Residential Property
TRIBUNAL SERVICE

Case Number: CHI/18UB/LIS/2010/0061

RESIDENTIAL PROPERTY TRIBUNAL SERVICE

SOUTHERN LEASEHOLD VALUATION TRIBUNAL

PROPERTY: Tanyards Court, Beer Road, Seaton, Devon, EX12 2PA

Applicant: Mrs VS Harrison and Mr G Singer and other leaseholders

and

Respondent: Jephson Homes Housing Association Limited

In The Matter Of

Section 27A and 20C of the Landlord and Tenant Act 1985 (Liability to pay service charges)

Tenants' application for the determination of reasonableness of service charges for the years 2006, 2007, 2008, 2009 and 2010.

Tribunal
Mr A Cresswell (Chairman)
Mr E G Harrison FRICS

Date of Hearing: 3 December 2010

Appearances: Mr G Singer for the Applicants
Mr J Evans for the Respondent

DETERMINATION

The Application

1. On 25 July 2010, Mrs Harrison, the owner of the leasehold interest in Flat 3, and other leaseholders, made an application to the Leasehold Valuation Tribunal for the determination of the reasonableness of the service charge costs claimed by the landlord of the property, for the years ended 31st March 2007, 2008, 2009, 2010 and 2011. The application referred, amongst other matters, to the apparent unreasonableness of management charges.

Preliminary Issues

2. The Tribunal informed the parties at the outset of the hearing that Mr Harrison was a co-founder of the firm which became Harrison Lavers & Potburys, but that he had been retired from that business for some six and a half years and has no commercial involvement with the firm.

3. No objection was made in relation to his membership of the Tribunal, and the Tribunal was satisfied that there was no conflict of interest.

4. The Tribunal made a note of the details of all of those in attendance.

Inspection and Description of Property

5. The Tribunal inspected the property on 3 December 2010 at 10.30 am. Present at that time were Mrs V Harrison and Mr G Singer, two of the Applicants, together also with Mr J Evans, Housing Manager, and Mr M Canning, Housing Officer, for the Respondent. The property in question consists of 32 one and two bedroom retirement flats, joined in the same complex to 2 retail units. Although the Respondent is a social housing landlord, the property is not social housing.

Summary Decision

6. This case arises out of a tenants' application, made on 25 July 2010, for the determination of liability to pay service charges for the years 2006 to 2010 inclusive. Under Sections 19 and 27A of the Landlord and Tenant Act 1985 (as amended) service charges are payable only if they are reasonably incurred. The Tribunal has determined that the landlord has not demonstrated that all of the charges in question were reasonably incurred. We detail below our specific findings.

7. The Tribunal allows the Applicants' application under Section 20c of the Landlord and Tenant Act 1985, thus precluding the Respondent landlord from recovering its cost in relation to the application by way of service charge.

Directions

8. Directions were issued on 25 July 2010 at a pre trial review. These directions provided for the matter to be heard at an oral hearing.

9. The Tribunal directed that the parties should submit specified documentation to the Tribunal for consideration.

10. This determination is made in the light of the documentation submitted in response to those directions and the oral evidence and submissions at the hearing.

The Law

11. The relevant law is set out in sections 18, 19 and 27A of Landlord and Tenant Act 1985 as amended by Housing Act 1996 and Commonhold and Leasehold Reform Act 2002.

12. The Tribunal has the power to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. Service charges are sums of money that are payable – or would be payable - by a tenant to a landlord for the costs of

services, repairs, maintenance or insurance or the landlord's costs of management, under the terms of the lease (s18 Landlord and Tenant Act 1985 "the 1985 Act"). The Tribunal can decide by whom, to whom, how much and when service charge is payable. A service charge is only payable insofar as it is reasonably incurred, or the works to which it related are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the charges.

