varied in 2018, of the collective service charge contributions payable by them after the top-slice payable by the Respondent had been removed. The fair contribution was, Mr Palfrey contended, solely a matter of division of the amount payable by the commercial units between the unit retained by the Respondent and the

unit leased to the Commercial Lessee. He noted also that the Commercial Lease post-dated the Flat Leases as well as their variation- so at the time of those, it was simply provided that the freeholder would pay a contribution in respect of all of the commercial premises and necessarily no reference was made to the terms of the Commercial Lease only entered into at a later date. Mr Fieldsend was not, the Tribunal found, able to argue against that on the available evidence. The Tribunal determined the position as set out by Mr Palfrey to be correct.

101. That still left the fact that the Respondent had absolute discretion to pay such sum as it regarded as fair and appropriate, which was somewhat imprecise. Nevertheless, that is what the Flat leases had always provided for. The provision had not been altered when the Flat Leases were varied as recently as 2018 and no evidence was given that any such change to the provision had been sought by the Lessees. Mrs Campbell said in evidence that she considered the apportionment between the Flats was unfair, notwithstanding the agreed variations but taken in the simplest way, that was not part of the Applicant's case.

102. Mr Fieldsend argued that no thought had been given as to whether the contribution by the Respondent was fair and reasonable and simply the approach taken by Bridgefords had been adopted. The Tribunal finds that the evidence was quite unclear as whether or not thought had been given to the percentage but that of Mr Godden suggested a degree of thought had been applied. Whilst the position was less than wholly satisfactory, the Tribunal determined that the Applicant had failed to demonstrate that the approach taken by the Respondent had not resulted in a fair contribution. The Tribunal considered that if the Respondent in due course operated the distribution of contributions to service charges in a manner which the Lessees considered ought to be challenged, the Lessees could do so through the usual section 27A application to the Tribunal. There was no failing in the Lease and that mechanism was ample. The possibility that there might be an issue in the future was not considered by the Tribunal to be a point in favour of the appointment of a manager, not least where other protection would operate.

103. Nevertheless, there remained the issue of the accounts, or other financial information, not showing payments or other matters related to the commercial units, hence the Lessee's belief that there were no such payments. As Mr Fieldsend correctly submitted, if one looks at the accounts, there is nothing to indicate that the commercial units were shouldering any of the costs and only in the hearing was it explained that the Lessees bore 80% (or 72% in relation to insurance). That was a better point.

104. The accounts relate to the service charge statement issued by the Respondent to the residential Lessees. They would not be defective for failure to show sums not relating to such statement and it is not obvious that there was a breach of the Lease. However, there is no hint

that any other document explained the interplay of commercial unit contributions and residential service charge contributions or that any figures had been adjusted to take account of that.

105. It is only right to say that the position as described on behalf of the Respondent and accepted by the Tribunal would not have been obvious to the Applicant. There was a significant failure on behalf of the Respondent to explain the approach taken, directly leading to an issue which might have been avoidable had the position been explained and demonstrated rather better. The Respondent might helpfully learn a lesson for future dealings. For the avoidance of doubt, the Tribunal did not find a breach in relation to financial matters but did consider there to be a relevant circumstance and of some significance.

106. Mr Fieldsend additionally argued that nowhere in the accounts was there recognition that the debt related to Flat 2 had been assigned to the Respondent. It can fairly be said that there is no identification of the specifics of other debts either and so that is not particularly surprising. However, it is a matter which ought properly to have been apparent from other related documentation. Mr Fieldsend made the sound point that the debt was also first mentioned during the hearing and then in round terms.

107. The explanation given as to how that debt had been dealt with was that the sum owed had been offset by the Respondent against the money that it was owed by the service charge account for the cost of insurance. Aside from the sum in the reserve for the major works, Mr Godden said- and the Tribunal accepted from the accounting information- that there was insufficient in the service charge account to pay for insurance, such that it had only been possible to pay for the insurance from the Respondent's own funds. He said that the inherited debt of Flat 2 had been offset against the sum paid for insurance. The figures given by Mr Godden were imprecise but the Tribunal records, without accepting their accuracy, that he indicated approximately £18,000 shortfall on the service charge account as against the costs of insurance, which the Respondent had met across 2019 and 2020, as being 72%.

108. With regard to that, Mr Fieldsend advanced a point in relation to double- accounting as he described it in cross-examination of Mr Godden and at some length, which Mr Godden rejected. Mr Fieldsend did not pursue the point in closing and so, save to say that the Tribunal did not find that specific point a good one, it appears unnecessary to deal with it at any greater length.

