SOUTHERN RENT ASSESSMENT PANEL

LEASEHOLD VALUATION TRIBUNAL

Case Number CHI/18UH/LAM/2008/0006

In the matter of Part II of the Landlord & Tenant Act 1987 (as amended) ("the Act")

and

In the matter of Trehill House, Kenn, Exeter, Devon ("the property")

BETWEEN

Mr & Mrs B Walshe Applicants

and

The lessees of flats at Trehill House and Trehill House RTM Company Limited

Respondents

Decision

Hearings: 23rd March 2009 and 11th May 2009

Date of Issue: 29th May 2009

Tribunal:

Mr R P Long LLB (Chairman)
Ms C A Rai LLB, Solicitor
Mr T E Dickinson FRICS

Application

1. On 17th November 2008 Mr A D & Mrs B Walshe, the lessees of Flat 3 at Trehill House, applied to the Tribunal to appoint a manager and receiver of Trehill House at Kenn near Exeter pursuant to section 24 of the Landlord & Tenant Act 1987 (as amended) ("the Act"). They requested that Mr Martin Woodhead FRICS of Messrs Drew Pearce of Exeter be appointed in that capacity. They also sought an Order under section 20C of the Landlord & Tenant Act 1985 to limit the ability of Trehill House RTM Company Limited to recover any of its costs of dealing with the application as service charges if the leases under which the properties at Trehill House are held permit it to do so.

Decision

2. Following the conclusion of the hearing and after deliberation the Tribunal announced its decision to those present in the following terms:

   "For reasons that we will give later in writing, we are not prepared to appoint a manager and receiver at Trehill House pursuant to Mr & Mrs Walshe's application, case reference CHI/18UH/LAM/2008/2006".

   The Tribunal has declined to make an Order under section 20C of the Landlord & Tenant Act 1985.

   This document constitutes the Tribunal's statement of reasons for those decisions.

Inspection

3. The Tribunal inspected Trehill House prior to the original hearing of the matter on 23rd March 2009 in the presence of Mr & Mrs Walshe and of Mr Chevalier. It saw a large country house built in Georgian style with a porticoed front that has been converted into eleven flats, one of which, flat 11, is sometimes described as "the maisonette". The exterior of the building was covered in scaffolding as works to replace defective rendering and to redecorate the exterior were still in course. The redecoration of the walls appeared to have been undertaken in what it feels it can best describe as a buff colour. As well as Trehill House itself, the Tribunal saw the shared garden area and was shown the separate garage block and parking area. It saw too that a number of other units of accommodation, some of them apparently formed from what were previously outbuildings and others consisting of what may once have been estate cottages, had been created upon the entirety of the land that once formed the estate occupied with Trehill House. It also saw the gardens and the water gardens, which latter were plainly in need of considerable further work in order to restore them.

4. Mr Michael Oliver showed the Tribunal the inside of the maisonette, which is the central part of the building on the ground floor with one bedroom on the first floor. As such it consists of a number of the original rooms in the house, all of which are of substantial proportions, with the entrance hall. The Tribunal was also shown corridors and stairways that give access to other flats in the remainder of the building, all of which are accessed from a door at the rear of the building. It saw that the flats on the upper floors are served by a lift, and was shown the work to the lead and the roof

from Mr Chevalier's flat, and paint splashes or marks on the window of Mr & Mrs Walshe's flat. Mr Verity showed the Tribunal the inside of his flat. He said that he wished them to see its small size by way of comparison with the size of the maisonette and some of the other larger flats.

The Law

5. The Tribunal has power to appoint a manager to carry out in relation to any premises to which Part II of the Act applies either such functions in connection with the management of the premises or such functions of a receiver, or both, as the Tribunal thinks fit. The circumstances in which the Tribunal may make such an Order are contained in full in section 24(2) of the Act and arise (in summary) where it is satisfied:

   a. That a relevant person has been in breach of an obligation owed by him to the tenant under his tenancy, and/or

   b. That unreasonable service charges have been made or are proposed or are likely to be made, and/or

   c. That unreasonable variable administration charges have been made or are proposed or are likely to be made, and/or

   d. That there has been a failure to comply with a duty imposed by or by virtue of section 42 or section 42A of the Act (relating to the way in which service charge contributions are to be held), and/or

   e. That any relevant person has failed to comply with a relevant code of practice approved by the Secretary of State, and

   and, in any of the above cases, that it is also it is just and convenient to make such an Order.

   Section 24(2)(b) of the Act provides that the Tribunal may also make an Order where it is satisfied that other circumstances exist that make it just and convenient for such an Order to be made.

6. It is a requirement of the Act in the circumstances of this application that, before such an application is made to the Tribunal, a notice must be served by the Applicant under section 22 of the Act upon the landlord and upon anyone else having management responsibilities in respect of the property notifying them of the intention to make such an application and of the grounds upon which it is to be made, specifying the matters complained of that are capable of remedy and allowing a reasonable time for remedial steps to be taken in respect of those matters.

The Hearings

7. There were two hearings in the matter. The first took place on 23rd March 2009, and immediately followed a hearing of an application by Trehill House RTM Company Limited ("the Company") to make certain variations to the leases under which the flats at Trehill House are held. The second, adjourned, hearing took place on 11th May 2009. Both hearings were attended by Mr Chevalier and Mr Beechener, directors of

the Company, who appeared on its behalf, by Mr Emmett of Torbay Management Services Limited ("TMS"), the present managing agents; both hearings were also attended by Mrs Beechener, Mr Oliver and Mr Verity, all of whom were in opposition to Mr & Mrs Walshe's application. Mr & Mrs Walshe attended only the first hearing, as did Ms Adam (also of TMS). Prior to the second, adjourned, hearing Mr & Mrs Walshe indicated in writing to the Tribunal that they were indisposed and unable to attend that hearing, but that they were content that it should proceed upon the basis of the trial bundle of evidence that they had supplied and of the documents accompanying their application. Mr Woodhead attended by appointment to give evidence for the first hearing. He departed having done so, and was present only for the early part of the second hearing.

