RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL AND LEASEHOLD VALUATION TRIBUNAL

Case No. CHI/29UG/LSC/2006/0130

Premises: 48 The Maltings, Clifton Road, Gravesend, Kent DA11 0AH

IN THE MATTER OF An Application under section 27A Landlord and Tenant Act 1985 (Liability to pay service charges)

HEARING **Wednesday 28th November 2007**

TRIBUNAL MEMBERS **Mr HD Lederman**
Mr R Norman
Mr C White FRICS

Applicant: Maxine Fothergill and Robert Fothergill (acting in person on 28 11 2007)

Respondent: Lakeside Developments Limited

Appearance: Miss Lorraine Scott, Non-practising Barrister of Conway & Co, Solicitors 8 Reading Road, Henley on Thames RG9 1ST formerly Legal Support Manager, BLR Property Management, Basicland Registrars Ltd, Managing Agents

INTERIM DECISION OF THE TRIBUNAL ON SUMS DEMANDED UNDER NOTICE SERVED UNDER SECTION 20 OF LANDLORD AND TENANT ACT 1985 (AS AMENDED) DATED 11TH JUNE 2003

1. The Tribunal finds £2,000.00 demanded under a letter from Temple Property Consultants Limited ("Temple") dated 11th June 2003 described as a notice under section 20 of the Landlord and Tenant Act 1985 (as amended) ("the 1985 Act") was not payable under the lease of 48 The Maltings, dated 1st November 1989 ("the Lease"). The Tribunal also finds that letter did not fulfil the requirements of section 20 of the 1985 Act in the form in which that provision was in force in June 2003.

REASONS

2. References to the Applicant in these Reasons are to Robert and Maxine Fothergill. References to the Respondent for the purposes of these Reasons include, where appropriate, their representatives BLR Property Management Limited and from and including 8th October 2007 Conway & Co solicitors. On 28th November 2007 the Applicant did not have the benefit of any legal or other representation.

3. On 8th October 2007 the adjourned hearing of this application took place. The first hearing had been adjourned from 5th March 2007 to enable the Applicant to apply to Dartford County Court in Case number 6BT04060 for directions as to the conduct of that case raising the same or similar issues between the Applicant and the Respondent. Written reasons were given for this Tribunal's decision on 5th March 2007. On 24th July 2007 District Judge Blunsdon at the Dartford County Court transferred Case number 6BT04060 to this Tribunal by consent. This Tribunal does not have jurisdiction to deal with matters such as statutory interest, fees and other costs ordered by or payable in the County Court proceedings. The Applicant and the Respondent may need to return to the County Court to deal with those issues, if they cannot be agreed.

4. These reasons are supplemental to and should be read with the written reasons for the Tribunal's decision on 8th October 2007. These are the reasons for the decision announced orally on the afternoon of the hearing on 28th November 2007 dealing with the question whether £2,000.00 demanded following service of a notice purporting to have been served under section 20 of the 1985 Act dated 11th June 2003 ("the section 20 Notice") is payable and whether the section 20 notice was valid.

5. Some of the background contained in these reasons is also relevant to the later reasons of this Tribunal addressing other issues heard in this application.

6. The Tribunal heard evidence (but not submissions) about whether the sums demanded under the section 20 notice were payable on 8th October 2007 and also heard some evidence from the Respondent about insurance costs on that date. The Tribunal had directed that the evidence and decision about the section 20 notice would be dealt with before other issues.

7. Further evidence about the section 20 notice was heard on 28th November 2007 before any decision on this issue was reached. Further submissions about this notice were also heard on 28th November 2007.

The background and the location of 48 The Maltings

8. The Maltings comprises part of a larger development including office premises, Hazards House, The Maltings and the Flats and car parking areas. This development comprises newly built flats (some 27 or so) and a building which was formerly a brewery converted to provide some 65 flats. The building is five stories in height and can be accessed from two staircases at either end. The Tribunal inspected some of the common parts to the development and the interior of 48 The Maltings before the first hearing on 5th March 2007. In The Maltings the Flats are numbered 1-64 and 92 -93. Most of the flats appeared to be accessible from central corridors running the length of the building at first and second floor levels. There was also a separate annexe for 2 flats.

9. The development works were carried out in about 1989. New leases were granted at about that time. These are believed to be leases of long duration in similar form to each other. The freehold of the development appears to have been owned initially by Pinecraven Developments plc (the original landlord) which transferred that freehold to the Respondent on an unspecified date before 2000. At some stage before 2000, the documents before us show that the Respondent appointed David Glass Associates plc to act as its managing agent for the building. In about 2001 or 2002 Basicland Registrars of 2nd floor Hyde House The Hyde London NW9 were appointed managing agents on behalf of the Respondent in respect of the development. At that stage Basicland Registrars appeared to be an incorporated business possibly a partnership.

10. The lease of 48 The Maltings was dated 1st November 1989 for a term of 125 years from 12th March 1989. It is a tripartite lease with maintenance and repair obligations being imposed upon the Gravesend Maltings Management Limited ("GMML") as the management company with a duty to provide services and collect service charges.

11. GMML went into liquidation and finally dissolved in about September 2003. By a letter dated May 2003 Temple based in Harpenden (directors JM Brooke and KA Brooke) informed lessees they had been appointed managing agents in place of Basicland Registrars.

12. Mr Brooke told the Tribunal he had worked formerly as a consultant to Basicland Registrars and signed some of the correspondence on their behalf in 2002-2003. We refer to some of that correspondence below. He had managed the development including The Maltings for some 12 months or so whilst working on behalf of Basicland Registrars.

13. Mr Brooke's company Temple ceased acting as the managing agent of the Respondent for the development in early 2005. In about early 2005, the Respondent appointed Basicland Registrars Limited trading as BLR Property Management ("BLR") to act as managing agents for the development. BLR traded from the same address as the former managing agents Basicland Registrars. Some evidence of the dates of change of managing agents appears from The Maltings Newsletter of February 2005.

14. The correspondence before the Tribunal (and the claim form in the related County Court proceedings issued in May 2006) reveals that the Respondent's address for service in the County Court proceedings was the same address at 2nd floor, Hyde House The Hyde London NW9. The telephone and facsimile numbers used by the Respondent in the course of the correspondence with the County Court in 2006 the proceedings against the Applicant were the same telephone and facsimile numbers as those of Basicland Registrars.

15. By letter of 24th July 2006 the Respondent announced a further change of managing agent for the development to Trust Property Management plc of Cavendish House 369 Burnt Oak Broadway Edgware Middlesex HA8. The Tribunal has not seen any evidence that Trust Property Management plc was actively involved in the management of the development. In the meantime on 17th March 2006 some of the lessees at the development caused The Maltings RTM Company Limited to be incorporated. On 14th August 2006 The Maltings RTM Company Limited served 3 claim notices in respect of a right to manage most of the relevant dwellings in this development including 48 The Maltings. On or about 14th December 2007 after a contested hearing the Leasehold Valuation Tribunal (differently constituted) held that The Maltings RTM Company Limited was entitled to manage the development as a whole. That determination took effect in about March 2008. Miss Scott of Basicland Registrars Limited appeared on behalf of the Respondent in those proceedings as well.

16. The Tribunal sets out this history in some detail because it assists considerably in an understanding of what has occurred and identifying the various parties in the correspondence before us. The Tribunal obtained this sequence of events following prolonged examination of the documents many of which only became available following adjournment of the hearings or questions from the Tribunal. Unfortunately neither the Respondent nor its representatives provided a detailed or sequential account of the history of the management of this development. This fact alone increased the time taken at the hearings to establish what happened and when. Much of the relevant documents and correspondence only came to light following questions by the Tribunal. Mr and Mrs Fothergill were novices to the Leasehold Valuation Tribunal and to litigation generally. Nothing in these reasons should be taken as criticism of their conduct of these proceedings. On the other hand the Respondent and their representatives were extremely experienced in leasehold management and Leasehold Valuation Tribunal proceedings. We were told that the Respondent had or managed a portfolio which is in excess of 2000 properties.

The right to request payment of the sums claimed in the letter of 11th June 2003

17. The copy of the letter of 11th June 2003 before the Tribunal was addressed to all lessees of The Maltings Gravesend. It was written by Temple from an address in Harpenden and signed by JM Brooke (Mr Jerry Brooke). We heard evidence from Mr Jerry Brooke who said he was the author of that letter. He gave evidence on 8th October 2007 and on 28th November 2007. Unfortunately no witness statement was produced by or for Mr Brooke and it was not clear until the hearing on 8th October 2007 that he was due to give evidence on behalf of the Respondent. The absence of a witness statement from him (or any written summary of what he was due to say) increased the time taken to hear his evidence at the hearings and meant that due allowance had to be made for the Applicants to have an opportunity to respond to his evidence. At the hearing on 8th October 2007 Mr Brooke confirmed that he was formerly a director of Temple and that company was in liquidation. Before that

company took over the management of The Maltings development, Mr Brooke had worked as a consultant for Basic Land Registrars which had been the managing agents of the development. He also confirmed he had been on the technical committee of the Association of Residential Managing Agents "(ARMA") a well known body which seeks to promote standards of management and conduct for managing agents.

18. On behalf of the Respondent Ms. Scott (then of Basicland Registrars) submitted in a letter to the Tribunal of 26th February 2007 that the £2000 demanded in the letter of 11th June 2003 was "pursuant to clause 4(3)(c) of the Lease in respect of sinking fund required to fund external repair and decoration works at the estate". She repeated this submission at the hearings on 8th October 2007 and on 28th November 2007.

19. Clause 4(3)(c) in the Lease is a lessee's covenant to:

> "Pay to the Management Company on demand such *annual sum* as the Management Company shall reasonably decide is required for a sinking fund to provide for future major expenditure to the Development to include without prejudice to the generality of the foregoing the renewal or replacement and/or major overhaul of any and every part of the Development the appurtenances thereof including any expense incurred in rectifying or making good any inherent structural defect within the Development the renewal or replacement (*sic*) or ducts service pipes and wires within the Development and interest paid on any money borrowed by the Management Company to defray any expenses incurred and to include as aforesaid all costs and expenses for future liabilities and expenses for renewing upgrading or improving the Development and whether certain or contingent and whether obligatory and (*sic*) discretionary and to include as aforesaid such sum as shall be estimated by the Management Company (whose decision shall be final) to provide a property repairs fund to meet any of the cost expenses outgoings and matters mentioned in the Third Schedule hereto that are of a *cyclical nature*" (emphasis added)

20. It should be noted clause 4(3)(b) of the Lease provides separately for other contributions towards service charges not expressed to be within clause 4(3)(c) of the Lease.

21. The Management Company is defined in the preamble to the Lease as GMML. Miss Scott made submissions on the footing that GMML was defunct, or had been wound up or dissolved at the relevant time in June 2003. That was also the gist of the evidence of Mrs. Fothergill and Mrs. Bull who gave evidence on behalf of the Applicants. Mrs. Bull produced a copy of a letter from Basicland Registrars dated 15th May 2002 addressed to Lewis Silkin solicitors which suggested that the

Respondent had attempted to wind up GMML on the ground that it had failed to adhere to an order of a Court presumably a judgment for monies due. The Respondent put in evidence a copy of letter of 29th July 2002 addressed to the Lessees of The Maltings (Respondent's bundle page 19) from Mr. Brooke then working for Basicland Registrars in which it was said that "it has been agreed with [The Maltings Residents Association] that Basicland Registrars on behalf of the freeholders will take over the responsibilities of [GMML] which is being wound up". The Applicants said they had no knowledge of this. Their conveyancing file was not available as it was with a firm of licensed conveyancers which was in liquidation. Mrs Bull gave evidence that The Maltings Residents Association was not a formal association which represented all or even most of the Lessees at the development. We return to the status of that association later in these reasons.

22. Miss Scott's submissions were to the effect that in 2003 for whatever reason GMML was not fulfilling its obligations under the Lease (and had not done so for an unspecified period) so that the Respondent was entitled to exercise the powers of GMML under the Lease in default. Clause 7(2) of the Lease provides for the landlord to exercise such powers and rights of in default of exercise by GMML. The Tribunal assumes for present purposes without deciding, that the Respondent was entitled to exercise the powers of GMML in June 2003. Whether the Respondent was in fact so entitled was not addressed in any satisfactory form in the evidence adduced on the Respondent's behalf and may remain to be decided on another occasion, whether by this Tribunal or a Court. The Tribunal makes no finding about that issue.

23. If the Respondent was entitled to exercise the powers of GMML pursuant to clause 7(2) of the Lease, the Tribunal finds considerable difficulty in viewing the letter of 11th June 2003 as a demand or request for monies under clause 4(3)(c) of the Lease.

24. The phrase "sinking fund" is not defined in the Lease. Strong indications of its meaning can be derived from the terms of clause 4(3)(c) itself. In particular the purpose of the fund is "to provide for *future* major expenditure to the Development" and to be an "*annual sum*". The reference to annual sum appears to the Tribunal to govern the entirety of the remainder of this poorly drafted clause. In other cases the Tribunal might have expected to have found something akin to the creation of a separate fund from which the objects of expenditure referred to in this clause could be paid. In the nature of the legislation affecting service charges the Tribunal would have expected such a sinking fund to be separately allocated so it could be held on trust as section 42 of the Landlord and Tenant Act 1987 requires. The Tribunal takes into account as this was a comparatively modern lease when the provisions of the 1987 Act would have been relatively well known to the draftsman of the lease and professional advisers working in the landlord and tenant field.