13. The relevant law is set out below:

Landlord and Tenant Act 1985 as amended by Housing Act 1996 and Commonhold and Leasehold Reform Act 2002

18 Meaning of "service charge" and "relevant costs"

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

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

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

19 Limitation of service charges: reasonableness

(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 provision of services or the carrying out of works, only if the services or works are of a reasonable standard; and the amount payable shall be limited accordingly.

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

27A Liability to pay service charges: jurisdiction

(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to—
(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

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

(3) An application may also be made to a leasehold valuation tribunal for a determination

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

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

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

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or
(b) on particular evidence,
of any question which may be the subject of an application under subsection (1) or (3).
(7) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.

Ownership and Management

14. The Respondent is both landlord freeholder and manager of the property.

The Lease

15. Mrs Harrison holds Flat 3 under the terms of a lease dated 2 March 1988, which was made between Jephson Second Housing Association Limited as lessor and Edgar Wallace Martine and Marjorie Agnes Martine as lessees. Jephson Second Housing Association Limited has since changed its name to that of the Respondent.

THE THIRD SCHEDULE
(Covenants by the Purchaser)

1 : 1 To pay to the Association the yearly rent hereinbefore reserved (if demanded) and to pay the Maintenance Charge

THE FOURTH SCHEDULE
PART I
(General Covenants by the Association)
PART II

3. To keep the roof foundations and external parts [including external walls and loadbearing walls and external doors and windows save the glass in any Flat doors and windows] of the Property and all other Buildings comprised in the Development in good and substantial repair and to paint or otherwise treat (as may be appropriate) as often as may be reasonably necessary in a proper and workmanlike manner and with suitable materials of good quality such external parts of the Property and all other Buildings comprised in the Development and all internal and external parts of the Warden's Office as are usually painted or otherwise treated

5. To keep the Common Parts clean and tidy and in a proper state of repair and condition

6. To maintain tidy and cultivated any grassed areas gardens or floral areas (if any) within the Common Parts

9 : 1 To keep the Development (including the Warden's Office) and the Property insured at all times from loss or damage by fire flood and such other risks and perils as the Association shall from time to time determine in a sum equal to the full rebuilding costs thereof (including the removal of debris) for the time being together with an adequate sum in respect of architect's and surveyor's fees and in the event that the Property shall be destroyed or damaged as aforesaid to lay out such moneys towards the reinstatement or rebuilding of the same subject nevertheless to the proviso contained in paragraph 7 of the Third Schedule

THE FIFTH SCHEDULE

PART I

(Covenants in respect of the Maintenance Charge)

1. The Association shall as soon as reasonably practicable after the commencement of the Service Charge Year prepare an estimate of the sums to be spent by it in such Service Charge Year on the matters specified in Part II of this Schedule and shall add thereto or deduct therefrom (as may be appropriate) any difference between:
   (a) the amount certified in accordance with paragraph 3 hereof; and
   (b) the amount of the estimate prepared in respect of the previous Service Charge Year (except the first Service Charge Year) making due allowance for any sums paid out of the reserve Fund or the income thereof and shall serve on the Purchaser notice of the total amount so calculated

2. The Purchaser shall pay to the Association a sum equal to the Specified Percentage of the total amount specified in such notice
3. The Association shall keep an account of the sums spent by it in each Service Charge Year on the matters specified in Part II of this Schedule and shall as soon as practicable after the end of such Service Charge Year at the request of the Purchaser provide the Purchaser with a written summary of the costs so incurred certified by a qualified accountant (as defined in Section 28 of the Landlord and Tenant Act 1985)

PART II

(Expenditure to be recovered by means of the Maintenance Charge)

1. The sums spent by the Association in and incidental to the observance and performance of the covenants on the part of the Association contained in Part II of the Fourth Schedule and Part I of this Schedule
2. All fees charges expenses salaries wages and commissions paid to any Auditor Accountant Surveyor Valuer Architect Solicitor or any other agent contractor or employee whom the

Association shall employ in connection with the carrying out of its obligations under this Lease and the Leases including the costs of and incidental to the preparation of the estimate notices and accounts referred to in Part I of this Schedule