The First Hearing

8. The Tribunal explained at the beginning of the first hearing that it had seen the copies provided to it of the section 22 notice that Mr & Mrs Walshe had served, and the annotated copies supplied by both parties of that notice with the Company's responses to the points that the original notice raised. In this note the section 22 notice is referred to as "the notice", and the Company's responses that appear in the annotated version are referred to as "the Company's response". The Tribunal said that it would treat the notice, and the Company's response, as being respectively the statements of the parties' cases.

9. Mr Walshe said that the indexed hearing bundle that he and his wife had supplied was to tell the story of the conflicts that had occurred at Trehill House over the years, of management priorities and of poor decisions. They submitted that maintenance had not been done and there had been poor housekeeping. Some wise counsel and significant experience was needed. Other lessees had complained in the past. Although the view of his wife and himself may be different from others, they considered that the garden was poor and the house dirty. They did not want conflict. This application was a last resort. They had made their feelings known over the preceding two and a half years, but had been ignored. They would like to pay their service charges and to get service for what they paid. They considered that Mr Woodhead may have the patience, wisdom and experience to assist everyone. They saw no chance of finding common ground without outside help. Mr Woodhead had explained that problems frequently arose in a development where, as here, there were residents, and also both partially resident and non-resident lessees.

10. Mr Beechener said that a development like Trehill House should be a community. Lots of people did lots of voluntary work there. Mr Chevalier said that Mr & Mrs Walshe were unwilling to become involved, and showed obdurate opposition to works that were proposed. They had ceased to be members of the Company of their own volition. Mr Beechener said that the Company would love to have Mr Woodhead's assistance, but it would be expensive. He questioned whether it would be just and convenient for the other lessees to have to pay his fees just in the hope of getting the Walshes' co-operation.

11. Mr Chevalier told the Tribunal that the Company had to balance the priorities for work to be done against the funds available. There had been major problems in this respect in the past. There had been an urgent need to deal with the external work, although this had been at the cost of being able to do internal work that the Company

would have wished to do. Some past mistakes over render and paint had had to be corrected as a matter of urgency. Questioned by Mr Walshe over the timing of the external work, he said that the Company had been faced with a problem over when to start. Surveyor's advice had been taken to proceed, and the quotations obtained would no longer have been valid in the spring. He accepted that weather delays had occurred, but submitted that any valid criticism in that respect could only be made with the benefit of hindsight. If the Company had delayed the commencement of the works the cost of scaffolding would also have been greater by reason of the additional time it would be in place.

12. Mr Woodhead (who gave evidence at a prearranged time when a hearing of another matter was otherwise still in course) said that he had been involved in management of blocks for over twenty years in Exeter and the surrounding area. He was a Fellow of the Royal Institution of Chartered Surveyors. He had for example recently taken on management of a block of 100 flats with a turnover of £800,000 a year. He had in the past been appointed manager and receiver by the Tribunal of blocks at Dawlish and at Cawsand, and had the appropriate professional indemnity cover to enable him to undertake such work. He had building surveyors on his staff to enable his firm to offer an all-round service. Although he had been involved in individual tasks at Trehill House over the years, and knew by local reputation of its problems, he had not undertaken sufficient enquiries there to be able to say what, if anything, the appointment of a manager and receiver might achieve, though he hoped to be of some assistance generally.

13. Mr Woodhead was unable to say what his annual charge would be. The proposal for charging that he had put forward was an attempt to be realistic. It would be easy at this stage before having a proper grip on the nature of the problems to give a very unrealistic estimate of cost. He had offered to host a meeting to try to resolve as many problems as may be if people could not manage the price he would have to charge. He had only just within the last day or two put forward some written questions for consideration by the parties, the answer to which might shed light on whether his appointment as manager and receiver could assist. It would be a shame if dialogue did not occur, as discord was expensive.

14. The parties agreed at the hearing itself, and hence some time after Mr Woodhead had left, that the written questions he had put forward might enable them to explore how the management of Trehill might be improved or made more acceptable to the lessees. There had at that time been insufficient time for any discussion of the questions to take place. The Tribunal understood at the hearing that all the parties agreed that such a discussion could be useful and might perhaps enable them to find a way to make progress outside the application. The Tribunal therefore adjourned the matter, with the agreement at that time of all the parties including Mr & Mrs Walshe, until 11th May 2009 in order to give sufficient time for discussions to be held and to allow as much common ground to be established as may be.

The Second Hearing

15. On 28th April 2009 Mr & Mrs Walshe wrote to Mr Woodhead with a copy to the Tribunal and to the Company to say that they considered it inappropriate to take part in a "parallel and related activity that is outside the legal process, no matter how well intentioned your suggestion of a written report at this stage". They continued "We

should add that, when asked by the Chair at the hearing of 23 March, adjourned until 11 May, we told him that we viewed your proposed questions as concrete – but upon reflection we do feel they may also inadvertently anticipate the decision the Tribunal is still to make in considering our application for you to be appointed as manager and receiver." They therefore withdrew any instruction on their part for him to attend a meeting with the Company.

16. Mr Beechener told the Tribunal at the hearing that the Company had offered to pay a material part of Mr Woodhead's fee for attending the meeting, but that Mr & Mrs Walshe were adamant that they did not wish to proceed with the meeting for the reasons that they had given in the letter. The Tribunal expresses its disappointment that its attempt to allow the parties an opportunity with Mr Woodhead's assistance either to resolve the matter, or at least to find some common ground, thus came to naught, and that the matter proved, in the events that happened, simply to have been delayed for six weeks. This is especially material in the light of the need for some urgency that has emerged in dealing with fire precaution matters.

17. At the beginning of the second hearing Mr Woodhead was asked by the Tribunal if he was present to represent Mr & Mrs Walshe. He replied that he had no instructions so to do, but was present only of his own accord in case he might assist the Tribunal. With the agreement of those representing the Company he answered some questions from the Tribunal relating to the events that had happened during the period of the adjournment. Those matters were dealt with at the outset in order to enable Mr Woodhead then to leave, if he wished, to deal with other matters.