109. Nevertheless, although the fact of the offset was not obviously inappropriate in itself, the fact that the only evidence of it was that given orally by Mr Godden was unsatisfactory. The Tribunal did not understand there even to be a statement of account for Flat 2 to show the effective payment of the arrears was made. The lack of transparency and the inability of the Lessees to know that the Respondent had acted as it had was a relevant circumstance.

110. In a similar vein, the accounting for the 9.95% contribution of East Kent Leisure was not wholly clear. However, on balance the Tribunal considered that was not particularly relevant to determination of this application. It is for the Respondent to contribute from the perspective of the Lessees and its method of re-charge to a group company does not alter the obligation as regards the Lessees.

111. The Applicant additionally had concerns in relation to the cost of insurance for the Property demanded of the Applicant and the Lessees through the service charges by the Respondent. It was of some relevance that- the Respondent's case argued and the Tribunal accepted- the previous freeholder had not discernibly charged the Lessees for the cost of insurance. As to why not was not apparent. The inevitable effect was that from 2019 the Lessees faced a new cost from the Respondent, and it is apparent from emails sent that the increase in service charge was, understandably, a cause for concern. Between that and funds for the reserve account, the Applicant said in evidence that service charges doubled. Inevitably, that increase in the service charge was substantial, but that arose from the Respondent charging a cost it was fully entitled to in principle in relation to insurance and where major works were being consulted on with a view to them proceeding. The Tribunal agreed that there had been a lack of information provided about the increase by the Respondent, as Mr Godden conceded.

112. The issue as to provision of policy documents is mentioned below.

113. The Applicant argued that the cost of the insurance was excessive. Mr Baker had obtained an alternative quote which was somewhat cheaper. As often occurs, it was identified that the basis for that quote and the actual insurance cover were not the same. The Tribunal did not find the alternative quote of assistance**.**

114. Mr Godden also said in response to Mr Fieldsend's questions, that his mother had been refused insurance in the past and that was required to be declared on applications. He said that the reason for refusal had related to a dispute as to settlement of a claim under a different policy elsewhere. Mr Fieldsend submitted that was likely to have led to an increase in cost and Mr Godden accepted that. There was no actual evidence that the insurance cost had increased or, if so, by how much. The Tribunal considers that different insurers may take different views of refusal based on a dispute about a claim. It was apparent, however, that the Lessees were unaware of the issue with the previous refusal to insure and equally that the Respondent had charged the full cost of the insurance without consideration of the reasonableness of that course of action. The Tribunal infers from the evidence received that the Respondent had not enquired whether any increased premium had resulted or, if so, to what extent.

115. There could consequently be an unreasonable service charge in relation to the cost of insurance. However, Mr Palfrey was able to point to other

errors with the facts presented by Mr Baker in obtaining a quote and there was far from sufficient evidence for the Tribunal to assess any impact of the particular dispute and the refusal. The Tribunal determined it had not been demonstrated that the insurance cost was excessive creating an unreasonable service charge. The question is another one which could be addressed if the Lessees were to make an application pursuant to section 27A of the 1985 Act.

116. The insurance cost is a nevertheless a circumstance of potential relevance. Such documentation as there may be related to the application for insurance including the previous refusal is, the Tribunal considers, a related document as provided for in the Code and the Tribunal finds such documents ought to have been supplied. The Tribunal finds there to have been a further breach of the Code to that specific extent.

117. It follows from the above that the Tribunal did not find that there had been a breach by the Respondent in relation to financial matters, even though dealings were less than satisfactory. There were relevant circumstances that fell a long way short of the Applicant's case as advanced but meant there were matters which nevertheless required careful consideration as to whether an appointment ought to result.

Communication

118. The Applicant alleged that the Respondent and its agents had not responded to correspondence or had not adequately done so.

119. One specific element in relation to the major works raised by the Applicant was that it was said he had not received the consultation documents in 2020. The Respondent's case was that they had been posted to the Applicant's Flat.

120. As referred to above, the Applicant's evidence indicated that he had altered the postal address of the Applicant's Flat and had contacted Royal Mail. However, there was no evidence that he had informed the Respondent- he assumed it had happened on completion of the conversion but could provide no evidence that was correct- and had certainly not altered the address at the Land Registry. The Tribunal finds it entirely possible that posted communications did not reach the Applicant's Flat for that reason.

121. In any event, the Applicant argued that the Respondent should have sent any communications about the consultation to him by email. His case was that he informed Bridgeford and Co to do so. The Tribunal considers that to the extent there was a failing, that failing was one by the former managing agent. There is no evidence that the Respondent itself was aware of those matters. It is a matter which it was reasonable to expect an agent to be able to attend to.

122. However, the Tribunal finds that in any event, there was no breach of the Lease or the Code on behalf of the Respondent. The parties agreed how notices were to be served within the Lease, that was not formally varied and there was no provision for service by email. The posting of the notices accorded with the provisions agreed in the Lease.