3. All further sums reasonably paid by the Association in and about the repair maintenance decoration cleaning lighting and running of the Buildings the Common Parts and the Warden's Office and the Development whether or not the Association was liable to incur the same under its covenants herein contained
4. Any Valued Added Tax or other Tax incurred by the Association in connection with the carrying out of its obligations under this Lease and the Leases
7. The costs of management of the Property and the Development including the costs of preparing and auditing accounts and printing and sending out of notices circulars reports or accounts and all fees payable to the Government or any other body
8. The cost to the Association of performing any of the covenants and obligations on the part of the Association so far as the same relate to the Development or the Property
9. Such sum as the Association shall properly determine as reasonable to be set aside in any year towards the Reserve Fund to make provision for expected future capital expenditure

PART III
(The Reserve Fund)

1. The Association shall establish and thereafter maintain under its control a fund to be known as "the Reserve Fund" to make provision for future substantial capital expenditure
2. The Association shall pay into the Reserve Fund (when recovered from the Purchaser and the other tenants under the Leases as part of their respective Maintenance Charges) such sums as it shall properly determine as reasonable to be set aside in accordance with paragraph 9 of Part II of this Schedule
3. The Association shall from time to time apply the whole or any part or parts of the capital and income of the Reserve Fund in or towards the defrayment of any substantial items of capital expenditure falling within Part II of this Schedule as the Association may in its absolute discretion determine

Service Charges In Issue

16. The Applicants submit a number of personal statements, highlighting their concerns with the Administration of the property by the Respondent. These statements highlight difficulties regarding disabled access; a double charge of service charge which was set off against the following year; a tardy response to repairs required to internal walls; a failure to heat corridors and stair well; failing to supervise and paying for inadequate gutter cleaning in 2006; delay in sorting out plasterwork in a corridor; replacement of a resident warden by a part-time scheme manager without relief cover; lack of an emergency call system and disabled access to the building and the scheme manager's office; inadequate response to a damp stain on a kitchen wall, followed by

inadequate repairs and a lack of annual inspection; the adverse effect upon the values of the poor reputation of the Respondent; inadequate heating due to a draughty window, a failure to lubricate the ventilation mechanism and a 2 1/2 year delay before replacement windows were fitted following storm damage; a failure to deal with black mould; inadequate response to water damage; failure to provide low costs contents insurance or comprehensive cover; inadequate and late response to window replacement, followed by trying to spend a further £30,000 of the reserve fund, which was not required; a rise in service charges without proper consultation or justification; an increase in the reserve fund by a substantial amount when there was already £81,000 in the fund; there was an increase in surveyor's fees of 96% since 2007; the landlord has not explained the figure of £20,540 for windows in 2017; Management fees have increased despite the recession and a reduction in service; other suppliers offer a cheaper management service.

17. Tunstall's Contract

The Applicants say that the contract costs at the property are the highest of any Jephson's properties. Equipment will soon become obsolete when BT changes its own system. It does not seem appropriate to charge for service and replacement. The standard of service has been unsatisfactory, with some flats not having any equipment and others having had to pay for replacements. The Applicants appeared to be paying more than the average payments of other schemes within the Respondent's portfolio of properties. They say that there is no warden and no emergency warden call system.

The Respondent says the current contract cost is about £2000, the £4000 figure identified by the Applicants including the 24-hour call centre monitoring costs. A consultation was issued in early 2009 with a view to replacing the current system so as to achieve digital compatibility. The current charge covers the existing contract. In 2007, the Tunstall's contract had been renewed on a national basis; because of the size of the contract, the Respondent was obliged to undertake European tendering. The contract allows for the replacement of inoperative units.

The Tribunal was satisfied that there was in place a contract for a dispersed alarm system at the property, which would enable leaseholders to make telephone calls and to use the emergency call system, which operates from

Plymouth. **We were also satisfied that the cost of the contract was a reasonable cost for the service provided.** There was no mechanism for the Tribunal to order the Respondent to repay leaseholders for equipment purchased privately by them.