18. Mr Woodhead told the Tribunal that his attention had been drawn to no breaches of the Service Charge Residential Management Code of Practice relating to management of property of this sort as it stood at the time of the application. He was aware that a new code had come into force on 1st April. Asked to update, if he wished, his answer to the Tribunal's question on the point at the first hearing, he said that he was aware of no matters of detail that the appointment of a manager and receiver would solve of which he had been unaware at the previous hearing. He had at that time hoped he could help because Mr & Mrs Walshe had proposed him in that capacity, but he was not sure if, as a result of the events that had happened, they still reposed the same degree of trust in him that they previously had, although they had not withdrawn his nomination. He could not be sure that the appointment of a manager and receiver would assist the position at Trehill House. His view in that respect had been coloured by the events of the last six weeks. He agreed with Mr Beechener in response to his question that the Company had made appropriate efforts to co-operate with him, but said he saw no point in a meeting if Mr & Mrs Walshe did not go along with it. With the Tribunal's consent so to do, Mr Woodhead then left the hearing.

19. The Tribunal announced after a short adjournment that it proposed then to deal with the matter by looking in turn at each of Mr & Mrs Walshe's grounds set out in their section 22 notice. It would do this by reference to the responses made by the Company and the material supplied by Mr & Mrs Walshe in their very extensive trial bundle and with their application. It would take into account too the evidence provided at the first hearing. Having established what, if any grounds existed upon which it may be empowered to make an Order it would then consider whether, in respect of each or all of those grounds, it would be just and convenient to make an Order of the sort applied for and, if so, in what terms. It re-emphasised the point it had

made at the first hearing that this is a problem solving jurisdiction (*Maunder-Taylor v Blacquiere [2003] 1EGLR 52*) and that in considering the "just and convenient" aspect it would bear that point in mind.

20. The Tribunal had before it the application made by Mr & Mrs Walshe and the documents sent with it, which included their statement of case and a copy of the section 22 notice, and a further copy of that notice with the Company's responses in italics. The Company's response to the statement of case was at page 7 of bundle C of the sets of papers supplied by it, and letters of support for the Company and TMS from four tenants were at pages 1-5 of that bundle. A further amended letter had been received from Mrs Pugh. Mr & Mrs Walshe's trial bundle was before all the parties. The Tribunal also had copies of some further correspondence supplied by Mr & Mrs Walshe at the end of April 2009, and a letter from the Company dated 5 May 2009 setting out its version of the events that led to the cancellation of any meeting with Mr Woodhead. Finally the Tribunal already had before it the evidence given at the first hearing by or on behalf of both parties, which is recorded above. It was satisfied that the parties all had copies of the documents that were before it and are referred to above.

21. The Tribunal therefore indicated that, having that information before it, it needed in the absence of Mr & Mrs Walshe and in the light of their comments only then to hear such representations as the Company wished to make upon the matter before proceeding to its deliberations.

22. Mr Beechener said first that, as was apparent from the documents before the Tribunal, Mr & Mrs Walshe had withheld some service charge payments over a number of years, both before and since the inception of the Company and the acquisition of the right to manage. The Company contended that some £3003 was due for general service charges, and a further £7218 for contribution to the works that were in hand at Trehill House, although he accepted that Mr & Mrs Walshe would contest those figures. It was contemplating proceedings to recover the sums it says are due for the building works. Those works were now largely complete, albeit subject to some snagging. He pointed out that the works had been undertaken in the first place as a result of reports from two different surveyors, Messrs Vickery Holman and Messrs O'Brien, that concurred that works of the sort undertaken were urgently required in order to protect the building.

23. As to the required fire precaution works, the Company had done the best it could with the money available to it. The works to date were set out in the responses to the section 22 notice and could be seen in the copy at page 16 of Bundle C. The Company originally concerned in the matter was no longer in business; a further report had been commissioned from Hedley Ritchie Fire Consultants, and was expected at any day. The authorities were threatening an enforcement order, and there was concern that the work required to be done urgently to avoid any unnecessary risk to residents.

24. As to the drainage position, it was likely to cost £40,000 or so to connect everyone, including the six freehold properties, to the mains. It had been established who owned the land on which the present septic tank was located, and the matter was progressing. The primary problem lay in the need to balance the conflicting demands for money from the works to the building, the fire prevention works and the drainage works, and all had been slowed rather by reason of shortage of funds. Mr Walshe had been in

touch with the relevant authorities and it was Mr Beechener's view that if anything Mr Walshe's interventions had had the effect of causing the respective authorities to wish to accelerate matters.

25. In response to a question from the Tribunal, Mr Emmett said that he was familiar with the Service Charge Residential Management Code of Practice relating to the management of flats as it stood up to 31st March last, although he had not yet had the opportunity of familiarising himself with the new version that came into effect on 1st April. He was unaware of any breach of that code that had been committed.

26. Mr Verity said that he supported the position of the Company. Its directors had done a great deal of unpaid work, and he was content with what had been done to date. He explained that the reason Mrs McMullen had appeared to abstain from voting upon the works at the EGM in July 2008 was that she had been unable to attend that meeting and he had held her proxy. Because he had felt that she was not fully informed about likely costs as a result of her absence from the meeting he had not felt able to cast her vote in favour of the works going ahead, but nor, knowing her general view that the works needed to be done, did he feel able to cast it against.

27. Mr Beechener went on to say that the 2008 service charge accounts would be available shortly. They simply needed to deal with accruals before completing them. The previous cleaner had been unable to continue as a result of health problems. A new cleaner had been appointed and he hoped that it was agreed that the standard of cleaning had improved. Further cleaning and internal refurbishment were necessary, but again the limitation of available funds was a major factor. The Company had to prioritise the use and application of such funds as were available.