123. It is not satisfactory that the Applicant was not aware of the consultation carried out on behalf of the Respondent. However, where there is no evidence of awareness on the part of the Respondent and where the former managing agent is no longer engaged, the Tribunal does not find that the point takes the case further in relation to future management.

124. Whilst the Tribunal has found that arrangements were made on behalf of the Respondent to deal with the matters raised in the section 22 notice, that was very much behind the scenes. There was a failure on the part of the Respondent to reply to the section 22 notice and to explain the Respondent's position and the steps to be taken. There was the failure to inform about, and the reason for, the change of managing agent, as noted above. The Tribunal finds all that contributed to the belief held by the Applicant and any other Lessees that the Respondent was continuing not to engage and appropriately respond.

125. More generally, there was considerable complaint from the Applicant about telephone calls to Bridgeford and Co not being returned, extending into and through 2020. Similar issues were also said to have arisen with emails. Communications involving the Applicant's letting agent indicate that the agent complained of similar problems. That is very unsatisfactory, whatever the cause may have been.

126. Mr Crowley was able to point to communication with the Lessees from the end of 2020 onwards, the first of which was dated 18th January 2021 and explained about Tersons' appointment and steps to be taken, including scaffolding being erected only one week later. The next communication was 18th February explaining that more scaffolding was needed due to the weather and the ground being too wet for ladders. Mr Crowley said at the start of the email that an update was "timely", with which the Tribunal agrees.

127. As Mr Fieldsend observed, there were three communications across a period of three months and the first was a month after the section 22 Notice. Mr Fieldsend submitted that whilst a plan was said to be in place by the end of January 2021, that was not communicated to the Lessees and he submitted that communication ought to have been engaged in with the Lessees so that they knew what was required. More generally, he suggested that Mr Crowley struggled to recognise that, and it was a failing on Mr Crowley's part.

128. Whilst the Tribunal did not regard that level of communication as perfect- and there was certainly some merit to the argument that the poor historic dealings might have reasonably pointed to a need to go an

extra mile or two to reassure the Lessees that any historic issues were just that- the Tribunal considers the approach to communication with the Lessees by Mr Crowley was within a satisfactory range. It was not long after its appointment that Tersons first wrote and the Lessees were then given an update when there was a change to the plan for completing the major works. Plainly that level of communication falling within an acceptable range is set against a background of there being threatened and then actual proceedings, such that demonstrable lack of communication would have been unwise.

129. Given that the involvement of Tersons has been in the quite particular circumstances of a section 22 notice and subsequent proceedings and where solicitors are acting on both sides and corresponding, it is inevitably difficult to know how good communication might have been otherwise. However, having heard the evidence of Mr Crowley, the Tribunal is sufficiently satisfied that communication is likely to be acceptable that the issue does not assist the Applicant in relation to future management and the appropriateness of appointing a manager.

130. Both Mrs Campbell and Mr Godden referred to the potential purchase of her Flats by the Respondent. It was put to Mr Godden that he did not reply to Mrs Campbell. Mr Godden said the price quoted was too high and so there was no point. Whilst the Tribunal accepts that may have been strictly correct and the potential purchase of Flats is not directly relevant to this application, it was another example of the Respondent's failure to explain the approach taken by it.

Other potential breaches and matters meriting mention

131. It will be appreciated that the above consideration has dealt only with matters related to breaches 1 and 2 as set out in the Notice, plus a wider issue, but not a specific breach, in relation to communication.

132. That leaves seven other breaches, about which relatively little was said. The Respondent had admitted two of them, breaches 5 and 7, as set out above. There was a discrepancy, but not one that the Tribunal found especially significant.

133. In relation to breach 6 as alleged in the Notice, a programme of planned and cyclical works, Mr Crowley dealt with his intended approach to management and said he had visited the Property, and this was not challenged. He stated that he wished to ensure the major works were dealt with so as to demonstrate action and then issue a budget and plan, which he would use as a platform to engage with the Lessees. Mr Baker said in evidence when asked by Mr Palfrey about those plans, that there was nothing that he would add. There was no discernible dispute that the steps which the current managing agent considered appropriate as to future works were so appropriate. The Tribunal considered there to be insufficient evidence that such matters had been

adequately addressed previously but also found there to be no current breach.

134. Original breaches 3, 4, as to fire safety and electrical safety were mentioned only to a very limited extent in evidence and to an even lesser extent in the submissions of each Counsel. Mr Palfrey noted there was a Fire Risk Assessment per 8.4 of the Code (breach 3) and that the issue as to electrical equipment per 8.7 of the Code (breach 4) related only to access to meters. The Tribunal considered the weight of the matters to be very light in contrast to other factors and of little or no impact of the Decision.