Mr Evans explained that the contract did allow for the replacement of inoperative equipment. Whilst being satisfied as to the reasonableness and payability of the Tunstall's contract costs, it was clear to the Tribunal that there had been a breakdown in communications, because leaseholders were unaware of the processes they may follow so as to ensure that there was equipment in each flat and so as to ensure that inoperative equipment was speedily replaced. It was also clear to the Tribunal that the Respondent had contracted in a way which was of more benefit to the Respondent than to the Applicants. We could not quantify whether there would be any further cost to the Applicants by reason of European tendering, because the cost of the tendering exercise may well have been balanced by economies of scale arising from the larger contract.

The Applicants had, in the absence of explanation by the Respondent, sought to compare the cost of their scheme with the costs of other Tunstall's provision at other schemes run by the Respondent. It was apparent, however, that there was not a true comparison, because the other schemes were not dispersed schemes, but fixed line schemes which, by their nature, are cheaper.

There was no reason to doubt Mr Evans' evidence to the effect that the costs of the scheme manager are quantified and that only those costs are charged to the leaseholders.

18. **Reserve Fund Formula**

The Applicants argue that in 2004, the Respondent changed the way that interest was calculated on the reserve fund, from a monthly crediting of interest to an estimated deposit on an arbitrary date with interest linked to a discounted bank rate published on that date. The Applicant's query whether the fund receives actual interest and whether the interest is taxed at source. They also query whether the formula has been audited by the Respondent's auditors, there being no evidence of audit and certification since 2002.

The Respondent says that the details of the calculation of the reserve fund interest are shown on a fact sheet within the Tribunal bundle. During the last three years, the average investment rate before tax achieved on leaseholders funds has been in excess of the average base rate.

The Tribunal finds that this is not an issue upon which it can make a direction. What was apparent, however, was that the leaseholders benefited from the method used by the Respondent to earn interest for the property's reserve fund. Mr Evans explained that the Respondent returns to the reserve fund interest on a notional figure of monies receivable, rather than actually received, the former always being as much as or more than the latter. What was missing, however, was a very simple explanation of this, as the documents currently submitted were perceived as being complex.

19. **Reserve Fund: The Shops**

The Applicants argue that the two retail units should make a proper contribution to the reserve fund, and query whether the domestic leaseholders have been subsidising the retail premises and whether they are due a refund as a consequence. It is apparent that any amounts received from the two retail units have been credited only to the reserve fund and that the amounts have been inconsistent year upon year. Recently, the Respondent had acknowledged that the resident leaseholders had been charged for the whole of the insurance premium and a correcting credit was made to those leaseholders in consequence.

The Respondent says the residential leases are drafted to cover the costs relating to the scheme on the basis of 3.33% for a two bedroom flat and 2.785% for a one-bedroom flat. Full letting of the two retail units is not guaranteed. The retail units do have full repairing and decorating responsibilities for those units and shopfronts. The units, because of the location, do not benefit from the management and services provided to the residential residents and are not, accordingly, charged for services or routine maintenance. No costs for the retail units impact upon the residential leaseholders. The retail units have been charged an element of reserve fund contribution, when let. Unit 1 has had a historic fixed charge of £65 per annum and Unit 2 to has more recently been charged £165 per annum when

commercially let. When raised, these contributions have been added to the reserve fund.

The Tribunal finds this is not an issue upon which it can make a finding. Whilst it appears to the Tribunal to be unfair that the leaseholders should, effectively, subsidise the retail units, at the same time as the Respondent is receiving rental income from the retail units, this was the effect of the leases which they had signed with the Respondent. Whether there could or would be a subsequent application to vary the leases was not a matter for this hearing.