28. In response to questions from the Tribunal concerning Mr & Mrs Walshe's assertions that there had been a complete breakdown of trust between the Company and themselves, Mr Chevalier said that he was not clear why this had been raised. As to the volume of correspondence they had received this would have been similar to that received by all lessees including correspondence relating to the action with Laira Properties concerning the driveway (which was still ongoing). It would also have included correspondence specific to the Walshes concerning what the Company regarded as arrears due by them but they (the Walshes) regarded as service charge payments withheld. As to the alleged lack of information, Mr & Mrs Walshe had resigned as members of the Company so that they no longer received communications sent to its members. The central file of information left for residents that he had set up was no longer in being because, he said, Mr & Mrs Walshe had abused it by divulging its contents to others. He struggled to understand the allegation about benefit to others in paragraph 1.2, and could only think that it related to a demand for £10 for cleaning a car that had been the target for the plant pots thrown, he said, by either Mr or Mrs Walshe, and referred to in the response to paragraph 1.2 in the notice.

29. Mr Verity said that the verbal attack upon him by Mr Walshe took place on an occasion when he was driving away from the property; Mr Walshe had approached him in an agitated state saying "you want to drive me out of the house", and had continued in that vein for some five minutes. On the occasion of the Tribunal's visit the entrance and access had previously been clean during that morning, but paper and chippings had been strewn there just before the Tribunal's inspection. He had himself cleared this up and stacked it by his door for disposal.

30. Mr Beechener said that the buildings insurance had been renewed on 16 December 2008. Mr Emmet said that although the lease made no mention of this requirement it was his firm's policy to make a copy of the current insurance schedule available on demand. It had also provided Mr Walshe with a copy of the whole policy wording of some fifty pages. Before July 2008 the Company had placed the insurance policy. His firm had replaced that policy in July with a policy that it had placed because it had better buying power and so was able to obtain better terms. Last year the whole premium had been paid in advance. He could not immediately say whether this year's premium was paid in full or by instalments. The Company had received no commission on the policy this year.

31. Mr Beechener added that he was aware of nothing that in his view might bear out the "breach of trust" allegation. The Company's representatives having no more that they wished to add, the hearing was brought to a conclusion.

Consideration

32. The Tribunal approached making its decision in the matter first by examining each of the grounds put forward by Mr & Mrs Walshe in the notice to establish whether or not in its judgement that ground afforded a ground on which it would be entitled to exercise the jurisdiction to appoint a manager and receiver. It first determined whether there were grounds upon which it might make an Order under section 24(2)(a) and (b) respectively, and then considered in the light of the grounds that it found to be established whether or not it would be just and convenient to make an Order. Finally it considered the section 20C application as to costs in the light of its conclusions upon the application for the appointment of a manager and receiver itself.

Breach of Obligation

33. Clause 6(d)(ii) of the leases contains a covenant to maintain and repair (inter alia) the drainage and sewerage system, including the septic tank. The Company accepts that the septic tank is emptied annually rather than on an ad hoc basis, and in its response accepts that there is a "blocked drain" that tends to smell sometimes, although it suggests a simple cure. The evidence before the Tribunal concerning the steps taken and yet to be taken to deal with problems over the septic tank set out above shows that there are matters that still need attention in that connection. There is, thus, a present breach of obligation in that respect. However the evidence before the Tribunal is that considerable steps are being taken to address the matter. It may be that the grilles to which Mr & Mrs Walshe refer become blocked from time to time, and thus a technical breach of obligation also arises. The evidence before the Tribunal contained in the Company's responses to the Section 22 notice (to be found for example at page 8 in Bundle C) is that steps are taken from time to time to deal with the blockages.

34. Mr & Mrs Walshe complain that the house is to be painted yellow and say that they did not agree to this as clause 6(e) of the lease appears to require. When the Tribunal inspected the property it was satisfied that the colour produced is buff (rather than yellow as Mr & Mrs Walshe suggest), as the Company's response (for example at page 9 of Bundle C) indicates. Its evidence is that its researches indicate that the property appears to have been painted a buff colour at a previous date. The question of the construction of clause 6(e) of the leases was not argued before the Tribunal. The leases are arguably ambiguous at this point, in that it is not entirely clear whether

they describe to the alternative to agreement with the lessee being to decorate in the same colour as that immediately prior to the decoration undertaken, or in any colour that may have been used at some previous date.

35. The Company's express evidence is that the garage block is included in the buildings insurance policy. This appears to deal with the point made by Mr & Mrs Walshe to the effect that no evidence has been produced to this effect. Whilst garages are not expressly referred to in the copy schedule produced by Mr & Mrs Walshe at pages 54-61 of the documents they sent with their application, that schedule refers to "buildings" in terms that seems to make it plain that all buildings are included and not just Trehill House.

36. An obligation to keep the shared gardens tidy and well cultivated is contained in clause 6 (h) of the leases. The gardens in question appear from the Second Schedule to be the south and east gardens and the water garden. The Tribunal was able to see on inspection that considerable work is required to bring the water garden up to standard and that more could perhaps be done with the other gardens. To this extent a breach may be said to have occurred.

Covenant for quiet enjoyment (Clause 7)

37. Mr & Mrs Walshe make several allegations of behaviour that they contend has left them feeling threatened. The allegations are of a largely non specific nature, but they complain of partisan intrusive and bullying behaviour by others towards them, of harassment by directors of the Company and of large amounts of correspondence and unwarranted and threatening demands including for personal gain. The Tribunal concluded from its reading of the extensive trial bundle that Mrs and Mrs Walshe submitted that, as Mr & Mrs Walshe had indeed stated at the first hearing, much of that bundle was directed to showing the history of various conflicts that have arisen at Trehill House over a considerable number of previous years.

38. The Tribunal concluded, from such evidence (as opposed to assertion) as is before it upon that aspect of the matter that these difficulties have arisen at least in large part from a marked difference of attitude towards the management of Trehill House shown by Mr & Mrs Walshe on the one hand and what appear to be the remainder (or at least the great majority) of the other lessees on the other. For example, what Mr & Mrs Walshe see as unwarranted and threatening demands the Company (and apparently most at least of the remaining residents) regard as an attempt to recover service charge payments that they consider are validly demanded, but that Mr & Mrs Walshe consider they are entitled to withhold.