25. The final phrase of clause 4(3)(c) of the Lease also suggests the demand may "include as aforesaid such sum as shall be estimated by the Management Company .....to provide a property repairs fund to meet any of the cost expenses outgoings

and matters mentioned in the Third Schedule hereto that are of a *cyclical nature"* (emphasis added). That final phrase is an inclusive rather than an exhaustive definition but nevertheless of assistance in determining the ordinary and natural meaning of the words in clause 4(3)(c) of the Lease.

26. Neither party adduced any authority about the meaning of a "sinking fund". In the context of this Lease it must also be distinguished from a reserve or deposit against default by the lessee which is provided for in clause 4(3)(a) of the Lease. In order to give meaning to clause 4(3)(c) of the Lease the Tribunal finds a valid demand must also be different from demands to pay the Overall Charge and the Maltings/Flats/Hazards Charge in clause 4(3)(b) which could be described as the ordinary or regular service charge payable in respect of The Maltings or those other parts of the development.

27. The letter of 11th June 2003 describes itself as a Notice under section 20(4) of the 1985 Act. There is no reference in that letter to the £2000.00 being an annual payment. Indeed it appears to be a one off payment required by 11th July 2003 to be apportioned and accounted for subsequently. The majority of the works which are described on the first page of the letter are said to "comprise typical repair and maintenance style repairs normally required in the buildings". The specification referred to in the letter prepared by Langley Reiff Byers (giving the details of the nature and cost of the proposed works) was not produced by the Respondent. Initially it was said by Miss Scott on behalf of the Respondents the specification was not available or could not be located partly because the papers had been transferred to a new managing agent Trust Property Management plc. No evidence of a request to Trust Property Management plc for the specification was put before us, let alone evidence that the papers which had been passed to Trust Property Management plc included the specification. Given the longstanding involvement of the Respondent, and its managing agents in their various forms, the Tribunal finds it puzzling that a copy of the specification could not be found. The Tribunal even suggested that a copy was requested from Langley Reiff Byers at the hearing in October 2007. No evidence was put before the tribunal to suggest that a request was made of that firm. The Tribunal had previously given directions on 15th December 2006 which required the Respondent to produce documents such as the specification.

28. A copy of the tender analysis document dated February 2003 was produced at the hearing on 8th October 2007 which gave some more detail of the proposed works. It was not possible to identify from this document the precise make up of the considerable sums allowed for preliminaries. Most of the items appeared to be routine or regular maintenance which would not ordinarily be regarded as "major expenditure". The Tribunal finds that although not "major expenditure" for the purpose of clause 4 (3) (c), the works in the letter of 11th June 2003 were nevertheless qualifying works within the meaning of section 20 of the 1985 Act..

29. The Tribunal turns to consider the factual background to whether the letter of 11th June 2003 amounted to a demand for a payment towards a sinking fund under clause 4(3)(c) of the Lease. The letter of 11th June 2003 in its own terms made no reference to a sinking fund, or similar term, although that is of course not conclusive of the question.

30. Mr and Mrs Fothergill took an assignment of the Lease on or about 28th February 2003. At that stage Basicland Registrars were the managing agents and answered written questions from the conveyancers acting for Mrs and Mrs Fothergill before completion. We have seen service charge accounts for the year ended 25th March 2003 relating to The Maltings prepared by an accountant who certified that the summary provided was a fair summary complying with the requirements of the 1985 Act. There is no reference to a sinking fund in those accounts or in the note to those accounts. None of the evidence on behalf of the Respondent suggested the service charge accounts referred to were inaccurate or incomplete.

31. The Tribunal has also seen service charge accounts for the year ended 25th March 2004 relating to The Maltings with a similar certificate from the same accountant (dated 26th August 2004). These contained no reference to a sinking fund, let alone a separate allocation of such a fund. There are similar service charge accounts for the year ended 25th March 2005 with a similar certificate from the same accountant (dated 25th January 2006). There was no reference to a sinking fund in the accounts for the year ended March 2005. In the service charge account for the year ended 25th March 2006 there is a reference to a Building works fund as at 25th march 2006 in the Notes to the account (page 45 of the Applicant's Bundle). However as that note or a corresponding note does not appear in the notes to the service charge accounts for the earlier years the Tribunal is not satisfied that this was a reference to a sinking fund for external maintenance works which was originally demanded in 2003. The sums referred to do not correspond to the expenditure incurred in external maintenance works. It was Mr. Brooke's evidence that a number of other lessees made payment of the £2000 demanded under a similar letter to them. If the payments demanded of £2000 were intended to be allocated to a sinking fund, the Tribunal would have expected to find some record of this in the service charge accounts referred to.

32. The Tribunal takes into account the evidence adduced by the Respondent that other lessees made payments of £2000 or part payments towards that demand. The Respondent adduced letters from some 10 other lessees in mid to late 2003 who had made such payments in response to what the Tribunal was informed were identical letters (pages 119-132 Respondent's bundle). In none of those letters was payment expressed to be made towards a "sinking fund", or similar expression. Further in none of the letters or acknowledgements from Temple was there any reference to sinking fund or similar term, or to the payment requested as the first instalment of further regular amounts towards such a fund. Mrs Bull enquired of BLR in her e-mail dated 14th May 2007 whether there was a *reserve* fund in existence. The response from Zainab Musaji of BLR by e-mail of the same date was

that there was no such fund in existence as the accounts were in deficit. In strict terms there may be differences between a sinking fund and reserve fund. However had such a fund existed the Tribunal finds it would have been mentioned by BLR at that stage,

33. The Tribunal has also seen an application for payment to Mr and Mrs Fothergill dated 16th January 2004 which appears to have been prepared by or served on behalf of Temple on behalf of the Respondent. This describes the £2000 sought as at 30th June 2003 referred to in the letter of 11th June 2003 as referring to "external maintenance". There is no reference to a sinking fund or similar expression or that being the first of a number of annual contributions towards such a fund.

34. Subsequently on 8th December 2006 the director of the Respondents wrote to Dartford County Court in connection with Court proceedings seeking to recover the £2000 and other sums from the Applicants. In that letter it was clarified that the £2000 related to building works.

35. The Tribunal is conscious that in approaching a question of interpretation of the events which have happened before and after 11th June 2003 they are strictly speaking not of direct relevance to the meaning of clause 4(3)(c) of the Lease. In the Tribunal's view those events do have a bearing upon whether the letter of 11th June 2003 was intended to be a demand for payment under that clause of the Lease. In the Tribunal's view the Respondent did not regard the letter of 11th June 2003 as a demand for monies in respect of a sinking fund contribution in June 2003. Of relevance is the fact that the works were intended to be commenced as soon after 11th July 2003 as possible. In one sense the demand was intended to be for future works, in another sense those works were immediate as the evidence from Mr Brooks was the works were due to start in July 2003. There was no indication from that letter or any of the other contemporary documents this was intended to be the first of a number of annual contributions to such a fund.

36. The Tribunal concludes that whatever modern principles of interpretation are applied to clause 4(3)(c) the letter of 11th June 2003 was not intended as and cannot properly be construed as a demand for a sinking fund contribution.

37. If that analysis is correct, the letter of 11th June 2003 was at best a demand for service charges which would have had to be apportioned in accordance with the provision of clause 4(3)(b) of the Lease and paragraph 6 of the First Schedule of the Lease. The apportionment of those sums does not arise before the Tribunal for decision today.

Application of section 20 of the 1985 Act

38. The Tribunal turns to consider the application of section 20 of the 1985 Act. The material parts of the relevant statutory provisions are contained in the Landlord and Tenant Act 1985 as amended by the Landlord and Tenant Act 1987:

39. "20(1) Where relevant costs incurred on the carrying out of any qualifying works exceed the limit specified in subsection (3), the excess shall not be taken into account in determining the amount of a service charge unless the relevant requirements have been either –

(a) complied with, or

(b) dispensed with by the court in accordance with subsection (9);

and the amount payable shall be limited accordingly.

(2) In subsection (1) 'qualifying works', in relation to a service charge, means works (whether on a building or on any other premises) to the costs of which the tenant by whom the service charge is payable may be required under the terms of his lease to contribute by the payment of such a charge.

(3) The limit is whichever is the greater of –

.....

(4) The relevant requirements in relation to such of the tenants concerned as are not represented by a recognised tenants' association are –

(a) At least two estimates for the works shall be obtained, one of them from a person wholly unconnected with the landlord.

(b) A notice accompanied by a copy of the estimates shall be given to each of those tenants or shall be displayed in one or more places where it is likely to come to the notice of all those tenants.

(c) The notice shall describe the works to be carried out and invite observations on them and on the estimates and shall state the name and the address in the United Kingdom of the person to whom the observations may be sent and the date by which they are to be received.

(d) The date stated in the notice shall not be earlier than one month after the date on which the notice is given or displayed as required by paragraph (b).

(e) The landlord shall have regard to any observations received in pursuance of the notice; and unless the works are urgently required they shall not be begun earlier than the date specified in the notice.

....

(8) In this section 'the tenants concerned' means all the landlord's tenants who may be required under the terms of their leases to contribute to the cost of the works in question by the payment of service charges."

40. The evidence from Mr. Brooke formerly of Temple was that the specification and details of the proposals were available from the caretaker at his "office" at the development. Mr. Brooke's evidence on 8th October 2007 was that the specification (a thick document) was given to the caretaker at his office within about 10 days of the letter of 11th June 2003 going out. This evidence is consistent with a copy of a letter from Mr. Brooke when he was working for Temple addressed to Miss LJ Hart of 55 The Maltings dated 25th June 2003. That letter was entitled "External repairs and Redecorations" and was produced by the Respondent at the adjourned hearing in November 2007. It clearly relates to the proposed works at the development including The Maltings. This letter states that copies of the "Specification of works will be available on site as from Wednesday 2nd July 2003. They will be located in the office next to Hazards House if you speak to the caretaker he will be more than happy to lend you a copy". A similar letter was written by Mr. Brooke on 18th July 2003 to Mr. R Turner of 19 The Maltings saying that a copy of the specification could be obtained by contacting the caretaker in his office.

41. Mrs. Fothergill's evidence was that she and her husband were not resident lessees and they had no knowledge that there was a caretaker's office on site in 2003 or that a copy of the specification was to be found there. She also doubted whether the room was in a condition such that it could be called an office. There was nothing in the letter of 11th June 2003 to indicate that a copy of the specification could be obtained by contacting the caretaker in his office. There was reference to the fact that copies of the specification would be made available on site shortly. The letter of 11th June 2003 said that the address would be "notified of this in due course". Mr. Brooke of Temple did not give evidence that there was any further notification of the location of the specification to the Applicants whether by letter or otherwise. Miss Scott did not point to such notification in the documents produced.

42. The very existence of the two letters to Miss Hart and Miss R Turner indicates that some lessees or their representatives were uncertain about the availability or location of the specification. The Respondent has not been able to provide us with a copy of the specification. Miss Scott said that they could not be obtained from the surveyors Langley Reef Byers because the Respondent was in litigation with them about the quality of the services provided. The Tribunal found this a puzzling explanation for non production of such a critical document. Despite the fact that the Tribunal raised the importance of this document in October 2007, no evidence of any attempt to obtain such a document from those surveyors or from the various managing agents who represented the Respondent or even the head of the alleged residents association Mr. Ward of 3 Hazard House was produced. Miss Scott said that she had tried to get a copy of this document but the surveyors firm had broken up. The fact that there was litigation suggested to the Tribunal there must have been someone to contact on behalf the surveyors.

43. It appeared to be common ground that there were no notice boards in the common parts of the development upon which copies of the specifications could have been left.

44. Mr. Brooke's evidence was that the specification was prepared in January 2003 and tender analyses were prepared by the surveyors in February 2003. The correspondence with Mr. Ward of 3 Hazard House of 12th November 2002 suggests that specification was in existence at the date of that letter. Mr. Brooke's evidence was that the tender analysis document and a covering letter went to the head of the residents association in February 2003. A copy of the letter from Mr. Brooke dated 21st February 2003 enclosing a tender report was produced to the Tribunal.

45. There was considerable debate about whether Mr. Ward of Hazard House was the head of a recognised tenants association within the meaning of sections 20 and 29 of the 1985 Act. The Respondent did not adduce any documentary evidence that Mr. Ward was the head or officer of any association of residents or lessees at the development which include The Maltings. Mrs. Fothergill denied that she or her husband knew of such an association let alone were members of such an association. They did not know Mr. Ward. The Respondent did not lead any evidence to suggest there had been at any relevant time a notice recognising Mr. Ward or anyone associated with him as a recognised tenants association within the meaning of section 29(1) of the 1985 Act. Mr. Brooke said that there had been correspondence between Mr. Ward and the Respondent about recognition of a residents association but did not produce that correspondence. The Tribunal did not understand him to say there was a letter in existence from the Respondent recognising that association. If there was such a letter the Tribunal would have expected the Respondent who appears to have had close connections with each of the managing agents to have been able to obtain a copy of such a letter or at least explain why such a letter could not be obtained. If such a letter had existed in the past, the Tribunal would have expected to heave heard some evidence from Mr. Ward who was said to have been at the head or a leading force in such an association. The existence of a recognised tenants association was not foreshadowed in the Respondent's written summary of its case on 26th February 2007.

46. Mr. Brooke accepted in response to a question from the Tribunal that the letter of 11th June 2003 made no reference to consultation with a residents association because there was a real possibility that some of the lessees were not members of the association.