135. Breach 7 as to insurance documentation was mentioned but focus was far more on the increase in the service charge because of the Lessees starting to be charged the cost of insurance and the amount of that cost. The insurance information had been provided if rather belatedly- it had certainly been requested by the Applicant by email 14th September 2020, aside from any other requests and emails from Bridgeford and Co stated a request had been sent by them to Mr Godden.

136. More notably, Mr Godden's evidence in relation to this element was less than satisfactory. He avoided straight answers which he may have perceived as unhelpful to the Respondent until specifically pressed. He had no explanation for failing to provide the insurance documents to Bridgeford and Co. The Tribunal found that he regarded the request as inconvenient, failed to appreciate the Respondent's obligations and that there was a breach of the Code, although that breach was less significant than other factors.

137. Breaches 8 and 9 as to the provision to the Lessees of the address of the Respondent in England and Wales were denied by the Respondent. The Tribunal found that given a specific Notice was only sent to the Applicant dated 25th March 2021 the appropriate details of the Respondent were provided in a Notice extremely late and just before the hearing. They had not been provided by the next rent date after purchase or otherwise within two months as required by paragraph 13.5 of the Code, not by a long way.

138. However, the Tribunal considered that the Respondent's name and address had been provided with the service charge invoice in April 2020, in which the Respondent was described as the landlord and its address for service of notices was provided. It was not apparent from the bundle whether the name and the address for service in respect of notices had been provided with any earlier invoice or statement of account or otherwise. The name had been provided in July 2019 by the solicitors for the former freeholder, although that was insufficient. It is apparent from email correspondence from the Applicant that in May 2020 he remained unclear as to the freeholder's identity and the connection between the Respondent and the name given at the time of the sale but that did not create a breach. As the landlord's details had

been provided, the Tribunal did not find the asserted breach as at the date of the section 22 Notice to be made out.

139. It necessarily, and significantly, followed that insofar as the Lessees would not have been liable to pay rent and other charges until the name and address for service were provided, they had been and hence the sums had been due and payable.

140. Certain other matters were frequently referred to in the written cases and at the hearing. The Tribunal has concluded that those ought to be briefly commented on. None of them assist the Applicant in establishing it to be just and convenient to appoint a manager.

141. A specific issue was raised by the Applicant in relation to the decking which formed the access to the Applicant's Flat. That decking had been laid by a contractor instructed by the Applicant and placed on top of the flat roof of the commercial premises where those extended back beyond the original building. The Applicant's tenant slipped on the decking in March 2020, although the Applicant said in evidence that he was not aware of that until much later, and subsequently the tenant's father cleaned the decking with a jet hose, which the Applicant accepted anyone could do. The evidence of Mr Frembgen was that he had contacted the previous freeholder in relation to the laying of the decking and had been given consent for that, which the Tribunal accepted in the absence of evidence to the contrary. However, there was no evidence that the Respondent, or its predecessor, in giving that permission had agreed to take responsibility for maintaining the decking.

Mr Fieldsend's argument on behalf of the Applicant was that the decking was able to be accessed from a staircase leading from the commercial unit at 30-31 White Rock and then out through a fire door. The Applicant said the door led from a bathroom for the amusement arcade for emergency exit. It was argued that the decking was therefore a "Communal Area" pursuant to 1.2 within the Definitions in the Lease and hence for the Respondent to attend to. The Tribunal notes that Mr Godden's evidence that the staircase to the external door was capped off internally was not challenged in further cross-examination and no other evidence was received, on which basis the evidence is accepted as correct. The Tribunal notes, however, that others could have accessed the decking in the same way as the Applicant's tenant. The Applicant's case was also that the decking was part of the "Structural External Parts" of the Property pursuant to 1.19 in the Definitions.

142. The Tribunal does not agree with those propositions. Whilst the roof was part of the structure and exterior of the Property and a communal area, the Tribunal finds that the decking was not, being placed on the Property and laid over the roof area, whether accessible or not, solely for the purpose of access to the Applicant's Flat. The Tribunal considers that the responsibility of maintaining the decking lay with the Applicant on whose behalf it was laid. The Tribunal does not find there

to have been a breach by the Respondent in relation to that decking and finds nothing in relation to the decking which supports it being just and convenient to make an order for the appointment of a manager.

143. There was also some time spent in communications and at the hearing in relation to pigeons nesting and related issues. The cliff face is just behind the Property. It is not in dispute that the cliff and its ledges attract pigeons nesting. In addition, the Applicant fitted solar panels to the roof of the Applicant's flat. He did not fit any mesh/ netting. The pigeons had apparently found there to be convenient places to nest to the edge of the panels, with a number of unsurprising consequences. The Respondent case was that dealing with netting and any related issues was a matter for the Applicant, the lack of netting having been the cause of the problems experienced.