39. The visits by the police appear to have arisen, at least primarily, from the incident when a flower pot was thrown from the top of the house, by either Mr or Mrs Walshe according to the Company's response at page 10 of Bundle C, onto the car of another resident. In general terms the Tribunal was faced with a set of allegations in this respect that amount to little more than charge and counter charge. It is difficult for it to apportion blame for whatever may have happened from that information as the Tribunal has it, but there may well have been fault on both sides. To such if any extent as a Right to Manage company can be in breach of a landlord's covenant for quiet enjoyment then any fault on its part would amount to a breach of that covenant,

but the Tribunal was far from being satisfied that the fault lay only on the Company's side.

40. The Tribunal was informed that the matter of the litigation with Laira Properties over the right of way leading to the garages continues. Involvement of residents in such litigation that may affect their rights is inevitable. There is plainly an issue that requires to be resolved, and the Tribunal declines to find for these purposes that the consequences of the existence of such litigation, which are invariably an inconvenience to those involved, gives rise to a breach of the covenant for quiet enjoyment.

41. With regard to the day to day management of the common parts, the Tribunal was unable to find an obligation in the leases requiring the cleaning and maintenance of common parts by the landlord (and by extension by the Company). It notes however that the Company has sought to provide some services in this respect and that a new cleaner has been employed.

Unreasonable Service Charges

42. The first of Mr & Mrs Walshe's points is that the parties failed to abide by guidance given by the LVT on the occasion of a pre trial review relating to another matter concerning Trehill House on 19th March 2007 that all areas of disagreement ought to be brought before the Tribunal and that only basic service charges should be raised in the meantime. The Tribunal did not readily see how the point could be said to establish that unreasonable service charges had been raised. A Tribunal on such an occasion can do no more if, it sees fit, than to make informal suggestions, and even if they are made such suggestions do not carry the force of law. The Company denies in its response that such a suggestion was even made.

43. Secondly Mr & Mrs Walshe raised the question of the apportionment of the cost of the work to repaint the garage facades and doors, and to replace the garage fascias. They said that this had been charged equally to all the garage owners rather than to the lessees in the proportions that the leases required. They agreed that the lease requirement was unfair, but said the work should not have been done and the cost apportioned prior to adjudication, and that because the doors and fascia boards were not part of the main structure they were the responsibility of the individual owners.

44. Technically Mr & Mrs Walshe are right about the apportionment. There appears to have been an error, although an error does not necessarily amount to the same thing as raising an unreasonable service charge where first there appears to have been a large measure of agreement (even if mistaken) and where secondly Mr & Mrs Walshe would seem to have been asked for rather less than they might otherwise have been asked to pay because the cost was divided between a larger number of contributors. The Tribunal was not addressed as to the correct interpretation of the leases upon the point. The leases are not entirely specific in their descriptions so that the matter is less than clear. If Mr & Mrs Walshe are right in their interpretation, as is possible on what little the Tribunal has before it, then it may be that if the work was done without their agreement the charge to them could have been regarded as unreasonable.

45. As to Mr & Mrs Walshe's point with regard to the redecoration works, these were carried out on surveyors' recommendations and after proper tender against a

professionally prepared specification. Due consultation took place. The leases allow for reasonable provision for anticipated expenditure. Therefore on such information as is before the Tribunal (which is markedly less than it might expect if dealing with an application under section 27A of the Landlord & Tenant Act 1985 ("the 1985 Act") to determine service charges) it would be difficult to find that unreasonable service charges have been raised in this connection. Mr & Mrs Walshe's case on this aspect amounts to little more than an assertion (no doubt true) that they do not approve of what has been done.

46. Mr & Mrs Walshe say finally on the matter of service charges that they have received demands for unverified and unverifiable sums. They do not appear to have availed themselves of such rights as section 21 of the 1985 Act (as it presently stands) gives them to inspect receipts or to ask for a statement of account. Had they done so within the time limits imposed by that section they would have been able to establish precisely what they were being asked to pay and how it was made up, and to obtain any explanations they reasonably needed or even to mount any challenge they thought fit based upon the facts as they were then established. Their bare assertions upon this topic are insufficient to establish that unreasonable service charges have been made.

Statutory Requirements, Health and Safety and Code of Practice

47. Mr & Mrs Walshe said that the Company had failed to address the risks from fire at Trehill House, which had been assessed as "high risk due to deficiencies in means of escape, provision of fire precaution equipment and general management of the property". The Company responded that it had commissioned a Fire Risk Safety Assessment from a properly qualified company. The report made a number of recommendations, and the Company listed the matters that it had already undertaken in response to that assessment. It made the point that it had to balance its available cash against the various demands upon it, and that there was insufficient money available to enable it to do all that it would have wished. The Company added that Mr & Mrs Walshe had contributed nothing towards cost of the fire prevention works, which had added to its financial difficulties. Mr Emmet had been able to tell the Tribunal at the Second Hearing of the steps that were being taken to comply with the recommendations in the report. The Tribunal recognised that the Company through him is doing the best it can to deal with the questions of fire prevention subject to the limitations that affect it. Its obligations in the lease are to comply with statutory notices "so far as it is able" but these are statutory requirements, so that there is a liability to lessees including Mr & Mrs Walshe that, perhaps for entirely explicable reasons, has not yet been met.

48. Turning to Mr & Mrs Walshe's points about failure to attend to matters of health and safety, hygiene and good housekeeping in paragraph 3.2 of the notice, paragraph 3.2.1 of the notice refers to a failure to clean internal common parts. The Company has undertaken this responsibility and has recently appointed a new cleaner. As previously indicated, the Tribunal could find no obligation upon it in the lease to carry out such internal cleaning. That being so, it does not appear that it has failed in carrying out such an obligation. The same argument applies to the contention in paragraphs 3.2.2 and 3.2.3 concerning the north portico and adjoining areas and the domestic waste provisions. On the other hand, as indicated in paragraph 3 above, it is clear from the Tribunal's inspection that the water garden at least is not maintained as it should be,

and that this is a breach of the obligation in clause 6(h) of the leases to keep the common gardens tidy and well cultivated.