47. Miss Scott relied upon a copy of a list of names at page 138 of the Respondent's bundle which was entitled "Maltings Residents Association". This was a document which had been produced by or on behalf of Mrs. Bull a witness who gave evidence on behalf of the Applicant. It bore the date 2005. Mrs. Lynne Bull gave evidence that she had tried to form a residents association in 2005 as a lessee of some flats in

the development. Mrs. Bull's evidence is confirmed by an edition of The Maltings Newsletter of May 2005.

48. Mrs. Bull also referred to a letter obtained by or from her solicitors written by Basicland Registrars dated 15th May 2002 addressed to Lewis Silkin a firm of solicitors. That letter addresses a number of issues but makes reference to an unofficial residents association. Reference is also made to such an association in one of the Maltings Newsletters. Mrs. Bull's uncontradicted evidence was that the unofficial residents association there was not progressed and there was no recognition of such an association by the Respondent.

49. Miss Scott also pointed to the statement prepared by Mrs. Fothergill for use in this application. The statement is unsigned and undated but bears the date stamp of 29th January 2007 as the date of receipt by the Tribunal. Miss Scott relied upon the passage on the third page of this letter when Mrs. Fothergill stated "I am a member of a committee for the residents who frequently have complaints about various works not being undertaken.....". This letter at the date it was written and in the context in which it was written does not support the Respondent's contention that Mrs. Fothergill was a member of any residents association at the Maltings in 2003, let alone a recognised residents association.

50. All the evidence the Tribunal heard or read on this issue pointed in one direction. The Tribunal finds that at the very highest Mr. Ward was an ad hoc representative of some of the lessees at the development including The Maltings. The Respondent has not satisfied the Tribunal there was a recognised tenants association for the purpose of section 20 of the 1985 Act in the form in which it was in force in mid 2003, or if there was such an association that Mrs. Fothergill was a member of such an association or represented by such an association. Accordingly the provisions of section 20 of the 1985 Act which applied to a recognised tenants association were of no application here.

51. The Tribunal turns to consider whether the terms of the letter of 11th June 2003 satisfy the provisions of section 20 of the 1985 Act as far as they applied to individual lessees. The Tribunal drew Miss Scott's attention to the provisions of section 20 of the 1985 Act as they were in force at the time of the demand made and the Lands Tribunal decision in *London Borough of Islington v Abdel-Malek* LRX/90/2006 and invited submissions on that decision particularly at paragraphs 29- 30. That decision suggests that it is incumbent on the landlord serving a section 20 notice to provide details of all of the estimates (including quotations or priced specifications) to the tenants at the beginning of the 28 day period for consultation under section 20 of the 1985 Act to ensure the tenant has sufficient information to be able to compare and make observations on the estimates for those works.

52. The Tribunal does not accept the Respondent's submission that by placing a copy of a specification in the caretaker's office amounted to compliance with section 20(4)(b) of the 1985 Act. The caretaker's office was not a place where the priced

specification was likely to come to the notice of tenants such as the Applicants who were not represented by a Residents Association. Mr. and Mrs. Fothergill had no reason to know that a caretaker's office existed or that it was likely to contain a copy of a specification. As they did not reside at The Maltings there was no reason to believe that a specification at that office was likely to come to their notice.

53. In addition, there is clear evidence in the form of Mr. Brooke's letter of 25th June 2003 that a copy of the specification was not placed in the caretaker's office until 2nd July 2003 at the earliest.

54. The Tribunal is not satisfied that the specification placed in the caretaker's office was a priced specification. What is said in the letter of 11th June 2003 is that a specification would be placed in the caretaker's office. This was repeated in the Respondent's agent's letter of February 2007. There was a copy of a tender analysis report from Langley Reiff Byers dated February 2003 in existence. To provide details of all of the estimates (including quotations or priced specifications) to the tenants that document or a document annexing similar information should have been made available to the tenants at least one month before the works started to comply with section 20(4)(b) of the 1985 Act. The Tribunal was not satisfied that the tender analysis or a document containing details of all of the estimates was made available to the Applicants 28 days before the start of the works

55. If a priced specification was placed in the caretaker's office, the Tribunal finds this was not until 2nd July 2003 at the earliest and this was a further non-compliance with section 20(4) of the 1985 Act.

56. The Tribunal was asked by Miss Scott on behalf of the Respondent to consider the issue of dispensation with compliance with section 20 of the 1985 Act under section 20(9) of the 1985 Act (as it was in force in mid 2003). The Tribunal is satisfied that works did commence or were in place by a contract dated 21st July 2003 (see for example an interim certificate dated 8th July 2004 which gives the date of the contract. The new provisions of section 20(1)(b) of the 1985 Act giving this Tribunal jurisdiction to entertain an application for dispensation did not come into force where qualifying works were commenced before 31st October 2003: see article 3 of the Commonhold and Leasehold Reform Act 2002 (Commencement No 2 and Savings)(England) Order 2003 SI 1986. Accordingly, the question of dispensation will have to be dealt with by a Court.

57. This decision and these reasons do not address whether the sums claimed in the demand of 11th June 2003 were reasonably incurred or whether the works were of a reasonable standard under section 19 of the 1985 Act. In the light of the Tribunal's decision above it did not go on to consider those issues.

Howard Lederman
Chairman 9th September 2008

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Chairman 9th September 2008

RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL AND LEASEHOLD VALUATION TRIBUNAL
Case No. CHI/29UG/LSC/2006/0130

Premises: 48 The Maltings, Clifton Road, Gravesend, Kent DA11 0AH
IN THE MATTER OF An Application under section 27A Landlord and Tenant Act 1985 (Liability to pay service charges)

HEARING **16th July 2008**

TRIBUNAL MEMBERS **Mr HD Lederman**
Mr R Norman
Mr C White FRICS

Applicant: Maxine Fothergill and Robert Fothergill (acting in person on 16 07 2008)

Respondent: Lakeside Developments Limited
Appearance: No appearance on 16th July 2008 but written representations from Miss Lorraine Scott, Non-practising Barrister of Conway & Co. Solicitors 8 Reading Road, Henley on Thames RG9 1ST formerly Legal Support Manager, BLR Property Management, Basicland Registrars Ltd, Managing Agents

DECISION OF THE TRIBUNAL ON SUMS DEMANDED AS SERVICE CHARGES FOR YEARS ENDING MARCH 2003 MARCH 2004 MARCH 2005 AND MARCH 2006

1. The Tribunal finds the sums demanded or paid as service charges for the service charge years ending March 2003 to March 2006 inclusive:

   a. in respect of insurance premiums were reasonably incurred and were not excessive as alleged. The Tribunal makes no finding about whether small sums were overpaid or wrongly charged in respect of insurance for the service charges years 2002-2003 and 2003-2004 as these allegations were not before the Tribunal.

   b. in respect of fire protection works were not reasonably incurred and were not payable. The Tribunal concludes that only 50% of the amounts paid or demanded in respect of this category of work were reasonably incurred and payable by the Applicant. The Applicant only paid for these works through service charges during the years ended March 2004, March 2005 and March 2006 an amount of £98.26. The Tribunal finds the total payable was £49.13.

c. in respect of management fees (managing agents' charges) the amounts charged were not reasonably incurred. The total of amounts paid by or charged to the Applicant for these fees in service charge years ended March 2003 to March 2006 inclusive was £562.71. The Tribunal finds the amount payable is £421.27.

2. The Tribunal has no jurisdiction to consider whether the sums demanded by the Respondent's agents' statement of 22nd August 2006 accompanying a notice under section 146 of the Law of Property Act 1925 claiming "arrears late recovery fee", "interest on unpaid balance", "arrears recovery fee" "Court summons County Court application fee "interest to date of judgement and "breach of section 146 notice fee" are payable, as these are not service charges within the 1985 Act.

3. No application was made by the Applicant for an order that any legal costs of these leasehold valuation proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person under section 20C of the Landlord and Tenant Act 1985. In addition no application was made for reimbursement of fees. Accordingly the Tribunal did not make any decision on these issues. Such applications may be made after these proceedings have been concluded.

4. The Tribunal makes no finding about the standard or quality of major works carried out in 2003 as these were not raised in the Applicant's application and were not before the Tribunal.

REASONS

5. References to the Applicant in these Reasons are to Robert and Maxine Fothergill. References to the Respondent for the purposes of these Reasons include, where appropriate, their representatives BLR Property Management Limited Basicland Registrars Limited (collectively described as "BLR")and from and including 8th October 2007 Conway & Co solicitors. On 28th November 2007 the Applicant did not have the benefit of any legal or other representation. On 16th April 2008 and on 16th July 2008 the Respondents did not have any representatives in attendance.

6. On 8th October 2007 the first adjourned hearing of this application took place. The first hearing had been adjourned from 5th March 2007 to enable the Applicant to apply to Dartford County Court in Case number 6BT04060 for directions as to the conduct of that case raising the same or similar issues between the Applicant and the Respondent. Written reasons were given for this Tribunal's decision on 5th March 2007. On 24th July 2007 District Judge Blunsdon at the Dartford County Court transferred Case number 6BT04060 to this Tribunal by consent. This Tribunal does not have jurisdiction to deal with matters such as statutory interest, fees and other costs ordered by or payable in the County Court proceedings. The

Applicant and the Respondent may need to return to the County Court to deal with those issues, if they cannot be agreed.

7. These reasons are supplemental to and should be read with the written reasons for the Tribunal's decision on 8th October 2007. The Tribunal's written reasons for its decision about the question whether £2,000.00 demanded following service of a notice purporting to have been served under section 20 of the 1985 Act dated 11th June 2003 is payable and whether the section 20 notice was valid ("the section 20 Notice reasons") have been provided separately. The findings of fact and background contained in the section 20 Notice reasons should be treated as incorporated into these reasons where relevant.

The burden of proof

8. The Respondent drew attention to the part of the Lands Tribunal decision in *Schilling and Schilling v Canary Wharf Riverside Development Ptd Limited* LRX/26/2005 LRX 31 2005 LRX/47/2005 which concerned the burden of proof where a tenant had challenged the reasonableness of standard or of costs. It is clear that it is for the landlord making a claim for costs to prove that there is a liability under the terms of the lease. However the *legal* burden of proof remains on the Applicant as they bring the application: see paragraphs 12 and 13 of the *Schilling* decision. In relation to the absence of a proper account under sections 20 and 21 of the 1985 Act, it was held it was sufficient for the tenant to raise the absence of proper account in order to place upon the landlord an evidential burden to satisfy the Tribunal that costs have in fact been incurred. In relation to the principal allegations made by the Applicant in this case it is for the Applicant to show that the cost or standard of work was unreasonable. However the Applicant need only raise a prima facie case on these issues. It is for the Respondent to meet those allegations and for the Tribunal to reach its decision on the whole of the evidence: see paragraphs 11 and 15 of the *Schilling* decision.

Insurance premiums

9. It is relevant to record how the evidence about this issue came to be given, as this affected the conduct of the hearings on this issue. On 8th October 2007 the Tribunal heard evidence from Mr Brooke of Temple the managing agents on behalf of the Respondent. In addition, without any prior warning or notice to the Applicant who was unrepresented at that stage, the Respondent applied to adduce evidence of Mr Marelli a director of GHBC Limited trading as "Towergate ghbc" ("GHBC") the insurance broker who had arranged insurance policies for the Respondent for The Maltings and other properties owned by the Respondent. No witness statement was available from Mr Marelli at that stage. It was apparent to the Tribunal the Respondent intended Mr Marelli should give evidence to justify the insurance premiums. The production of that evidence at that stage without any witness statement or prior notification to the Applicant, amounted to a clear and flagrant breach of the provisional directions issued by this Tribunal on 15th December 2006.

No satisfactory explanation was provided by Miss Scott for the failure to adhere to those directions or to provide any early notification of the gist of that evidence. For example the existence of GHBC was mentioned in BLR's written statement on behalf of the Respondent of 26th February 2007 but no indication was given that live evidence would be given, let alone of the kind of evidence that was ultimately tendered by Mr. Marelli. Nevertheless, the Tribunal decided to admit Mr. Marelli's evidence on the basis that the prejudice caused to the Applicant by the Respondent's breach of directions could be mitigated or minimised if the Applicant was given an opportunity to respond and a statement from Mr Marelli was obtained. The Tribunal formed the view the hearing would have to be adjourned in any event if Mr Marelli's evidence was heard on 8th October 2007 as there would have been insufficient time to complete the hearing on that day. On 8th November 2007 the Tribunal issued further directions for witness statements in advance of the hearing listed to take place on 28th November 2007.

10. At the hearing on 28th November 2007 Miss Scott of Conway & Co produced an additional paginated bundle of documents which she said was identical to documents which had been produced at the hearing on 8th October 2007. The Applicant also produced additional documents. Both parties took the opportunity to make detailed submissions on the validity of the section 20 notice at that hearing. Mr Marelli did not attend at that hearing in the morning and his witness statement had not been produced in advance of that hearing. After the luncheon adjournment Miss Scott informed the Tribunal that Mr. Marelli had been involved in a motor accident and would be unable to attend the hearing on that day.

11. At the hearing on 28th November 2007 the Tribunal heard evidence from Mr Cox of Alan Boswell Insurance brokers who had insured other properties owned by the Applicants. Miss Scott cross-examined Mr Cox.

12. At the end of the hearing on 28th November 2007, the Tribunal rejected an application by Miss Scott on behalf of the Respondent that the further evidence and further issues should be dealt with by written submissions. An important ground for rejecting that course was that it would prejudice the Applicant who was not legally represented and had difficulty in understanding the issues which needed to be addressed and reducing them to writing, in view of lack of legal training or experience. Mrs Fothergill informed the Tribunal she did have the benefit of some ad hoc advice from LEASE (the agency which provided advice but not representation to tenants on leasehold issues). However the Tribunal's view was the advice from LEASE would not adequately make up for the disadvantage the Applicant would suffer if the remaining issues were dealt with in written submissions. In addition the proceedings had commenced with oral hearings which in the Tribunal's view had illuminated considerably the written statements of case. The absence of an opportunity to test by cross examination and questions from the Tribunal the issues relating to management charges and fire protection works would

have severely inhibited the Tribunal's assessment of the evidence and the process of finding of facts.