144. The Tribunal does not find it useful to say much about this element of the case. However, it had plainly been the Applicant who had decided what to fit and what not to fit, with no identifiable involvement from any other party. Suffice to say, the matter did not assist the Applicant in persuading the Tribunal to make an order appointing a manager.

145. Another issue was raised about what was said to have a piece of scaffolding pole which it was said fell onto the balcony of a flat and broke a table. Emails were referred to. The Applicant had no direct knowledge and relied on an email from the particular Lessee. The Respondent through Mr Crowley stated that the item which fell was not a piece of scaffolding but rather a piece of dislodged cement fillet.

146. The Tribunal does not seek to address any details of the dispute or make any finding. There was not, the Tribunal finds, a breach of the Lease or the Code whichever way and neither is there a circumstance otherwise relevant to the appointment of a manager. The answer to what fell and exactly why it did does not matter in relation to future management of the Property. Hence no finding is required.

147. Finally, the Applicant argued that Mr Crowley was conflicted by the extent to which Tersons are instructed by the Respondent, in particular where the Respondent's contribution is not prescribed.

148. However, the Tribunal did not regard that as producing a conflict. Simply, the managing agent is just that, an agent for the Respondent, from whom the instructions necessarily flow. Concerns as to the approach taken by the Respondent are very relevant, including as to impact on management by the agent. Conflict of interest is not.

Consideration of whether it is just and convenient to appoint where matters have been identified as relevant to that

149. The combination of the admissions made on behalf of the Respondent and other findings made are such that the Applicant has comfortably stepped over the low threshold such that in principle an appointment of

a manager could be made, provided it was determined to be just and convenient.

150. Mr Fieldsend commenced his closing submissions by re-iterating paragraph 44 of his Skeleton Argument, which quoted the uncontroversial statement in *Queensbridge Investments Ltd v Lodge* [2015] UKUT 635 (LC) that, "tenants of residential units which constitute part of a building are entitled to expect that the building will be properly managed including in particular repaired (especially so as to keep the building safe) and insured." Whilst that statement was made in the context of issues arising with the particular mixed-use building dealt with in that case, the Tribunal accepts that the sentiment applies the same for any residential building- including this one, which is also mixed-use. The Tribunal is entitled to consider whether the appointment of a manager is just and convenient mindful of that.

151. There had undoubtedly been failings historically and prior to the purchase of the Property by this Respondent. Whilst the Tribunal had sympathy for the Lessees in those circumstances, the Respondent could not be held responsible for those failings prior to its purchase. Ownership changed from the freeholder at the time of concerns originally arising to the Respondent as a wholly unconnected company.

152. The Applicant's perspective and that of other lessees was clearly significantly influenced by those historic failings. For the Tribunal, approaching matters as at the hearing date, the unsatisfactory position prior to mid- 2019 was simply part of the backdrop against which to view the question of breaches by the Respondent and other relevant circumstances. In principle, the change of ownership might be anticipated to be a positive and to weigh against a manager requiring to be appointed. In the event, the change had not produced obvious positive effects, at least until this year.

153. There have been a number of matters which the Tribunal has found do not take matters further than the key ones in respect of answering the question of whether it is just and convenient to make an order appointing a manager. That is not to say that they were irrelevant as part of the wider picture or to entirely disregard that wider picture. However, the focus of the Tribunal is on those matters which may be determinative as to whether or not the appointment of a manger should be made.

154. The Tribunal has found breaches by this Respondent after June 2019 in relation to works to the Property but some way less than the Applicant's case. Concern of the Tribunal as to repair matters was, as explained above, significantly tempered by the shortfall in service charge funds and the subsequent undertaking of works notwithstanding that.

155. Breaches with regard to financial matters are, inevitably, a cause of real concern. However, whilst the Tribunal found unsatisfactory elements, principally lack of clarity, it did not find a breach. There has also been

concerns accepted in relation to communication with the Lessees and a breach in relation to provision of insurance documentation. Other matters have been found of only marginal relevance in this instance.

156. Whilst those matters were not over an especially long time, they do cover the period since the Respondent purchased the Property. There was not a time during which the Respondent owned the Property that no breach of the provisions of the Lease and Code arose and in which all else was well. It cannot be said that the Respondent managed the Property well for the first eighteen months or thereabouts.

157. The point in relation to historic matters, having found there to be a breach (or other circumstances), lies with the assistance that provides to the Tribunal in determining whether future management of the Property will be acceptable in the absence of the appointment of a manager. If the Tribunal considers that, irrespective of the previous failings by this Respondent, the future management will be appropriate, the considerable interference with the rights of the freeholder which arises from the appointment of a manager would not be appropriate.