49. The question of transparency of service charge demands and of accounts in paragraph 3.3 of the notice is essentially the same as that referred to concerning paragraph 2.2 of the notice and dealt with at paragraph 46 above. Mr & Mrs Walshe have been equipped by Parliament with the rights, if exercised within the time limits specified, to address any problems of accounting and receipts that they may encounter, although they have apparently not exercised them. The leases do not require the service charge accounts to be audited, and the Company's response (foot of page 17 in Bundle C) indicates that Mr & Mrs Walshe have been provided with further information in writing on eighteen occasions since January 2008. This suggests that in its view it has supplied a substantial amount of information, but the Tribunal cannot tell whether that has been all the information requested by Mr & Mrs Walshe, nor on the information before it form a reliable view of the reasonableness of the requests they have made.

50. The Tribunal is aware from the information that has been given to it about the major external works that estimates were obtained and the statutory consultation procedure was followed. As far as it is aware nothing else has required formal consultation of that nature. The matters of the contract upon which the appointment of TMS was made and of the appointment of Firetrain or of Devon House Management are, so far as the Tribunal can tell from what is before it, matters of ordinary day to day management of the Company properly undertaken by the Board of the Company. The same argument applies, subject again to the provisions of section 20 of the 1985 Act, to the choice of contractors. It would be an unusual situation where the actions of a Board were all to be reviewed and approved by persons who were not even members of the Company, even in a specialised situation of the sort that exists at Trehill House.

51. Mr & Mrs Walshe say that they have not been given a copy of the insurance schedule. However they provided a copy of the schedule for the period from July to December 2008 so that they have that document at least, if not the present schedule. Mr Emmett said that they had also been supplied with a full copy of the policy wording. The Tribunal accepted that there were no procedures in place to deal with grievances. It indicated when dealing with the preceding application to vary the leases in some respects that it did not consider that the leases were the appropriate place to set up such a procedure, which was presented to it in that application specifically as a proposed variation of the leases in order to establish a procedure outside of the statutory procedure for dealing with service charge disputes.

Other circumstances that make it just and convenient to appoint a manager and receiver

52. The matters that Mr & Mrs Walshe raised under this heading relate in the main to the historical breakdown in relations between themselves on the one hand and other residents and the Company on the other. The bundle of documents that they presented for the hearing amply demonstrates this breakdown. In addition they assert that the standard of the decisions of the Company and its advisers has been inadequate to meet the requirements of managing a property such as Trehill House. The disputes have been historical in their nature, and the Tribunal did not consider that there were adequate grounds for it to suppose that the appointment of a manager and receiver would prevent them in the future. The parties are in 'opposed camps', and an action that meets with the approval of one is certainly not assured of the support of the other.

The fact that such an action may be taken by a manager and receiver appears unlikely in the light of the past disputes to alter that situation. The evidence given on behalf of the Company shows that its Board has plainly been operating under considerable financial constraints and has had to prioritise its decisions in respect of a number of very pressing matters. The fact that Mr & Mrs Walshe may have preferred other priorities does not of itself render those decisions inappropriate, and upon the evidence before the Tribunal it is difficult to conclude that the decisions have been unreasonable ones.

53. Hence the Tribunal did not consider for those primary reasons that these elements of themselves made it just and convenient that it should appoint a manager and receiver. It bore in mind too Mr Beechener's observation that the appointment of a manager and receiver at a cost considerably greater than that of the present managing agent was too great a cost for the remaining lessees reasonably to bear in the hope (not even then guaranteed to be fulfilled) of securing Mr & Mrs Walshe's co-operation. It was influenced too, albeit to a much lesser extent, by Mr & Mrs Walshe's decision at a late stage to withdraw from the discussion process arising from Mr Woodhead's suggestions, and to allow for which all the parties agreed the adjournment of the first hearing in March. That decision led the Tribunal to have some doubt whether the Walshes were as anxious to co-operate as they suggested, but it was regrettably unable to ask them to comment upon the point as it would have wished because they did not attend the adjourned hearing.

Grounds for Appointment

54. The Tribunal found that some of the grounds in section 24(2)(a) of the Act had been established to the extent described in the preceding paragraphs. The grounds established were:

    a. that there has been a breach of obligation in respect of the drainage system insofar as the Company has failed promptly to overcome the difficulties associated with the septic tank, and possibly the drainage grilles (paragraph 33 above)

    b. that the failure to consult Mr & Mrs Walshe over the colour of the house may be a technical breach of obligation, dependent upon the construction placed upon the leases in that respect (paragraph 34 above)

    c. that there has been a breach of obligation to keep the gardens tidy at least so far as this relates to the water gardens (paragraph 36 above)

    d. that to the extent that the fault for arguments may have been attributable to the Company or its officials there may have been a breach of the covenant for quiet enjoyment (albeit induced through the Company and not on the part of the landlord) (paragraph 39 above)

    e. that to the extent that the charges for the cost of the work to repaint the garage facades and doors was not apportioned correctly unreasonable service charges may have been demanded (paragraph 44 above)

f. that to the extent that the fire protection matters have not been fully implemented there has been a breach of the obligation to comply with the statutory requirements in that respect (paragraph 47 above).

55. Any one of those established grounds is sufficient to enable the Tribunal to make the appointment sought if it is satisfied that it is just and convenient to do so. However, it is not prepared to make the appointment. In its judgement it is not just and convenient do so.

56. Its primary reason for taking that view is that it is persuaded from the evidence put before it that the Company is doing its best to tackle the problems at Trehill House within the financial constraints that it faces. It is apparent that it is seeking to deal with the outstanding problems in a constructive fashion with the assistance of professional property managers. No evidence or argument was put before the Tribunal that persuades it that the appointment of a manager and receiver would enable matters to be dealt with in a way that was materially different and more effective. There may be some individual difference of emphasis in some areas, but there is likely to be little other change. The Tribunal adds that even if it is wrong about the obligation to carry out internal cleaning it would not have considered that the additional failure to carry out such an obligation was sufficient to oblige it to alter its decision in the matter.