13. Following the hearing on 28th November 2007 the Respondent finally served a written witness statement dated 9th April 2008 signed by Mr Marelli. Before that, the Tribunal had provisionally arranged a hearing on 11th February 2008. That hearing date was re-arranged to enable the attendance of Mr. Marelli at the request of Miss Scott who by that time was working for Conway & Co solicitors in her letter of 26th January 2008. Accordingly a further hearing took place on 16th April 2008 partly to enable Mr Marelli to give evidence orally. On 4th April 2008 Conway & Co. had written to the Tribunal saying the Respondent would not have representation at the hearing scheduled for 16th April 2008 and that Mr Marelli would attend to give evidence on behalf of the Respondent. Conway & Co's letter of 4th April 2008 also contained further submissions on some of the matters which the Tribunal considers below.

14. Mr. Marelli and Mr. Cox attended to give evidence at the hearing on 16th April 2008. Also in attendance was Mr. Jerry Brooke the witness and former managing agent of Temple who gave evidence on behalf of the Respondent at earlier hearings. In view of the letter from Conway & Co. of 4th April 2008 the Tribunal reached the view there was no legal or other representative of the Respondent present at that hearing. Conway & Co subsequently complained in their letter of 2nd May 2008 to the Tribunal, that the Tribunal "disallowed" Mr Brooke from making representations on behalf of the Respondent at that hearing. On 16th April 2008 the Tribunal ruled that Mr. Brooke was not an authorised representative of the Respondent at that hearing and could not make legal or other submissions on behalf of the Respondent, particularly as the Respondent was represented by a firm of solicitors Conway & Co. The Tribunal did however hear evidence from Mr Brooke at the hearing on 16th April 2008. Both Mr. Cox and Mr. Marelli were knowledgeable in their fields of expertise. However each of them had a financial interest in the evidence they were giving and a financial interest in obtaining and retaining insurance brokerage work from the Applicant and the Respondent respectively. The Tribunal had ruled previously on 8th October 2007 that neither witness could be treated as an expert in the usual sense of the word used in part 35 of the Civil Procedure Rules. However both witnesses were content to accept they were under a duty to give accurate and truthful answers and subject to the codes of conduct of their regulators. After hearing from each of Mr Marelli and Mr. Cox the Tribunal concluded (and both of these witnesses agreed) there was a great deal of common ground between these witnesses and very little difference in their evidence at the end of the day. There were some small and ultimately immaterial differences about whether Allianz had quoted or "no quoted" for insurance for The Maltings which are referred to below.

15. The Tribunal decided to adjourn the hearing on 16th April 2008 primarily because it became apparent there might be highly relevant documentary material concerning

fire protection works and the fire alarm system which the Applicant had not brought along to the hearing which might have a very real bearing upon that issue.

16. By a letter dated 2nd May 2008 Conway & Co indicated the Respondent's dissatisfaction with the decision to adjourn and expressed the view that "the Tribunal [was] so biased against ["the Respondent"] that it is not cost effective to take any further part in the matter." The Tribunal considered carefully whether there was any substance in the allegation of bias or whether there were any steps it should take to seek further submissions upon that issue. The Tribunal reminded itself of the test in *Porter v Magill* [2002] 2 AC 357 that the question in determining an issue of apparent bias was whether the fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the Tribunal was biased. In particular, the Tribunal had no indication from the letter of 2nd May 2008 what the basis of such an allegation was other than an unspecified feeling by the Respondent that the Tribunal was minded to adjourn the hearing on 16th April 2008, but had "disallowed" submissions by Mr Brooke of Temple on 16th April 2008.

17. Later in May 2008 the Tribunal issued written directions relating to the conduct of the next hearing and the production of evidence for use at that hearing, which was ultimately listed and heard on 16th July 2008. In view of the Respondent's solicitor's concerns that Mr Brooke may not have been allowed to make representations at the earlier hearing, the Tribunal specifically gave the Respondent permission to adduce further evidence or representations from him or from other witnesses about insurance or fire protection works or management charges for the years 2002/2003, 2003/2004, 2004/2005, 2005/2006, such evidence or representations to be in the form of witness statement(s) signed and dated to be served upon the Tribunal and upon the Applicants by 4 pm on 30th May 2008.

18. No representations, evidence or documents were received by or on behalf of the Respondent before the hearing on 16th July 2008. The Applicant submitted 3 further bundles of documents for use at that hearing, including documents relating to insurance, fire protection works and a third bundle of miscellaneous documents. All of these were served upon the Respondent.

19. At the hearing on 16th July 2008, there was no appearance or representation on behalf of the Respondent and the Tribunal had no further evidence or witnesses from the Respondent. There were no further submissions or representations by or on behalf of the Respondent which had a direct bearing on the issues to be addressed at that hearing on 16th July 2008. The Tribunal had ensured that copies of the 3 additional bundles filed on behalf of the Applicant for use at the hearing on 16th July 2008 had been served on the Respondent. This was also the evidence of the Applicant.

20. Following the hearing on 16th July 2008 the Respondent's solicitors Conway & Co wrote to the Tribunal by a letter dated 17th July 2008. That letter was expressed to be on behalf of BLR property management, an entity which that letter accepted was not a party to the proceedings. In view of the lateness of that submission, the absence of any satisfactory explanation for its late production in breach of the directions given in May 2008, and the fact that the hearing had finished, the Tribunal felt unable to take any account of its contents in reaching its determination. The contents of the attachment to that letter sought to comment upon some of the bundles which the Applicant had served in advance of the hearing on 16th July 2008. Before reaching the decision to decline to take account the attachment to Conway & Co.'s letter of 17th July 2008, the Tribunal considered its contents and formed the view that it did not contain material which might affect the outcome of its decision.

Evidence about insurance premiums paid and charged

21. The gist of the Applicant's case is that the insurance premiums charged for the relevant years were excessive, having regard to the nature of the development at The Maltings and the risks to be covered and the amounts of cover. The Tribunal finds the total insurance premiums charged for The Maltings for the service charge years 2003 – 2007 inclusive were as follows:

Service charge Year	£ amount inc IPT / comments	company	Sum insured £
2002-2003	21,809.76 (pages 17 & 32 Applicant's bundle) (amount for The Maltings not known)	Sun Alliance	4,651,912
2003-2004	14,044.85	Axa	6,047,485
2004/2005	14,167.72	NIG	7,231,231
2005/2006	15,330.20	NIG	5,784,984
2006/2007	13,363.31	NIG	7,520,479

22. Mr. Marelli's evidence was that the sum insured is higher that the declared value in each of the above service charge years. The declared value was the re-building costs. His evidence on this issue appeared to be unchallenged. The Tribunal accepted Mr. Marelli's explanation about this, as accurate.

23. The insurance premium charged for the service year 2006/2007 is not in issue and has only been included in the above table for comparison purposes. The insurance certificates have not been made available by the Respondent for the year 2002-2003 or the year 2005-2006. In these cases the figures are taken from copies of service charge accounts. Despite the descriptions on the index to the documents provided by the Respondent, the certificate provided was for the service charge year 2006-2007 not 2005-2006. Similarly the certificates which were described as relating to

the years 2002-2003 in fact related to the service charge years 2003-2004. The confusion about the dates of certificates extended to BLR's statement of case dated 26th February 2007 which consistently misdescribed the service charge years to which the certificates provided related. The Applicant provided part of the certificate for the year 2002-2003 at page 5 of the Applicant's bundle but that part did not disclose the amount paid for the insurance. The Tribunal could not be satisfied the part of the service charge account provided in the Applicant's bundle for the year 2002-2003, related to The Maltings as that phrase is defined in the Lease.

24. The Respondent's failure to provide the copy certificates is extremely unfortunate, particularly as Mrs Fothergill requested BLR to permit inspection of the accounts in February 2007 and that request was not acceded to. Even if the dates for inspection provided were not convenient it would have been courteous and helpful of the Respondent to have provided alternative dates for inspection following the adjournment of the first hearing. The Respondent and its agents BLR persisted with their failure to provide relevant information and documents, after the Applicant had provided a bundle for use at the hearing in early 2007 which contained a heading which stated that the service charge estimates accounts and demands for the 2005/2006 service charge year were not available.

25. The amounts charged to or paid by the Applicant or their predecessor for the above service charge years for insurance so far as they are within the documents and evidence made available to the Tribunal were as follows:

Service charge year	Amount paid or charged for insurance £	Percentage Charged	Page number	Correct sum payable £
2002-2003	215.92	0.99	32 Applicant's bundle	167.93
2003-2004	214.17	1.54	34 Applicant's bundle	107.08
2004-2005	Cannot be separately identified	Unknown		
2005-2006	92.40	0.77	pp47-48 Applicant's bundle	

Terms of the Lease relevant to insurance premium

26. In the above table the figures relate to the properties described as 1/12, 14/64 and 92/93 The Maltings which is the area defined as The Maltings component of the

service charge for the purpose of clauses 1.9 and 1.10 of the Lease. For the purpose of the part of the Lease which relates to the cost of insurance, clause 4(3)(b) of the Lease requires the lessee to pay a proportionate part of what is described as "The Overall Charge". The proportionate part of the overall charge payable under paragraph 6 of the First schedule to the Lease is 0.77%. "The Overall Charge" is defined by Part I of the Third Schedule to the Lease. Paragraph 6 of Part I of the Third Schedule to the Lease contains the lessor's covenant to insure. In other words the lessee of Flat 48 is only liable to pay 0.77% of the cost of the insurance. The material parts of the covenant relating to insurance are contained in paragraph 6 of part I of the Third Schedule to the Lease. That covenant requires the Management Company:

> "At all times during the term .....to .... Insure and keep insured the Development with an Insurance Company of repute to be nominated by the Lessor through the Lessor's agency in the name of the Lessor with the respective estates and interests of the Lessee his mortgagee and the management Company being noted against comprehensive risk including loss or damage by fire and loss or damage or liability to any person arsing from the ownership or occupation or user of the Development and all such other risk usually described as Property owners Liability and such other risks (if any) as the Lessor or its agents may think fit in the full reinstatement value thereof for the time being (inclusive of architects and surveyors fees)....."

27. "The Development" is defined by paragraph 5 of clause 1 of the Lease to include a number of other parts of the development including the office premises. It is a feature however of the insurance policies taken out by or on behalf of the Respondent (at least as far as they have been produced to the Tribunal) that insurance appears to have been limited to the residential parts of the development. Neither side made anything of this. Nothing appears to turn on this point.

28. Sections 18–30 of the Landlord and Tenant Act 1985 (as amended) ("the 1985 Act") refer to restrictions on "Service Charges". The relevant provisions are:

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

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

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

and the amount payable shall be limited accordingly ...

30— In the provisions of this Act relating to service charges—

... 'landlord' includes any person who has a right to enforce payment of a service charge.

Section 30A provides: The schedule to this Act (which confers on tenants certain rights with respect to the insurance of their dwellings) shall have effect."

29. The amendments to some of these provisions with effect from March 2004 are not material to these proceedings. The Respondent in practice took out the insurance of all the service charge years in question and sought to charge the costs as service charge. The issue does not arise whether the sums payable to the management company (GMML) are service charges or whether the management company is a landlord within sections 18- 19 of the 1985 Act as there was no management company in place. *Cinnamon Ltd v Morgan* [2002] 2 P. & C.R. 10 suggests this would not prevent the application of section 19 of the 1985 Act.

30. The Respondent relied upon the decision in *Berrycroft Management Company Limited v Sinclair Gardens Investments (Kensington) Limited* (1998) 75 P. & C.R. 210 as authority for the proposition that it is reasonable for a landlord to insure a property portfolio through a single underwriter and a single broker even if this results in premiums being higher than quotations on an individual property that may be obtained by a lessee of that property: paragraph 12 of BLR's letter 26th February 2007. The Tribunal does not read *Berrycroft* as laying down such guidance. The Court of Appeal's decision in that case simply held that the Judge's findings of fact on the facts of that case were not open to challenge. It is a question of fact in each case whether the provisions of sections 18-19 of the 1985 Act are satisfied.

31. The Respondent subsequently (in Conway & Co's letter of 4th April 2008) relied upon *Forcelux Ltd v Sweetman* [2001] 2 E.G.L.R. 173 a decision of the Lands Tribunal. There it was held the test for the recovery of insurance premiums under

s.19 (2A) of the 1985 Act was whether they had been "reasonably incurred", not whether they were "reasonable". This required consideration of the appropriateness of the landlord's actions and whether they were in accordance with the terms of the leases, the RICS code and the 1985 Act. On the facts of *Forcelux* the insurance costs had been reasonably incurred. That is the issue the Tribunal has to decide here.

Evidence about insurance premiums

32. Mr Marelli gave evidence that GHBC had been the insurance broker for the Respondent since July 2002. The Respondent owned approximately 2000 residential units. His evidence at one stage was that it was the "right" of the Respondent to insurer under a block policy. This is how he understood the effect of the *Berrycroft* decision: see his letter of 2nd October 2007 (Respondent's bundle pages 148-149). That is not the Tribunal's understanding of that decision. He went on to say that a block policy enabled GHBC to provide wider cover than an individual block of flats policy and it streamlined administration.