158. Given the finding by the Tribunal that the threat of proceedings and the proceedings being instituted was relevant to the actions of the Respondent, inevitably a key consideration was whether acceptable management would continue following the end of the proceedings and once the "exposure of the management to scrutiny", as Mr Fieldsend put it, by the Tribunal was no longer faced. Just as inevitably, the Applicant argued that at that point the Respondent would adopt the historic standard of management or thereabouts creating fear for the future- although much of that historic standard related to the previous freeholder and not this Respondent.

159. In that regard, the initial response to the Applicant and Lessees regarding the section 22 Notice did not inspire an abundance of confidence. The Tribunal has found that the Respondent did not take the opportunity to address matters in the absence of proceedings in the manner it ought to have by way of communicating with the Applicant and addressing the issues raised in a clear and constructive manner. Indeed, viewed from the perspective of the Applicant, there was limited progress for several weeks (albeit this included the Christmas period). That could properly go to support the making of an order appointing a manager. However, the Tribunal has found that perspective reflects on that which the Applicant could see and not the whole story.

160. The Tribunal has accepted that once Mr Crowley was engaged, steps were put in place for the major works. They were commenced and carried out in a reasonable timescale from that point. There were communications, including as to scaffolding. There were important matters, including accounting ones, outstanding, but there was demonstrable progress in contrast with previous dealings.

161. The likely approach to the undertaking of future repairs was not considered by the Tribunal to cause a management order to be just and convenient. After the major works are dealt with there is no evidence that more than routine maintenance will be required for the foreseeable future or that, provided there are sufficient funds, any issue is likely to arise with the organising of works by Tersons. That weighs against the appointment of a manager being just and convenient, rather than in favour of it.

162. Mr Palfrey queried what there was for a manager to do that was not already being done He submitted that the Tribunal could see what Mr Crowley intended to do. Mr Palfrey submitted that the Applicant sought to tar Mr Crowley with the same brush as the previous agents and to bring historic complaints over to the new agent. The point was well made that when he had asked Mr Baker about those plans, Mr Baker replied that there was nothing that he would add. Indeed, the Applicant had only been able to assert a lack of transparency with the plan. and not knowing who was undertaking the major works, which were largely complete. What then, Mr Palfrey asked, was the purpose of the manager being appointed?

163. The most pertinent question the Tribunal considered, and the one potentially providing the answer to Mr Palfrey's above query, was whether the Respondent will deal with financial and accounting matters acceptably and whether Tersons will be able to ensure that occurs in the event of the Respondent itself showing less than complete enthusiasm for the task. There is relatively limited information on which to make an assessment of that last aspect. The focus of Tersons had been, understandably, on arranging for the works to be attended to.

164. Alternatively, does concern about financial and accounting matters go so far that it is just and convenient for a manager to be appointed, at least for a period of time until all elements in relation to finances, including clear accounting and an appropriate approach to cost of insurance, are dealt with?

165. The strongest point in favour of the Applicant is that it is not clear that the Respondent will deal with the financial aspects acceptably, in a transparent manner and instilling confidence in the Lessees that the appropriate approach to management, and especially funds, is being taken. It was the key question in the Tribunal's judgement.

166. There is no evidence of action having been taken so far which would give unshakeable confidence and so it is entirely understandable that the Applicant held ongoing concern in that regard. The somewhat unimpressive approach of the Respondent to accounting matters certainly lent weight to the appointment of a manager. The fact that the Tribunal was less than impressed with the evidence and approach taken by Mr Godden added to that.

167. It may be that the accounts up to March 2021 will be entirely clear and will resolve any previous issues. Mr Godden said that going forward there will be one set of accounts covering both residential and commercial elements of the Property, which may very well clarify the position for the Lessees, as would undertaking the same exercise for 2019 and 2020. However, not such accounts were before the Tribunal and so the contents are necessarily a matter of speculation.

168. There accordingly remained a real question for determination as to future management and the potential appointment of a manager, with matters to address in relation to finance and accounting which it was less than clear were being appropriately attended to as at the date of the hearing. The parties are reminded, however, that not all of the points made by the Applicant were found by the Tribunal to have merit and the Tribunal had only accepted part of the case sought to be advanced by the Applicant in relation to finances.

169. The Tribunal has considered the fact that Mr Crowley demonstrated understanding of the need to address the accounts and also the fact that the Applicant's argument that the sum actually held in the service charge account was unclear was not a strong one, nor was the double-accounting point.