57. The problem at Trehill House appears to be that the applicants disagree, as they are fully entitled to do, with the approach that the Company has taken to the difficulties it faces. Mr Woodhead, whom all the parties accept is an experienced property manager, could identify no other problem, and frankly and fairly told the Tribunal that he could not be sure that the appointment of a new manager would assist in the management of Trehill House. Having heard and read the evidence put before it, the Tribunal fully shares that view.

58. Finally, other than the matters of the breach of obligation concerning the drainage system and the failure fully and promptly to deal with the fire protection matters, the grounds established are by comparison quite minor. There must be doubt whether the failure to consult over colour is actually a breach at all, and if it is it would not of itself be sufficient to justify a wholesale change in management that the appointment of a manager and receiver would involve. The decision to delay dealing with the water garden when there are other far more pressing matters, and limited funds, is a wholly justifiable one. The matter of arguments is one that seems to have involved fault on both sides that the appointment of a manager and receiver may seems unlikely to overcome, and the question of the apportionment of the cost of work to the garages was again by comparison quite minor and may very well even have resulted in the applicants receiving a slightly smaller demand than they should have done.

59. As to the questions of the drainage and the fire protection works, the Tribunal was satisfied that the Company and its current advisers were dealing with these matters, together with the external works and the management of their respective costs, as well as they could, and prioritising what are in fact limited funds to produce the best advantage to the lessees generally that could reasonably be achieved.

60. Although it is unlikely that the leases would permit the Company to recover its costs of dealing with this application through the service charge regime, for the avoidance of doubt the Tribunal declines to make an Order under section 20C of the 1985 Act,

as Mr & Mrs Walshe had asked it to do, to limit its ability to recover any of those costs as service charges if it is in fact able to do so. The application for the appointment of a manager and receiver has failed, and in the Tribunal's judgement it would be unjust in the circumstances to make such an Order.

Robert Long
Chairman
27th May 2009

SOUTHERN RENT ASSESSMENT PANEL

LEASEHOLD VALUATION TRIBUNAL

Case Number CHI/18UH/LAM/2008/0006

In the matter of Part II of the Landlord & Tenant Act 1987 (as amended) ("the Act")
and
In the matter of Trehill House, Kenn, Exeter, Devon ("the property")

Decision

upon the application of Mr & Mrs Walshe for leave to appeal the Tribunal's decision dated 27th May 2009

Dated 15th July 2009

Tribunal:
Mr R P Long LLB (Chairman)
Ms C A Rai LLB, Solicitor
Mr T E Dickinson FRICS

1. Mr A D and Mrs B P Walshe seek leave to appeal against the Tribunal's refusal to appoint a manager and receiver at Trehill House consequent upon their application, dated 17th November 2008, that it should appoint Mr Martin Woodhead to that position. The Tribunal's decision in the matter, dated 27th May 2009, was issued on 3rd June 2009. Mr & Mrs Walshe initially notified the Tribunal by letter dated 10th June 2009 that they wished to appeal and sought an extension of time in which they might provide their grounds of appeal. The Tribunal extended the time for delivery of the grounds until 6th July 2009, and the grounds were delivered on that day to the Tribunal under cover of a letter dated 3rd July 2009.

2. Mr & Mrs Walshe's letter dated 10th June 2009 indicates that they wish to appeal against the decision because they were unable to attend the second of the two hearings in the matter, that held on 11th May 2009, because both of them were in poor health. They say that in consequence there was much that had not been heard, and that they had not been able to respond to points raised in defence.

3. For the reasons set out below the Tribunal is not prepared to grant Mr & Mrs Walshe leave to appeal its decision.

4. It is material that on 6th May 2009, five days before the second hearing, Mr & Mrs Walshe emailed the Tribunal office in the following terms:

   "We must now take the earliest opportunity to inform the Tribunal that neither of us will be capable of attending the hearing on 11th May. Mrs Walshe's increasing ill-health and Mr Walshe's hearing problems, which include tinnitus and which cannot at present be ameliorated by hearing aids, leave us both incapacitated to the extent that we can no longer reliably and effectively represent ourselves as applicants in person.

   We are aware that the Tribunal is most likely to proceed with the hearing in our absence. Our hearing bundles ..... detail all correspondence between ourselves and the respondents relating to the matters identified in our section 22 notice."

5. Mr & Mrs Walshe were present at the first of the hearings on 23rd March 2009 when, as appears from paragraph 14 of the Tribunal's decision, the matter was adjourned with the consent of everyone present to 11th May 2009 to allow discussion of certain proposals relating to the management of Trehill House that Mr Woodhead had put forward only a day or two before 23rd March.

6. As appears from the Tribunal's decision, Mr Woodhead appeared on the instructions of Mr & Mrs Walshe at the first of the two hearings, and appeared again at the hearing on 11th May, when he informed the Tribunal that he had no instructions from Mr & Mrs Walshe to represent them on that occasion, but was present only of his own accord in case he might assist the Tribunal. His evidence at the second hearing is described at paragraph 18 of the Tribunal's decision.

7. The grounds provided by Mr & Mrs Walshe appear to the Tribunal to constitute a mixture of criticism of the decision in that they draw attention to what they say are some inaccuracies in it, and of further description from their point of view of events that have occurred from time to time. They do not appear to suggest that the Tribunal committed any error of law, but seek to amend or to enlarge upon the facts that were before it at that time.

8. No doubt had they attended the second hearing, or made arrangements to be represented at it, or even arranged that the hearing take place at a slightly later date when they would be better able to attend or to be represented in some suitable way, they might have been able to draw the attention of the Tribunal to some at least of the inaccuracies that they allege, but they did not take any of those steps. This was their application and it was for them, having made it, to support it. They chose to do so by seeking to rely upon a substantial number of papers, largely copy correspondence of one sort or another that they had supplied.