33. Mr Marelli gave evidence that as a broker GHBC sought to avoid any exclusion or exemption from cover for subsidence for the whole of the Respondent's portfolio. This was the first special feature of the policy obtained. Mr Marelli's evidence was that only 3 companies in the market would provide such cover for the service charge years which were being considered by the Tribunal. GHBC also sought to include within cover persons who he described as "transients". Thirdly as the Respondent's broker GHBC sought to have cover for contract works up to a value of £10,000 without prior notification to insurers. Another special term which GHBC had obtained was emergency assistance cover. The Applicant complained that the existence of this cover was not communicated to them or other residents at The Maltings. Nevertheless such cover was obtained in the service charge year and was evidenced by the insurance certificate for 2004/2005.

34. Mr. Marelli's evidence was the quotations provided by Mr Cox of the Alan Boswell (the broker who gave evidence on behalf of the Applicant) were not comparing like with like. In particular Mr. Marelli said that the quotation obtained in the letter of 27th February 2007 on pages 9 - 27 of the Applicant's supplemental bundle (quotations from Norwich Union and Ecclesiastical) did not address the same terms and conditions obtained by GHBC.

35. Following the adjournment of the hearing on 28th November 2007 Mr Cox produced further quotations from Allianz Insurance which appeared to show that cover for all 4 parts of the development including the part defined in the lease as The Maltings could be obtained for £15,000 including Insurance Premium Tax ("IPT"). This was sent under cover of an e-mail dated 19th March 2008. There was an e-mail from Kathryn Jervis of the Alan Boswell Group, a colleague of Steve Cox dated 15th November 2007 which confirmed that quotations from Allianz included contract works cover for a level of £250,000 and that high risk groups such as

students and asylum seekers were not excluded. That e-mail confirmed that Allianz would not offer cover for pre-existing subsidence cover. It stated the norm throughout the industry was for the subsidence claim to be handled by the insurer responsible for insuring the building at the time of damage. Mr Marelli produced a copy of the policy wording which deleted the exclusion for pre-existing subsidence from Axa. The Tribunal accepts the figures contained in the Alan Boswell Group e-mails dated 15th November 2007 and 19th March 2008. The Tribunal finds that the effect of these quotations would be to reduce the figures payable for the premium for The Maltings by a percentage possibly as high as 20% or 30%. In the absence of detailed comparison of like for like figures the Tribunal is unable to make more precise findings about possible savings in premiums if a broker such as Alan Boswell had been used for the service charge years ending March 2003 to March 2006 inclusive.

36. Mr Marelli's evidence was that GHBC had moved the insurance to different insurers where necessary to obtain better terms when necessary. The Tribunal finds this evidence of testing the market was restricted to seeking different quotations for insurance upon the terms specified as appropriate by GHBC. The Tribunal finds this was a very limited and incomplete testing of the market because it was limited by the particular terms and conditions which Mr. Marelli accepted were peculiar to GHBC and the Respondent (particularly the subsidence exclusion).

37. There was a dispute about whether the quotation obtained from Allianz for the Alan Boswell group was valid. It appears that a different office of Allianz had "no quoted" GHBC when it had applied. This difference was outlined in an e-mail from Carlo Marelli to Lorraine Scott dated 11th January 2008 put before the Tribunal. A similar e-mail was obtained by Steve Cox from a business development manager at Allianz who said Allianz would be prepared to re-quote upon similar terms, even though the quotation would not be in Mrs Fothergill's name.

38. The Alan Boswell Group and Steve Cox had obtained insurance for the development including the part defined as The Maltings for the year from 23rd March 2008 for a total premium of nearly £14999.00 inclusive of IPT for The Maltings RTM Company Limited. A copy of the policy was produced. The sum insured was £7,520,479.00.

39. In the course of his evidence on 8th October 2007 Mr Marelli referred to the claims history of The Maltings. Subsequently (at the Tribunals' request) a document entitled Five year Claims experience (March 2003- February 2008) was produced on behalf of the Respondent. This document appeared to have been compiled by or on behalf of Mr Marelli. This showed 14 separate claims for damage, one of which would have related to a part of the development outside of the definition of The Maltings in the Lease. Be that as it may, the most significant claim in terms of value by far was a fire which took place on 1st April 2005. The recorded payment was £72,314.98. The terms of that document did not appear to be disputed by the

Applicant. The Tribunal finds that document reflects the claims history of the development.

40. The Applicant produced evidence from the Alan Boswell Group for their own portfolio of properties under the auspices of the Southern Private Landlords' Association for the years 2004- 2007.

41. In the course of cross examination and questions from the Tribunal Mr Marelli confirmed that the sums for which The Maltings were insured were obtained by him from the Respondent's managing agents from time to time. He did not consider it was within his remit to challenge or question these valuations. They were not investigated by him. Mr Marelli also indicated the sums insured were increased by an amount for inflation each year, except for the year 2005/2006 where the sum insured was not increased on instructions from the Respondent. The Tribunal accepts that evidence. It became apparent that Mr Marelli rebated or shared some of the commission obtained from broking the insurance for the Respondent's properties with the Respondent. Mr Marelli was not prepared to disclose the detail of the commission sharing arrangement. The Tribunal formed the view that on the case as advanced by the Applicant it was the final premium which was payable which was of significance, not the allocation of commission between the Respondent and its broker. There was no evidence to suggest that the level of commission payable under the block policy arranged by GHBS for the Respondent was a factor which increased the premium payable as service charge by lessees of The Maltings.

42. The key point which emerged from the evidence of Mr Cox of the Alan Boswell Group was that the premium rates which he had been able to obtain for the Applicant's portfolio (on different terms of insurance) were considerably lower. We find and the Applicant contended that the rates which the Alan Boswell Group were able to offer the Applicant's portfolio were considerably lower than the rates which were offered to the Respondent upon the terms found for them by GHBC. Unfortunately the declared value figures and the premiums include parts of the development other than those parts defined as The Maltings under the Lease. The Applicant contended they were able to obtain rates equivalent to £1.56 per £1000 and from 2006 £1.48 per £1000 for declared value (reinstatement value) and obtained a 17.5% discount because they had a portfolio of properties which required insurance. A schedule was produced by the Applicant at the hearing on 16th April 2008 which was intended to demonstrate that difference.

43. The Tribunal is not satisfied that the Applicant's schedule itself demonstrates that lower premiums were available for The Maltings during the service charge years in question in these proceedings, although other evidence from Mr Cox and the Alan Boswell Group demonstrates this. Some of the earlier evidence of Mr Cox of the Alan Boswell Group requires some adjustment because some of his quotations (for example that contained in his e-mail of 29th October 2007) to Maxine Fothergill on

pages 15b-16b of the Applicant's supplemental bundle contained quotations for parts of the development which are not defined as The Maltings in the lease. Some of the earlier quotations obtained on behalf of the Applicant assumed a good claims history which there clearly was not – see page 12b of the Applicant's supplemental bundle Iain Edwards Churchill Insurance Consultants and the quotations at pages 9-11 of an earlier supplemental bundle of the Applicant. The Tribunal does not criticise the Applicant, Mr. Cox or the Alan Boswell Group for the contents of this earlier evidence. It was apparent that the claims history of the development was first disclosed by Mr. Marelli during the course of his evidence in these proceedings in October 2007 and subsequently. The Tribunal does not criticise Mr. Marelli or GHBC for this late disclosure. However the Respondent's omission to disclose this information at a much earlier stage meant that much of the earlier work and time spent on these proceedings by the Applicant and their broker was wasted. No satisfactory explanation for this late disclosure was provided on behalf of the Respondent. The claims history was clearly intended to form an important plank of evidence on behalf of GHBC.

Conclusion on insurance premiums

44. The Tribunal is troubled by a number of aspects of the evidence adduced by the Respondent about insurance premiums. Firstly the effect of the subsidence exclusion clause (a bespoke clause marketed and suggested uniquely by GHBC for the Respondent) is to require individual lessees to pay a higher premium than would otherwise be the case even with a reputable insurance company for the benefit of the Respondent's own particular commercial circumstances and requirements. The terms of paragraph 6 of part I of the Third Schedule to the Lease permit this. Mr. Marelli made a convincing case to the effect that this particular Respondent did not wish to have to deal with the additional administrative burden of arranging subsidence insurance for properties coming into the portfolio. Nevertheless the Tribunal was deeply concerned about the implications of this as, taken with other factors, it appears to have resulted in a premium in excess of the market rate for a policy which would ordinarily have been obtained if the landlord of The Maltings solely represented the interest of the lessees or a majority of lessees, or a smaller portfolio of properties including The Maltings.

45. The second troubling feature about insurance premiums is that there was no evidence that the managing agents or the Respondent had taken any steps to obtain a valuation for the purpose of ascertaining the correct figure for insurance in the entire period 2003-2007 with which we are concerned. The amount insured by the Maltings RTM Company Limited now appears to be similar, so this may not have made a significant difference in premium terms. However the Tribunal was at one stage concerned whether this indicated that the premiums were not reasonably incurred.

46. A third troubling feature is that the difference in the premiums still seemed to be significantly higher even once the subsidence cover had been taken into account.

47. A fourth troubling feature is that because of the specific requirements of the Respondent in relation to pre-existing subsidence, no real or effective market testing of the premium had been carried out. The utilisation of that requirement artificially narrowed the market of insurers who would be willing to quote for such insurance.

48. At the end of the day the Tribunal was unable to conclude that these features alone meant the insurance premiums for the service charge years 2002-2006 were not reasonably incurred. The Tribunal considers itself bound by the approach of the Lands Tribunal in the *Forcelux* case at paragraphs 40-43. Adopting the approach in *Forcelux*, the fact that the premiums could have been obtained at a cheaper rate is not evidence by itself from which the Tribunal can conclude the premiums incurred and charged as service charges were not reasonably incurred.

49. The schedule at paragraph 25 of these Reasons indicates that for 2002-2003 and 2003-2004 the percentages charged for Flat 48 were in excess of the 0.77% payable under paragraph 6 of the first schedule to the Lease. These issues were not argued before the Tribunal and so the Tribunal makes no findings about them in these Reasons.

Fire protection works

50. The full history of these works and the issues behind them only came to light following the adjournment of this case after the hearing on 16th April 2008. Following that hearing the Applicant obtained copies of documents including some evidence adduced in Court proceedings and statutory notices, which shed considerable light on what had occurred in relation to these works. Very little of the history of statutory notices was revealed to the Tribunal by the Respondent or its agents BLR in their letter of 26th February 2007 or subsequently in their written or oral evidence (including the evidence of Mr Jerry Brooke). BLR and the Respondent had some knowledge of some of these statutory notices and earlier Court proceedings involving the Respondent concerning responsibility to carry out these works as the letter from them to Lewis Silkin 15th May 2002 (produced by Mrs Bull in her evidence) shows. BLR and the Respondent omitted to provide any detail of these Court proceedings in the information and evidence provided to the Tribunal.

51. In the light of the documents provided and in particular the witness statement of Susan Anne Coughlin ("Ms Coughlin") an employee of Gravesham Borough Council ("the Council") made on 16th October 2001 in County Court proceedings in Gravesend County Court (case No GV100745) the Tribunal finds as follows. The freehold of the development was originally owned by Pinecraven Developments plc. The freehold was later sold to the Respondent who appointed David Glass Associates plc to act as agents to collect rent and building insurance.

52. In October 2001 Ms Coughlin identified numerous defects in the design and construction of the fire warning system at the development: see in particular paragraphs 9, 10, 11, 13 and 16 of that statement. The Respondent did not challenge her evidence about this. The Tribunal finds that the defects she observed existed.

53. Paragraph 16 of her statement confirms consultation with a representative of the fire brigade about a schedule of works required to remedy the defects observed. The Respondent did not challenge her evidence about this. The Tribunal finds that the Fire Brigade approved and endorsed the schedule of works recommended by the Council to remedy the defects in the fire protection and warning system at the development.

54. In this part of these Reasons all references to legislation in respect of statutory notices are to the legislation as it was in force at the time of the notices. On 19th December 2000 Ms Coughlin caused to be served upon GMML and David Glass Associates plc (then the agents for the Respondent) a notice under section 377(A) of the Housing Act 1985 indicating the Council was considering taking enforcement action in respect of the defects notified. The Tribunal finds such a notice was served and that GMML did not make any commitment to carry out the works required by the Council.

55. The Tribunal finds that on 26th April 2001 the first of a series of statutory notices concerning the fire protection and alarm system at the development was served. This first notice was served under section 352 of the Housing Act 1985 in respect of fire protection and fire warning system works at The Maltings upon GMML and David Glass Associates plc (then the agents for the Respondent).

56. The Tribunal finds the Respondent or its agents Caxtons Limited ("Caxtons") then issued a notice under section 20 of the 1985 Act dated 5th March 2002 in respect of proposed works to the fire detection system emergency lighting systems as proposed by the Council. The schedule that was attached to that notice was either the schedule at pages 12-15 of the Applicant's bundle or in a very similar format. The Respondent obtained quotations for these works from Kent Fire Limited ("KFL") and Image 2000 Systems. The name of the person to whom those quotations was addressed at the Respondent was John Galliers. John Galliers appears to have had a leading role at BLR for much of the period 2002-2006 and was the author of an e-mail of 15th July 2008 commenting upon other evidence adduced by the Applicant for use at the hearing on 16th July 2008. KFL was selected to carry out works which according to their quotation dated 4th February 2002 consisted of installation of a Fire Control Panel, 28 manual call points, 88 smoke detectors, 88 sounders, 45 emergency lighting units instruction manual and log book. The total costs payable to KFL was said to be £45,360.00 plus VAT. The invoice for these works has not been produced by the Respondent. In the event the lessees were also charged a proportion of Caxtons' fees. Each lessee appears to have been charged a figure in the region of £951.97 for these works. It is possible the fees to Caxtons were charged to the lessees separately. BLR said these works

had been undertaken in a letter from Mr. Brooke dated 5th February 2003 addressed to the Applicant's licensed conveyancers who made enquiries before the Applicant purchased 48 The Maltings. In view of the history of the defects and history of statutory notices set out below, the Tribunal finds that much of the work carried out by those contractors was not of a reasonable standard, was poorly designed or inadequately implemented or a combination of all three.