170. The Tribunal determined that the remaining issues and the need to address them had been made clear and noted the Respondent had confirmed that they would be attended to. The Tribunal accepted this on balance to be correct, that the Respondent and its agent could properly be allowed to attend to that in the coming period and there was insufficient to render it just and convenient to appoint a manager to ensure that task was dealt with. The plan by Mr Crowley was considered by the Tribunal to be sensible.

171. The Tribunal does make it clear that it expects the Respondent to deal with accounting and financial matters in such a way as to avoid opaqueness but rather with all appropriate transparency in the future. If there are accounts prepared in relation to residential elements only, they need to indicate that overall anticipated and actual sums were greater and ensure that the accounts show the amount after the contribution by the commercial units has been allowed for. Inevitably, the Lessees will have to know what the original sums were and what the commercial units' contributions were if they are to be satisfied that they have not been over-charged. There must be transparency.

172. The Tribunal also expects the Respondent to demonstrate how contributions by the Respondent and the Commercial Lessee impact on the amount of the expenses to be borne by Lessees. Hence, showing in clear terms service charges and the payments of the Respondent to insurance and the offset against service charge arrears of Flat 2 (which the Respondent would otherwise bear), and all sums owed to the Respondent for insurance, the major works and, if relevant, other heads of charge.

173. The Tribunal accepts that acquiring the amusement arcade was the driver for the purchase and finds that an amusement arcade which happens to have the rest of a building attached is an apt description of the Property from the Respondent's perspective. A good deal therefore depends on Mr Crowley and Tersons as managing agents ensuring appropriate management of the Property. However, the Tribunal re-iterates that having considered everything read and heard about financial matters, it is not persuaded that the consequence is that a manager should be appointed.

174. Another argument advanced on behalf of the Applicant- albeit that it is not a financial breach or directly related as to the just and convenient question was that the Applicant sought a variation in the level of service charge contributions made by the various occupiers of the Property. Mr Baker proposed that the contributions should be altered to reflect the floor area occupied by each occupier, including the Commercial Lessee and the Respondent's occupation of commercial premises. It was argued that the manager could be given the power to vary the contributions.

175. Mr Palfrey argued that was not an appropriate measure and that there was, firstly, nothing wrong with the existing regime and, secondly, varying the level of contributions to reflect floor area was too simplistic and failed to properly reflect that the commercial premises did not use the common parts.

176. The Tribunal did not consider that the point was quite so clear cut. It is notable that there is, for example, a considerable amount of first floor roof area, which forms part of the structure and exterior and where it appears the Lessees must contribute to repair through service charges but which roof only serves the ground floor commercial units. Contributions reflecting floor area is a potentially valid approach and one not uncommonly taken. If the question had been determinative, careful and detailed analysis would have been required.

177. However, the Tribunal does not consider that is particularly relevant in any event. The Tribunal determined that it is not the time to seek to re-write the percentage contributions of the Lessees or that there is anything which should properly weigh when considering whether it is just and convenient to appoint a manager. The parties have a contractual relationship where they have agreed contributions. Whilst the Applicant had not understood how the contributions of the residential and commercial premises fitted together, the Tribunal found no issue with that. If a basis for variation of the Leases arises, there are mechanisms to deal with that. The Tribunal does not regard the appointment of a manager to be an appropriate one, save where there is very serious defect in relation to which urgent action is required and then very much on a temporary basis pending a variation. That is not the position which has arisen.

178. Gaby Hardwicke made representations in writing on behalf of the Commercial Lessee opposing variation of service charge liability but, as the Tribunal did not make an appointment, it is not necessary to refer to any additional points made by those solicitors as to any potential variation.

179. It will be vital to a constructive relationship between the parties that the Respondent is clear in its dealings and that the Lessees can fully understand the service charges being demanded and the services being provided. The Tribunal has little doubt that if ongoing communication is poor, especially about matters which remain in need of attention, the Applicant and/ or other Lessees will consider the Tribunal's expectations to have been unfilled and that other action may follow. Indeed, the Respondent would do well to reflect on the dissatisfaction that has been expressed, whether merited or otherwise, and to recognise where it has been at any fault to ensure avoidable future problems do not arise.

180. Despite considerable progress having been made with the works to the Property and other arguments of the Applicant not having been found good, the Tribunal considered whether it may be just and convenient to make a order appointing a manager but to then suspend that order on terms, such that if the financial management of the Property were not to be satisfactory to the extent of an ongoing breach of the terms of the Lease or the Code, the suspension would lift and management by a manager commence. That is a rarely adopted course but one open to the Tribunal in appropriate cases and provided for by section 24(6). The Tribunal can suspend the order on terms which it may fix.

181. The Tribunal is not aware of any case authority in relation to the appropriate situations for the making of an order but one then suspended or as to the appropriate terms of such a suspended order. However, the Tribunal considers that the answer is likely to be highly fact- specific, not least in relation to appropriate terms of the suspension.