9. In considering the application for leave to appeal the Tribunal concluded that there were three areas that it should examine in order to discover whether or not circumstances existed that may justify further consideration of the matter. The first of those was whether or not there may have been any error of law, the second whether there may have been any material procedural error and the third whether the material now before it may lead it to conclude that some injustice might have occurred.

10. As to the first of those points, nothing in either the letter of 10th June or in the later document received on 6th July suggests that there has been any error of law.

11. The Tribunal was not clear from the material presented by Mr & Mrs Walshe whether or not they contended that the decision to proceed with the second hearing on 11th May 2009 in their absence amounted to a procedural error. It therefore re-examined that decision, and has concluded that no such procedural error arose from that decision.

12. It reached that view for three reasons. First, Mr & Mrs Walshe's email of 6th May contains no actual request for an adjournment. Indeed, the terms of the email appear, if anything, to assume that the matter will proceed. The fact that the matter had been adjourned following the first hearing was at least sufficient to indicate to the parties that the Tribunal is able to adjourn a matter, even if one ascribes no further knowledge of its procedures to them. Secondly, the terms of the email are not such that it may reasonably be said to imply a request for an adjournment. It contains no indication that the indispositions referred to are such that attendance may be possible at any later date or that Mr & Mrs Walshe were considering any of the other steps to enable them to be represented mentioned in paragraph 8 of this note.

13. Finally, regulation 15(2) of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 (SI 2003/2099) indicates that the Tribunal shall not postpone or adjourn a hearing except where it considers it is reasonable to

do so having regard to the grounds for the request, the time at which the request is made and the convenience of the other parties. A request for adjournment on the grounds of material demonstrable indisposition may of itself frequently (although not always) show a reasonable ground for adjournment. However, even if the email had amounted to a request (express or implied) for an adjournment, it was received only five days before the hearing date that had been fixed, contained limited information about the indispositions and any likely period of adjournment that would be required, and an adjournment may well have inconvenienced the other parties. It would have been difficult at the least for the Tribunal first to infer from that email an application for an adjournment and then in the light of regulation 15(2) to grant one on the information then put before it.

14. Thus the Tribunal was unable to find that there was any error of law or procedural error that would justify granting leave to appeal. It then considered whether or not it appears that as a result of the other matter provided by Mr & Mrs Walshe any material failure of justice might have occurred. If it had then an appeal may well be appropriate in any case to set right such a failure. Mr & Mrs Walshe have supplied a detailed list of comments upon the decision that has been issued, averring in some cases errors in the matter set out in it, and in many others adding further material that amounts in effect to a presentation of their side of events that were raised at the second hearing. Whilst it may be argued that having failed to attend or to be represented at the hearing of their own application they should not now be heard upon those aspects, the Tribunal considered that it was right to examine them in all in order properly to deal with the failure of justice aspect of the application. The points are set out at length in the letter of 3rd July and it is not necessary to repeat them here.

15. There may perhaps be some errors in the Tribunal's reportage of some facts in the light of what Mr & Mrs Walshe now say. There is, for example, almost certainly an error in that Trehill Limited was not mentioned on the front sheet to the decision as it should have been, but it made no representations at the hearing of the matter or before it. Had they (and/or Trehill Limited in the light of their comments about an email it subsequently sent) been present or represented at the second hearing they could no doubt have assisted the Tribunal to such extent as was necessary with those points

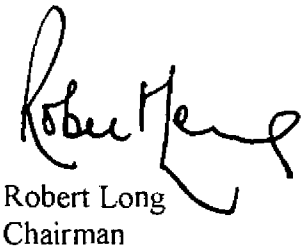
16. Much of the remainder of the letter of 3rd July deals with Mr & Mrs Walshe's account of historical matters where it diverges from matters set out in the decision. The substance of what they now say serves to emphasise the deep and keenly felt differences that have arisen, for whatever reasons, between the substantial majority of the other lessees (now represented by the right to manage company) on the one hand and themselves on the other. The Tribunal's decision makes it plain that it was aware of those differences and its observations at paragraphs 52, and 57 and 58 of its decision clearly indicate the conclusions that it reached in that respect.

17. The Tribunal made plain at both hearings (see paragraph 19) that the jurisdiction to appoint a manager and receiver is a problem-solving jurisdiction and has indicated the Court of Appeal authority upon which it

based that view. Thus in reaching its decision it was concerned to examine the present situation at Trehill House, and the means by which the management of that property can best be taken forward in the light of the existing difficulties. It was satisfied for the reasons it gave that the problem of the relations between Mr & Mrs Walshe on the one hand and the RTM company and the other lessees on the other was not one that was likely to be solved by the appointment of a manager. The historical events serve as background, but in this case, as in many others of this sort, they are no more than that.

18. None of them have been tested in any way, but the Tribunal determined that even if it were to postulate that it accepted that every one of the criticisms that Mr & Mrs Walshe make of its decision at face value, and accepted that every one of the descriptions they advance is entirely accurate, the totality of the information (both that available at the hearing and that provided now) provided by them would still fall well short of persuading it that the appointment of a manager and receiver at Trehill House is any more likely to overcome the problems there than appeared to it to be the case following the conclusion of the second hearing. The fundamental situation would remain as described at paragraphs 56 and 57 of the decision and, as recorded there and in paragraph 18 of the decision, even the manager and receiver nominated by Mr & Mrs Walshe said that he could not be sure that the appointment of a manager and receiver would assist. It has therefore concluded that there is no material miscarriage of justice in the decision that it has reached that would require the matter to be re-examined upon appeal.

19. Accordingly the Tribunal declines to grant leave to appeal. Mr & Mrs Walshe are entitled to renew their application for leave to appeal to the Lands Tribunal, which is the Lands Chamber of the Upper Tribunal, at 43-45 Bedford Square WC1B 3AS, but must do so within fourteen days after the date of this decision. A form of application for leave to appeal may be found on the Lands Tribunal website at:
http://www.landstribunal.gov.uk/Documents/rules_procedures_and_forms/AprilNewForms/LR.pdf



Robert Long
Chairman
15th July 2009