57. Some of the callout charges evidenced by contractors' worksheets in late 2002 and early 2003 indicate that the faults which were repaired were the responsibility of KFL. In particular the FPS Safety Systems ("FPS") worksheet dated 2nd January 2003 contains the following comment "Recommend the system be re-programmed as KFL did not install the system correctly. Panel still remains in fault – no text address is evident due to KFL's mistakes". That worksheet was addressed to Basicland Registrars but would have reached BLR and the Respondent. A similar report was contained in the engineer's worksheets for 17th February 2003 and 25th February 2003. The Respondent's case is that the invoices in this period and in the subsequent service charge year 2003-2004 relate to "ongoing servicing of the fire system which is required every year and additional attendances to deal with items of repair as detailed on the relevant invoices": see BLR letter 26th February 2007 paragraphs 15, 23 and 26. The Tribunal finds that for the entire period with which it is concerned (service charge years ending March 2003 – March 2006 inclusive) some costs were incurred in relation to periodic maintenance costs of a fire alarm system which were reasonably incurred. However there were a number of additional costs of remedying defects or faults which were either the direct or indirect result of the system being installed configured or designed to a standard that was not acceptable to the local authority or the local fire authority. The fact that the local authority and the local fire authority (or the Fire Brigade) were not persuaded that the fire alarm system met the statutory standards is itself evidence that the works and services were not to a reasonable standard. The Respondent did not provide any information or submissions about the reasons for the statutory notices.

58. The Tribunal finds Ms Coughlin inspected the development in early 2003 after a considerable amount of work had been done in respect of the Council's recommended schedule. Ms Coughlin wrote to Caxtons on 3rd April 2003 saying that a number of problems referred to previously still existed particularly relating to the fire doors. Ms Coughlin was of the view that the doors were only 14 years old and were considered to be "upgradeable" before the current works were carried out. That was a reference to works specified in the schedule prepared by Caxtons in 2001 which had been the subject of the section 20 notice served in 2002. The Tribunal finds those problems existed at 3rd April 2003. Ms Coughlin wrote to a firm of solicitors Whyte & Company on 15th April 2003 saying that the notice would not be withdrawn until the part of the work which the Council was concerned about had been completed to its satisfaction. The Respondent did not provide any explanation evidence or submissions about this.

59. Ms Coughlin's letter of 4th June 2003 to Caxtons referred to correspondence from the Fire Officer confirming that the works carried out to the doors were not adequate. The Tribunal finds that the Fire officer was not satisfied that the works carried out were adequate in June 2003. Ms Coughlin said the Council was considering further enforcement action. The Tribunal finds the Council did so consider. That letter was copied to the Respondent and to Basicland registrars (also known as BLR). The Tribunal finds that the Respondent and its agents BLR knew of and became aware of this correspondence between Caxtons and the Council in June 2003.

60. In mid May 2004 Council was still seeking assurances from Caxtons about the fire protection works and that the managing agents would ensure that regular inspection and maintenance of the seals to fire closing doors would take place: see Sue Coughlin's letter of 14th May 2004. The Tribunal finds that referred to the seals to the fire doors. The Tribunal was not provided with any documents confirming that such an assurance was given but infers that it was, as this statutory notice was later lifted by the Council.

61. The lessees were being charged for all the fire protection works which were taking place: see for example Temple's letters of 6th February 2004 and 21st October 2004 to all lessees (pages 33 and 38 Applicant's bundle) which described the works to the fire alarm system in the service charge year to 25th March 2003 and the year to 25th March 2004 as "maintenance and repairs or maintenance". The Tribunal finds that much of the work to the system carried out could not properly be described as maintenance but amounted to repair or improvement works required to remedy works inadequately carried out either at the time of the development in 1989 or by KFL in 2002-2003.

62. On 8th December 2004 FPS Safety Systems (a contractor engaged to carry out works to the fire alarm system) wrote to Mr Jerry Brooke at Temple (then the managing agents for the Respondent) saying they had encountered major problems obtaining access to various flats. This by itself is not evidence that the fire protection works were below a reasonable standard. It is evidence from which the Tribunal infers that works to the individual sounders and/or detectors in the flats needed to be carried out. Other evidence for that conclusion is to be found in the December 2004 The Maltings Newsletter which contained the following short item about the fire alarm system:

> "On November 18th the Fire Alarms went off in several of the flats. After a call to the Fire Brigade who checked for a fire and confirmed no Fire found they found they could not stop the Fire Alarms. After several calls to the Fire alarm engineers we were able to stop the fire alarms in the flats concerned. However there is still a fault in the control box needing to be rectified....."

63. The Tribunal finds that the events described in that Newsletter item about the fire alarm system occurred. On 16th December 2004 Temple wrote to lessees (but only apparently at the development itself and not those lessees who were off site) seeking access for fire alarm works to be carried out on 17th and 18th January 2005.

64. On 6th January 2005 Caxtons said they were withholding their further services as they had not been paid. Caxtons confirmed they had been appointed by BLR. Caxtons confirmed that all correspondence from the Council should have been addressed to Mr Brooke of Temple. In February 2005 The Maltings Newsletter produced by a lessee after contact with BLR, confirmed that fire extinguishers were missing from the lower corridors "owing to poor security". That Newsletter also confirmed that fire alarm engineers were due to return to re-set the internal sensor in each of the flats. The lessees were paying and being charged for fire extinguisher hire.

65. On 29th March 2005 Mrs Lynne Bull a lessee of a number of flats at The Maltings, sent an e-mail to Jacqui Katz of Basicland (then the managing agents of the Respondent) saying that the alarm system was still "buzzing with faults showing again". The Tribunal finds that her comments about the alarm system remaining defective at that date were accurate. The Tribunal finds that a small proportion of the problems with the fire alarm system were attributable to damage inflicted to individual sounders in flats at the development. Much of this damage inflicted "deliberately" however was attributable to the location and/or sensitivity of the detectors. There is material which indicates the alarm would be activated by smoke from burned toast: see letter from FPS dated 8th December 2004 pages 25-26 Applicant's bundle). In the circumstances of the development at The Maltings where a considerable number of the flats were sub-let by lessees, the deliberate damage or lack of care with the individual detectors was a factor which the organisation responsible for designing installing and implementing the system should have foreseen. BLR and the Respondent have not adduced any evidence about the instructions or brief or design specification given to the individual contractors. The only evidence of such a brief is a Schedule of Works prepared by Caxtons. That schedule does not provide any detail about the sensitivity or location of sensors and sounders.

66. The Tribunal finds that on or about 1st April 2005 there was a serious fire at the development causing loss and damage in the region of £72,314. Mrs Bull gave evidence, which the Tribunal accepts, that the fire alarm system did not operate or did not operate effectively on that occasion. The fire appears to have started in the underground car park of the development which included The Maltings. This is what is stated in the e-mail from Mrs Bull to Jacqui Katz of BLR dated 27th May 2005. The Tribunal finds this fire was a life threatening event to residents at the Maltings and the non-operation or defective operation of the fire alarm system was a matter of the utmost seriousness.

67. On 4th April 2005 or shortly thereafter, the Tribunal finds the Council issued a notice under section 372 of the Housing Act 1985 in respect of the fire alarm system at the development. The Tribunal finds that notice was served on BLR and on the Respondent. That notice complained the fire alarm system was not operating and required overhaul and a current test certificate. The Tribunal finds those defects existed. Section 272 of that Act was entitled "Power to require execution of works to remedy neglect of management". The Tribunal finds the existence and service of that Notice is strong evidence that the fire alarm system and the costs charged (including maintenance costs) were not of a reasonable standard and the costs incurred for installation repair and ongoing maintenance of that system were not reasonably incurred.

68. On 29th April 2005 or shortly thereafter, the Tribunal finds the Council issued a second notice under section 372 of the Housing Act 1985 in respect of the fire alarm system at the development. That notice was served on BLR and on the Respondent. The notice complained the fire alarm system required overhaul and a current test certificate. This notice also stated the fire alarm system was not operating effectively. This notice stated cables had been burnt through due to fire damage and the display panel was displaying a large number of faults. The Tribunal finds those defects existed after the fire in April 2005.

69. On 4th October 2005 a new firm of fire alarm engineers 4d Installation and Services ("4d") provided fire commissioning and inspection services and sent servicing certificates for the fire alarm systems at The Maltings (Respondent's bundle pages 65-68). The final certificate of Inspection and Servicing was dated 13th September 2005. The invoice from 4d dated 11th October 2005 (Respondent's bundle page 75) confirms 4d carried out works of replacement and installation of sounders and heat detectors. It appears that these works related to the basement car park area and had been carried out by May 2005.

70. On 28th October 2005 Ms Coughlin wrote to BLR referring to an inspection of the development which she undertook with a Fire Brigade officer the day before. She required that a contactor should certify in writing that the fire doors reach an appropriate standard for 30 minutes fire and smoke resistance. On this basis on behalf of the Council she was prepared to withdraw the notice served in late April 2005 on the footing it had been complied with. The Tribunal infers the April 2005 notice was withdrawn as it did not show on the Land Registry when a search was carried out by solicitors for prospective purchasers at the development carried out in March 2006.

71. The Tribunal infers from this that the fire alarm system was not operating to reasonable standard until the certificate was provided in October 2005. The Applicant had complained from the outset in these proceedings that no certificate of completion of the fire protection works carried out in 2002-2003 had been provided (or as the Applicant put it had not been "signed off" by the Fire Officer). The Applicant's conveyancers had asked for a copy of such a certificate in their letter of

30th January 2003. In 2003, BLR on behalf of the Respondent responded that they did not have a copy of the current fire certificate and referred the Applicant's conveyancers to the local authority. The Tribunal finds that no certificate of completion or compliance with relevant standards existed in February 2003 and BLR must have known that. The first certificate which existed was dated September 2005.

72. Unfortunately the fire alarm system at The Maltings did not remain in satisfactory working order for long, as it should have been repaired satisfactorily in September 2005. On 14th June 2006 the Council served a further notice under section 372 of the Housing Act 1985 upon the Respondent and BLR alleging that there was a fault with the fire alarm system at The Maltings, and requiring the fault to be rectified and a current test certificate to be provided. The Tribunal finds that notice had been issued as the result of an inspection which had taken place in the weeks before service of that notice in 2006. The Tribunal also finds the fault referred to in that notice existed and had existed for some time before service of the Notice. The precise detail of the defect is not in the evidence before the Tribunal. One symptom of the fault is referred to in an e-mail from Lynn Bull to Zainab Musaji of BLR dated 7th September 2006. It appears from that e-mail (and the Tribunal finds as a fact) the system was causing problems by going off in the night, and there were no contact details to report the fault to. The Council provided more detail of the repair works carried out in September 2006 in a facsimile transmission to Hatton Wyatt solicitors dated 26th October 2006. This confirmed that a new panel had been installed. The Council stated (and the Tribunal finds as a fact) that the system still had faults at that stage and further work by an engineer was required. A copy of the engineer's commissioning certificate dated 30th October 2006 confirmed that additional faults remained to be rectified.

73. On 13th November 2006 Mrs. Lynn Bull complained to BLR by e-mail that the fire alarm system was still showing a fault. On 21st November 2006 Zainab Musaji of BLR responded in an e-mail to Mrs. Lynn Bull that a contractor had either attended or was due to attend to rectify the fault on the alarm which was showing. It is unclear from that e-mail whether the contractor had attended or was due to attend. The Tribunal finds that the alarm system was not in working order at the date of that e-mail. BLR's attitude to this was also reflected by a further sentence in that e-mail which read "Due to the large amount of arrears on the service charges we are not in a position to carry out any non-essential works".

74. The relevance of events after the 25th March 2006 (the service charge year end) is that they confirm that the certificates provided by the contractors in September 2005, were not conclusive or persuasive evidence that the faults or defects with the fire alarm system had been adequately or completely addressed by the contractors 4d.

Service Charges claimed by the Respondent for fire protection works

75. The amounts charged or paid by the Applicant or her predecessor can be illustrated by the table below, limited to charges for The Maltings.

Service charge Year	£ amount inc VAT / comments	company	Description of work/service	Amount charged to Applicant £
2002-2003	901.97	KFL	KFL works quotation 04 02 2002	Nil directly
2003-2004	2,614.38		Applicant's bundle page 34	40.26
2004/2005	1,866.49	FPS	Applicant's bundle page 28	29.05 (being 1.54%)
2005/2006	1,880.00	4d	Applicant's bundle pages 42 and 44	28,95 (being 1.54%)
2006/2007	2000.00 (precise amount unknown not disclosed)	4d and others	Applicant's bundle pages 64 and 65	

Conclusions in relation to costs of fire protection works

76. The above figures do not include the cost of hire of fire extinguishers which is itemised separately in some of the accounts provided.