182. There is no suggestion in the Act that the test of just and convenient is any different in the rare instance of a suspended order as compared to an order appointing a manager in operation from the date of the Decision or as otherwise appropriate. There is no suggestion that any lower standard is required to make a finding that it is just and convenient to make a suspended order. The Tribunal considers that there would be two separate questions.

183. The first would be whether it is just and convenient to appoint a manager, suspended or not. The second, which would only fall to be answered where the first answer is positive, would be whether there was a reason to suspend that order in the particular circumstances of the case.

184. In the event, the second question is not reached. The Tribunal has concluded that it is not just and convenient to make an order appointing a manager for the Property.

185. The Tribunal has weighed the evidence received with care and considered the interplay of those aspects of the case which go to support the appointment of a manager with those which do not. However, taking matters overall and with particular caution with regard to the question of the Respondent being transparent in relation to financial matters, the Tribunal has reached its decision. The margin was a narrow one.

186. It is to be hoped that the Lessees will understand the importance of proper co-operation with the Respondent and Mr Crowley, not least by paying service charges including arrears accrued, and that the Respondent will understand the importance of communication with the Lessees beyond finance and accounting matters. The parties will have an ongoing relationship for as long as the Lessees own the leases of their flats and the Respondents own the freehold of the Property.

187. As noted above, if there are ongoing issues as to apportionment of service charges between the Lessee, whether in combination with the Respondent and/ or the Commercial Lessee or otherwise, those can be dealt with by way of an application pursuant to section 27A of the Act or as otherwise appropriate, albeit that considerations as to potential time and cost may arise.

188. The next question for the Tribunal in the event of the appointment of a manager would be that of whether such manager should be Mr Scott Baker. However, in the event, that question does not fall to be answered. In those circumstances, there appears no purpose in setting out the questions asked of and the answers given by Mr Baker.

189. The Tribunal does refer to one issue which it considers very relevant and which is that Mr Baker, and the Applicant similarly, was unable to identify a conflict arising from instruction by the Applicant in relation to the letting of the Applicant's Flat as compared to acting as manager. The first gave contractual obligations to one particular Lessee and a different relationship with that Lessee compared to the relationship that would exist with the other Lessees if appointed. An example of a particular issue which might arise is if the Applicant failed to make a payment due or failed to comply with another obligation under the Lease. A manager cannot, the Tribunal considers, wear both such hats at the same time.

190. In contrast, the Tribunal did not agree with the Applicant that the Respondent's managing agent is in a position of conflict. The managing agent owes its duty to the Respondent alone. The Respondent's interests may not accord with those of the Applicants but that does not produce a conflict. It might well be relevant to whether a manager should be appointed in a given case but that is a separate issue.

Decision

191. It is explained above that the Tribunal does not find it just and convenient to appoint a manager for the Property.

192. As will also be apparent from the above, the decision was not the simplest by any means and the margin was quite fine. There were a number of factors which lent weight to the appointment of a manager and might well have resulted in such an appointment in not very different circumstances. Additionally, if the Tribunal had been considering the situation in existence in late 2020 when the major works were outstanding and the previous managing agent was in place, the outcome would very possibly have been different.

193. The Tribunal is not, as explained above, without some concern as to financial matters. The steps which the Respondent stated would be taken in relation to the accounts need to be taken. In the event that the Respondent does not deal with financial matters in a manner which facilitates the Lessees having a proper understanding of the position, the Tribunal perceives that a further application for the appointment of a manager may well be made. It is not for the Tribunal to pre-judge the outcome of that, but it can be reasonably be said that a failure to have appropriately resolved financial matters is very likely to be the cause of real concern to a future Tribunal. The appointment of a manager may yet be appropriate in relation to this Property if the outstanding matters are not appropriately attended to.

194. Nevertheless, this application fails.

Section 20C Application

195. The question for the Tribunal is whether it is just and equitable to disallow recovery of the costs incurred by the Respondent in relation to the proceedings through the service charge.

196. Neither Counsel was keen to make representations in the absence of knowledge of the outcome of the application. The outcome of an application and the findings made will often be of quite some relevance, although the answer to the question is not dictated by the outcome of the proceedings alone.

197. The Tribunal does not wish this aspect of the case to add significantly to time or costs. However, in the circumstances the parties need to be given time to make brief representations which the Tribunal can then consider. The Tribunal will thereafter provide a supplemental Decision, limited to the section 20C application.

198. Accordingly, the parties may make representations in writing in respect of the Applicants application pursuant to section 20C, limited to the

equivalent of two sides of A4 paper by 30th July 2021, following which the Tribunal will provide a decision on that aspect of the case.

Rights of Appeal

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

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

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

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