77. The Applicant's predecessor paid the £901.97 for the fire protection works in the service charge year 2002-2003 before the Applicant acquired 48 The Maltings. It is unclear whether a proportionate part of Caxtons' fees was paid by the Applicant's predecessor or has been or will be charged to the lessees separately. For this reason the Tribunal makes no finding about the Applicant's share of Caxton's fees and will treat her share of those fees as not in issue in these proceedings. Although those works were not carried out to a reasonable standard, the Applicant was not able to point to any evidence that they paid those sums in the service charge year 2002-2003. Accordingly the Tribunal does not make any finding in relation to the £901.97 for that year in relation to the Applicant.

78. The documents and invoices provided for the service charge years ending March 2004, March 2005 and March 2006 do not enable the Tribunal to arrive at precise figures for the costs of remedying defects in design installation or in earlier repair works from time to time. The invoices provided by the Respondents were self evidently not a complete set of the relevant vouchers. Doing the best it could from

the material available, the Tribunal's view is that half of the costs incurred in the service charge years ending March 2004, March 2005 and March 2006 could be attributed to the costs of remedying defects in the design or installation of the system or of defects or faults in earlier repair works. Accordingly only 50% of the service charges demanded from the Applicant in those years are payable on the footing that the sums were not reasonably incurred and/or the services provided were not of a reasonable standard. In addition the Tribunal finds that no or no reasonable steps were taken to investigate or secure recovery of losses from those responsible for defects in the installation in 2002 and/or inadequate repair works and/or there was inadequate supervision or design of the work in 2002 or the repair works. The total paid for those 3 years by the Applicant was £98.26. The Tribunal finds total payable by the Applicant was £49.13. This figure excludes any liability for Caxtons' fees which will have to be dealt with separately if they remain in issue.

79. The fire protection works for the service charge year ended March 2007 are not the subject of these proceedings. The Tribunal makes no finding in respect of the sums paid or demanded for that service charge year.

Managing agents' fees

80. The sums charged for management fees for 48 The Maltings for the relevant service charge years can be illustrated as follows

Service charge Year	£ amount inc VAT / comments	Company	Description of work/service
2002-2003	111.24	BLR	Applicant's bundle page 32
2003-2004	148.31	Temple	Applicant's bundle page 34
2004/2005	111.23 (being 0.99% of 11,235.95)	Temple	Applicant's bundle page 28
2005/2006	191.93 (being 0.99% of 19,387.52)	BLR	Applicant's bundle pages 42 and 44
2006/2007	168.30 (being 0.99% of 17,000.00 (precise amount unknown not disclosed)	BLR	Applicant's bundle pages 64 and 65

81. Where the percentage is inserted in the schedule above, the documents before the Tribunal entitling the Respondent to charge the service charges actually demanded have not been provided.

82. The Tribunal ruled at the hearing on 16th April 2008 that the only areas of challenge to management fees by the Applicant were the fees concerning the major works (including the section 20 notice of 11th June 2003), the insurance premiums and the fire protection works. That ruling was reflected in directions issued by the Tribunal in May 2008. Accordingly other challenges which the Applicant wished to make to the managing agents' fees were not considered by the Tribunal.

83. The Respondent asserts that the Managing Agents' duties were reflected in the "menu" of duties and matters set out in paragraph 18 of its letter of 26th February 2007. The Tribunal measures some of the performance of the managing agents from time to time again the standards set out in the RICS Service Charge Residential Management Code approved under section 87 of the Leasehold Reform Housing and Urban Development Act 1993 Act ("the Code"). The Tribunal views the menu of duties set out in paragraph 18 of the Respondent's letter of 26th February 2007 with some caution as neither Temple nor BLR produced any contemporary evidence of the terms of their engagement by the Respondent of the kind recommended by the Code (paragraph 2.1).

84. One of the points made in paragraph 18 of its letter of 26th February 2007 should be dealt with at the outset. It is suggested that a high level of staff and computer technology was required. Whatever the position may have been in relation to BLR (as to which the Tribunal had no evidence), when the management of the development at The Maltings was transferred to Temple in May 2003 until early 2005 the use of staff and computers was minimal. Temple was effectively a one man company comprised of Mr. Brooke and his wife. Mr. Brooke's evidence was that no computer records existed or had been lost or handed over. The omission to keep copies of such records as may have existed, negates the purpose of technology and itself is a serious failure on the part of a managing agent.

85. The criticisms made of the managing agents' conduct in relation to the major works carried out in 2003 can be divided into 2 parts. Firstly consultation in relation to the scope and cost of the works. Secondly supervision of the works and collection of funds. Consultation largely appears to have revolved around discussions and provision of information to Mr. John Ward of 3 Hazard House. The opportunity was missed to invite lessees as a whole to suggest other contractors in the tender list which was given to Mr. Ward in November 2002 (page 115 Respondent's bundle). Given the terms of section 20 of the 1985 Act, the fact that Mr. Brooke was on the technical committee of ARMA and had experience of working with BLR, the Tribunal finds the breaches of the provisions of section 20 surprising. Those breaches were not simply academic or technical. The correspondence with lessees shows that a number of lessees were raising questions, making late payments or asking for further time to pay for these works at or after the time when the works were due to commence. Examples of this include letters to Mr. Turner (18th July 2003), payment from James Marrett 25th September 2003, letter from Katy Hayday 26th September 2003, letter to Mrs. S Holdern 26th September 2003 letter from Miss Julia Hart received 30th September 2003, letter from Tina Thomas 10th October

2003 and Miss J Deacon's letter of October 2003. If consultation and copies of the specification (or the works schedule) had been made available in good time before the commencement of the works, the chances of ensuring prompt payment would have been considerably improved. The prospects of reducing questions from lessees about the works would have been reduced had this occurred.

86. There is a more fundamental point about the section 20 notice of 11th June 2003. If this was intended to be a request for a sinking fund, the letter was a particularly unclear means of making such a request. If the sums demanded and collected were intended to form a sinking fund as Miss Scott suggested, this should have been reflected in the service charge accounts. As it was, the absence of a sinking fund meant there was no reserve left at a later stage in later service charge years. The Tribunal regards this as either a fundamental misunderstanding of the nature of the sinking fund or a failure of communication by the managing agent. At the very least the intention to create such a sinking fund should have been communicated to the accountant.

87. BLR said that a reconciliation of the expenditure for the major building works commenced in 2003 had not yet taken place. BLR attributed this to the failure of Temple to provide information: see paragraph 20 of BLR's letter of 26th February 2007. BLR acknowledged that the managing agents had not certified the actual expenditure: see paragraph 21 of BLR's letter of 26th February 2007. The Respondent's position did not change during the course of the hearings in October 2007, November 2007, April 2008 and July 2008. The only gloss on this is that Miss Scott indicated the Respondent was in litigation with Langley Reiff Byers in relation to the performance of its duties under the contract for the supervision of the major works. The Tribunal invited Miss Scott and BLR to provide copies of the pleadings in those proceedings so the Tribunal could assess whether Langley Reiff Byers had a role to play in BLR's professed inability to finally certify the actual expenditure. The Respondent did not accede to that invitation. If the Tribunal accepts what BLR says about this failure to certify the actual expenditure at face value, there has been a serious failure of duty by either Temple or BLR or both in omitting to retain sufficient records and information to enable actual expenditure to be certified. The Tribunal was sceptical of BLR's explanation for the failure to certify or arrange for certification of actual expenditure of the works or the failure to provide documents (such as witness statements and pleadings in the Langley Reiff Byers litigation) which explained why such certification was not possible some 4 years after the works had been completed. The Tribunal infers that there is no satisfactory explanation for the failure to certify the actual expenditure and that the managing agents Temple and BLR have contributed to this situation by failing to provide a full explanation. The seriousness of this failure is compounded by the fact that monies so collected for a sinking fund should have been held on trust: see paragraphs 10.1 – 10.4 of the Code for example.

88. In relation to insurance premiums it appeared to be common ground that no attempt was made to verify or recommend the investigation of the amount for which the

building was being insured for the service charge years ending 2003 – March 2006 inclusive. This was a 4 year period when sums in excess of £60,000 were being expended for insurance for the part of the development known as The Maltings alone. Taken with the other parts of the development the sums expended for insurance were considerably greater probably nearer £80-90,000. Paragraph 18(e) of BLR's letter of 26th February 2007 acknowledges that it is part of the managing agents' duty to liaise with the insurance broker. In this case the broker Mr. Marelli said that it was not part of his duty to check the figure for which the building was being insured. If that was how the Respondent's broker regarded his duties, this was all the more reason for a managing agent to take an active role in ensuring the insurance was for the correct sum.

89. Paragraphs 18(b) and 18(f) of BLR's letter of 26th February 2007 acknowledge an important role for the managing agent in relation to the provision of information about service charge accounts. Mr. Brooke of Temple was unable to provide copies of demands or accounts relating to the period when Temple had been managing The Maltings, other than those produced in the bundle. He said that the documents had been handed back to BLR. BLR for their part appeared to be unable to provide to the Tribunal or the Applicant copies of service charge accounts or demands for the year ended March 2006 showing the sums that had been demanded form the Applicant. The documents provided by BLR in support of proceedings for alleged service charge arrears at pages 132-133 of the Applicant's bundle were statements which provided no or insufficient details of the amounts charged. This failure to produce is capable of at least two possible explanations. Firstly an inadvertent omission or failure to appreciate the relevance of the documents. Secondly a failure to keep records. On either view the managing agents' ability to provide an explanation for service charge accounts and invoices has been seriously compromised.

90. The history of the fire protection works set out in these Reasons. On the limited and incomplete explanation of events given on behalf of the Respondent in these proceedings it seems clear the managing agents during the service charge years ending March 2003- March 2006 failed to recognise that the works carried out in 2003 by KFL were ineffective in significant respects, or poorly designed or poorly co-ordinated. The Respondent and the Managing Agents left a fire alarm system in place which was prone to being set off by a relatively innocuous event such as burnt toast and exposed to damage from residents who could not turn off the alarm. If Temple or BLR did appreciate that the works carried out did not provide an alarm system of a suitable standard, they do not appear to have advised the lessees of that fact. The existence of statutory notices issued by the Council from time to time is not just evidence of a defective alarm system. Those notices indicate that the managing agent had failed in its duty to co-ordinate and organise repairs to the fire alarm system in the developments in which The Maltings formed part. Those notices also indicate that the Council had lost confidence in the ability or the willingness of the Respondent and the managing agents to carry out the necessary works to the fire alarm system to comply with acceptable standards without the

compulsion of such notices. The Tribunal finds that the repeated failures in respect of the fire alarm system were contributed to by the failures of duty by the managing agents to monitor, supervise or organise repairs to that system and associated failures of security (such as ensuring doors were closed so that fire extinguishers could not be removed).

91. The Respondent sought to justify the management fees for each of the years in question by drawing attention to the 102 units in the development, the complexity of the leases and the services provided: see paragraphs 16 and 17 of BLR's letter of 26th February 2007. The Respondent through BLR argued that the sums charged per unit during the service charge years 2003 were market rates or below market rates for managing agents' fees. The Tribunal accepts this submission.

92. The Tribunal is unable to reach a precise finding as to the residual value of the services managing agents services provided after the failures set out above have been taken into account. In the light of the failures described above. The Tribunal finds the managing agents services were not of a reasonable standard. Doing the best it can on the incomplete information available, bearing in mind the different events in each of the different service charges years the Tribunal finds that the managing agents' fees should be reduced for each year by the proportions set out in the schedule below.

Service charge Year	£ amount inc VAT charged	Reduction found by the Tribunal to reflect unreasonable standard of service	Amount payable £
2002-2003	111.24	20%	88.99
2003-2004	148.31	33%	99.36
2004/2005	111.23 (being 0.99% of 11,235.95)	20%	88.98
2005/2006	191.93 (being 0.99% of 19,387.52)	25%	143.94

Howard Lederman
Chairman
9th September 2008

RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL AND LEASEHOLD VALUATION TRIBUNAL

Case No. CHI/29UG/LSC/2006/0130

Premises: 48 The Maltings, Clifton Road, Gravesend, Kent DA11 0AH
IN THE MATTER OF An Application under section 27A Landlord and Tenant Act 1985 (Liability to pay service charges)

TRIBUNAL MEMBERS

Mr HD Lederman
Mr R Norman
Mr C White FRICS

Applicant	Maxine Fothergill and Robert Fothergill
Respondent	Lakeside Developments Limited
Appearance	No appearance on 16th July 2008 but written representations from Miss Lorraine Scott, Non-practising Barrister of Conway & Co, Solicitors 8 Reading Road, Henley on Thames RG9 1ST formerly Legal Support Manager, BLR Property Management, Basicland Registrars Ltd, Managing Agents

DECISION OF THE TRIBUNAL ON APPLICATION UNDER SECTION 20C OF THE LANDLORD AND TENANT ACT 1985, APPLICATION FOR REIMBURSEMENT OF FEES, AWARD OF COSTS AND LEAVE TO APPEAL APPLICATION

1. The Tribunal decides that the Applicant's application for reimbursement of fees and for an order under section 20C of the Landlord and Tenant Act 1985 (as amended) ("the 1985 Act") made in their letter of 17th October 2008 shall be treated as part of the application.

2. The Tribunal decides that the Respondent's costs incurred in connection with the hearings before this Tribunal on 5th March 2007, 8th October 2007, 28th November 2007, 16th April 2008 and 16th July 2008 shall not form part of service charges recoverable under the Lease from the Applicants, pursuant to section 20C of the 1985 Act.

3. The Tribunal orders the Respondent to reimburse the Applicant the whole of their fees paid by them in respect of the proceedings relating to service charges which were the subject of the hearings before this Tribunal on 5th March 2007, 8th October 2007, 28th November 2007, 16th April 2008 and 16th July 2008.

4. The Tribunal orders the Respondent to pay £250.00 costs in respect of the adjournment of the hearing on 8th October 2007.

5. The Tribunal refuses the Respondent's application for permission to appeal made in its letter of 2nd October 2008.

REASONS

Section 20C of the 1985 Act application and application for reimbursement of fees - Introduction

6. Initially no application was made by the Applicant for an order that any costs of the leasehold valuation proceedings were not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person under section 20C of the 1985 Act or for reimbursement of fees. Accordingly the Tribunal did not make any decision on these issues in its written decision of 9th September 2008 or any earlier decision. In her letter of 17th October 2008 Maxine Fothergill explained that she did not understand the form. The Tribunal also accepts that she may not have fully understood the significance of such an application during the course of the proceedings when the question was raised with her. The Respondent was given an opportunity to make further representations about this following receipt of the Applicant's letter of 17th October 2008. No submissions have been received. As the Respondent has previously made written representations and was given the opportunity to make further representations the Tribunal's view was that it was appropriate to consider that application.

7. The Tribunal accordingly decides that if and insofar as the omission to put those applications within the original form was a breach of the requirements in paragraph 3 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003/2099 (as amended) those requirements shall be dispensed with or relaxed. In particular, the Tribunal is satisfied that no prejudice is caused to the Respondent by the omission to make those applications earlier. The Respondent has access to experienced managing agents with an in house legal support and its managing agents are well used to dealing with such applications. The Respondent is currently represented by external solicitors Conway & Co.

8. References to the Applicant in these Reasons are to Robert and Maxine Fothergill. References to the Respondent for the purposes of these Reasons include, where appropriate, their representatives BLR Property Management Limited Basicland Registrars Limited (collectively described as "BLR")and from and including 8th October 2007 Conway & Co solicitors. These Reasons should be read together with the reasons for the decision on 9th September 2008.

Section 20C of the 1985 Act application

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

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

.....

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

10. The lease of 48 The Maltings was dated 1st November 1989 for a term of 125 years from 12th March 1989 ("the Lease"). There is provision for the costs of managing agents in paragraph 9 of the Third Schedule to the Lease to be charged to the lessee under clause 4(3) of the Lease. The Respondent's managing agents have taken an active role in the defence of these proceedings and in arranging for witness and other evidence and submissions to be put before the Tribunal. It is conceivable the Respondent might seek to recover some or all of those costs by way of service charge. There does not appear to be provision for the Respondent or any landlord to charge legal costs to the lessee under the terms of the Lease, but that issue is not before the Tribunal so it expresses no view on this issue .

11. The upshot of the hearings of the 5th March 2007, 8th October 2007, 28th November 2007 16th April 2008 and 16th July 2008 is that a significant proportion of the costs claimed in respect of management fees and fire protection works are not payable.

12. The Tribunal also found that the notice purportedly served pursuant to section 20 of the 1985 Act did not comply with the provisions of that Act. It is possible the Respondents will obtain an order of the Court to dispense with some or all of the requirements of section 20 of the 1985 Act (as it was in force in 2003). That issue was considered in the hearings on 8th October 2007 and 28th November 2007. Even if such an order is obtained, the Tribunal's decision on the issues raised by that application was determined as far as the Tribunal proceedings were concerned in favour of the Applicant.

13. The Applicant relies upon the proposition in *Holding & Management Ltd v. Property Holding and Investment Trust plc* [1989] 1 W.L.R. 1313 at 1324 per Nicholls L.J.). "To my mind it is unattractive that a tenant who has been substantially successful in litigation against his landlord and who has been told by the court that not merely need he pay no part of the landlord's costs but has had an award of costs in his favour should find himself having to pay any part of the

landlord's costs through the service charge. In general, in my judgment, the landlord should not "get through the back door what has been refused by the front". This was said in a different factual context and the Tribunal is not bound by those dicta on the question of what is just and equitable.

14. However Peter Gibson LJ in *Iperion Investments v Broadwalk House Residents Ltd* (1995) 27 H.L.R. 196 held the court has a discretion to direct that litigation costs be excluded from a service charge, even if the costs have passed the test of section 19 of the 1985 Act and have been reasonably incurred. "The obvious circumstance which Parliament must be taken to have had in mind in enacting section 20C is a case where the tenant has been successful in litigation against the landlord and yet the costs of the proceedings are within the service charge recoverable from the tenant". The Tribunal has regard to that guidance.

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

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

17. In relation to the first hearing on 5th March 2007, the Tribunal found that the hearing could have been avoided or at least the costs minimised if the Respondent had contacted the Tribunal as soon as it or its managing agents were aware of the possibility that the same issues might be considered by the County Court. In reaching that conclusion the Tribunal took into account that the Respondent's managing agents BLR had an in house legal department (including a barrister) which had prepared a detailed response running to 6 pages dated 26th February 2007. Neither that response (which referred to the County Court proceedings in

some detail) nor the bundle of documents submitted on behalf of the Respondents in support of that response referred to or adduced the Defence filed on behalf of the Applicant in the County Court proceedings. In fact paragraph 5 of the BLR letter 26th February 2007 asserted in essence that a Defence had not been filed, when in fact a short defence had been filed on 20th December 2006. Even if the Respondent or its managing agents had not actually received a copy of that Defence, they should in the Tribunal's view have checked with the County Court before making the incorrect assertion that no Defence had been filed. In the circumstances, given that the entirety of that hearing could easily have been avoided if directions had been sought by the Respondent, the Tribunal decides it would not be just or equitable for the Respondent to seek to charge any of its costs or the costs of its agents in respect of that hearing to the Applicant as service charge.

18. In relation to the hearings on 8th October 2007 and 16th April 2008 so far as the first hearing concerned the issue of insurance premiums, the Tribunal has made findings that the Respondent was in breach of the provisional directions issued by this Tribunal on 15th December 2006 in paragraph 9 of its written decision of 9th September 2008. Although some of the time at that hearing on 8th October 2007 was taken up with the issue of the section 20 notice issue, there is a considerable chance that that hearing or a large part of that hearing (and the hearing on 16th April 2008) could have been avoided (or at least the time taken reduced) if the Respondent had complied with the Tribunal's directions. The Tribunal takes into account the fact that the Respondent was ultimately successful on the issue of insurance premiums. However, much of the evidence about insurance premiums adduced by the Respondent was only disclosed or provided after the hearing on 8th October 2007. Had the Respondent or its representatives (BLR at that time) disclosed that evidence in advance in a coherent and transparent manner the time at these hearings on the issue of insurance premiums could and should have been substantially reduced. The Tribunal takes into account the fact that the Applicant ultimately succeeded on the issue relating to section 20 of the 1985 Act, some of the evidence relating to which was considered at that hearing. In the circumstances the Tribunal finds it would be wholly unjust for the Applicant to be required to pay any of the Respondent's costs associated with the hearing on 8th October 2007.

19. The Tribunal turns to the hearing on 28th November 2007. Much of this hearing was taken up with evidence about whether the 11th June 2003 notice purportedly served under section 20 amounted to a claim for a sinking fund and about membership of a tenants association. In relation to the first issue, whichever way this is analysed the first reference to sinking fund or to the letter being a claim for payment under clause 4(3)(c) of the Lease appears to have been in BLR's letter of 26th February 2007. Much of the debate about this could and should have been avoided. The Tribunal refers to its findings in paragraph 86 of its decision of 9th September 2008. The Tribunal also takes into account is findings in paragraph 87 of its decision of 9th September 2008 concerning the lack of satisfactory explanation for the failure to certify expenditure on building works. The Tribunal concludes that most of the litigation about the alleged section 20 notice and the demand for monies was

brought upon itself by the Respondent's conduct or the conduct of its managing agents from time to time. In the circumstances the Tribunal finds it would be quite inequitable for the Applicant to be required to pay any of the Respondent's costs associated with the hearing on 28th November 2007.

20. The Tribunal turns to the hearing of 16th April 2008 so far as it concerned service charge and other issues. Conway & Co's letter of 4th April 2008 stated that the Respondent " ...not have representation at the final hearing of this matter now scheduled for 16th April 2008" and that Mr Marelli would attend to give evidence on behalf of the Respondent. No mention was made in that letter or any other communication before the hearing of the attendance of any other witness or representative attending on behalf of the Respondent.

21. At the hearing on 16th April 2008 the Tribunal did receive the evidence of Mr Jerry Brooke formerly of Temple Property Consultants Limited. The Tribunal had to spend time at that hearing explaining to Mr Brooke and to everyone else present that he Mr Brooke could not make oral submissions on behalf of the Respondent as he was not an authorised representative. Subsequently the Tribunal issued further directions which attempted to give the Respondent the opportunity to make any submissions it wished about the evidence given. This situation was avoidable and entirely the making of the Respondent or its solicitors Conway & Co for failing to clarify in advance of that hearing who represented them. The Tribunal issued correspondence responding to the Respondent's questions about this. In the circumstances the Tribunal finds it would be quite inequitable for the Applicant to be required to pay any of the Respondent's costs associated with this part of the hearing on 16th April 2008 having regard to the failure of communication on the part of the Respondent or their solicitors which lead to waste of time and resources.

22. In respect of the final hearing on 16th July 2008, much of this concerned evidence about the fire protection works and management fees. The Tribunal has set out the background to this in paragraph 50 of its decision of 9th September 2008. The disclosure of documents and the representations made by BLR about this issue in and accompanying its letter of 26th February 2007 painted a seriously incomplete picture of events and the background to expenditure on this item. Had BLR or other managing agents on behalf of the Respondent provided early or complete disclosure much of the time taken at this hearing on this issue could have been saved. Indeed the very need for this hearing might have been avoided. The hearing on 16th April 2008 was adjourned to enable this documentation to be obtained. The Tribunal finds it would be wholly inequitable if the Respondent was able to recover any of its costs relating to this hearing or to this issue from the Applicant.

23. It follows from this that the Tribunal also finds that the letter of 26th February 2007 providing submissions on behalf of the Respondent from BLR presented a materially incomplete account of events. Whether this was the responsibility of BLR or of the Respondent or some other person or organisation, the Tribunal finds

it would be wholly inequitable if the Respondent was able to recover any of its costs relating to this letter from the Applicant.

Reimbursement of fees

24. Under paragraph 9(1) of the Leasehold Valuation Tribunal (Fees)(England) Regulations 2003, the Tribunal "may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings". The Applicant applies for reimbursement of fees by the Respondent. The provision contains no indication of the criteria to be regarded by the Tribunal and there is no longer any requirement that notice must be given that such an application will be considered. However, essentially for the reasons outlined in granting the section 20C application, the Tribunal orders reimbursement of fees by the Respondent.

Payment of Applicant's costs

25. The Applicant applies for its costs and made submissions in their letter of 17th October 2008. The Tribunal's power to order payment of costs is contained in paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 Act which provides in its material parts in relation to costs:

> "10 (1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).
>
> (2) The circumstances are where --
>
> (a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by paragraph 7, or
>
> (b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.
>
> (3) The amount which a party to proceedings may be ordered to pay in the proceedings by determination under this paragraph shall not exceed --
>
> (a) £500, or
>
> (b) Such other amount as may be specified in procedure regulations."

26. For the reasons set out at paragraph 18 above, the Tribunal finds the Respondent acted unreasonably and disruptively in relation to the failure to provide a witness statement of Mr Marelli (or other warning of the gist of his evidence) before the hearing on 8th October 2007 in breach of directions or before the hearing on 28th November 2007. Although the Applicant was not legally represented at these hearings, they did call their insurance broker to give evidence and did give up working time which would have occasioned loss. In the circumstances doing the best it can about the amount of such a loss, the Tribunal orders the Respondent to pay the Applicant £250.00 costs in respect of the hearing on 8th October 2007.

Application for permission to Appeal

27. The Respondent applies for permission to appeal the Tribunal's conclusion that the letter of 11th June 2003 was not a demand under clause 4(3)(c) of the Lease, in its letter of 2nd October 2008. The grounds for seeking permission to appeal are that the Tribunal's decision is wrong in law and are set out in detail in that letter. It is also suggested there are 101 properties which have leases in similar terms. The Tribunal has very little evidence as to the number of those lessees who have paid the demands made in the terms of the letter of 11th June 2003 and no evidence to assess the assertion that the terms of the other leases are identical or that there are disputes or differences with other lessees about this clause of the letter of 11th June 2003: see paragraph 32 of the Tribunal's decision made in relation to the hearing on 28th November 2007. The Tribunal would have expected the Respondent to have made it clear that this decision affected many other properties at an earlier stage so that direction could be made for securing consistency under regulation 8 of the LVT (Procedure) Regulations 2003 if there were such disputes or similar leases. The Tribunal views the late assertion of such other disputes or that the decision affects other properties with considerable scepticism as this has not been raised before.

28. No authority is cited in support of the Respondent's contentions that the Tribunal's approach to interpretation of clause 4(3)(c) of the Lease, or its application of that approach to the facts of this case was wrong. The arguments raised in the letter of 2nd October 2008 from Conway & Co. do not add anything to the submissions made to the Tribunal on behalf of the Respondent at the hearings. The appeal has no reasonable prospect of success and there is no other reason for the appeal to be heard.

29. Accordingly permission to appeal is refused.

30. In accordance with section 175(2)(b) of the Commonhold and Leasehold Reform Act 2002 a further application for leave may be made to the Lands Tribunal within 14 days. (LT Rule 5c(2) as amended).

Howard Lederman
Chairman 24th November 2008