Insurance

The Applicants argue that, having seen a report of 9 September 2008 from Mazars Property Consultants Ltd, it is assumed that VAT is recoverable by the Respondent, because it is VAT registered, whereas the premium inclusive of VAT was paid by the leaseholders. It is queried whether the three-year correction referred to in the following section went back sufficiently far.

The Respondent says the insurance requirement is detailed in paragraph 9.1 of part II of the fourth schedule of the lease and is provided as part of a block policy taken out by the Respondent on all properties owned. The Respondent is VAT registered. The Mazars reinstatement costs report of 2008 is an update of a report first commissioned in 2004. The report is used primarily to aid the calculation of a premium for the individual retirement schemes. Following the 2010 budget meeting, the insurance costs at the property were recalculated to take account of the retail unit information and a credit was made to residents via the 2010/11 premium. The insurance for the property at £1550.99 equates to a cost of 50p per £1000 insured, because the leaseholders benefit from inclusion in the Respondent's block policy.

The Tribunal finds that there are benefits to be gained from the inclusion of the property in a block policy, and that the actual charges for insurance are not unreasonable. The Respondent has made a refund because it became apparent that the leaseholders had been charged for the whole of the insurance premium applicable to the property, when contributions had also been received in respect of the retail units. The Applicants have argued that two years were omitted from this refund, 2006/2008, which would equate to £250 in total. Whilst the terms of the lease require the leaseholders to meet 100% of the costs of the insurance premium, by virtue of their

specified shares, the Respondent will want to determine whether it should properly return the claimed sum to the credit of the leaseholders

21. **Insurance**

The Applicants argue that there may have been a failure to claim insurance in respect of repairs to flashings on the western face of the property in the vicinity of the Velux Windows in 2007 following structural damage during a severe storm. The work which followed, to repair the damage, was included in the service charge for that year. A resident paid for the urgent replacement of three double glazed window pane units because the seals had been ruptured and the resident was not reimbursed even though glass is covered by the building insurance. The damage was not reported to the insurance assessor. Soon afterwards, the same Velux window frame units were inspected by Kendall Kingscott in February 2008 as part of the building conditions survey and reported as needing urgent replacement because they were distorted and inefficient.

The Respondent says in April 2007, the maintenance officer, Janet Golding, visited the scheme and inspected the Velux Windows at 33 and found that the windows were not damaged, and that the glazing repair issues were age related and not caused by an insured event, with the consequence that no claim was made on the insurance policy. The glazing panels which were, by then, at least 20 years old had not misted as part of an insured event and the glazing is not a responsibility of the landlord. In February 2008, the initial survey report by Kendall Kingscott indicated that window replacement be considered as they were now warped. By this time, the leaseholder had replaced the glazing.

The Tribunal finds it cannot reach any relevant finding as to the recoverability of the cost of window and glass replacement by individual leaseholders. Whether or not a claim should have been made against the insurance policy for the property is not relevant to our consideration as to whether the service charge is payable or reasonable. Any such claim would more properly be brought in the County Court, with the proviso that it must be acknowledged that wear and tear would not be covered by insurance.

22. **Reserve Fund: Deduction for Tax Arrears**

The Applicants argue that interest was owing from 1998 and 1999 and was transferred into the reserve fund for 2000; tax arrears were claimed on this amount. The cost of a mistake by the Respondent in relation to payments of tax should not fall upon the leaseholders. There was no consent by the leaseholders to this deduction. The deficit was made good by an increase in the contributions of 52% for the years 2008/9 and 2009/10. The reserve fund relates to the condition of the building and the increase was unfair to new residents.

The Respondent says historically reserve funds were not kept in designated trust funds, but held in general accounts. Consequently, they were not subject to trust fund taxation as Housing Associations were exempted, with the resultant benefit to leaseholders of gross interest being added to reserve funds. In 2006, HMRC reduced trust fund taxation to 20%, but also identified that all reserve fund contributions being held in Housing Association general accounts should be deemed to be implied trusts and, therefore, subject to trust taxation over the years. Upon advice, the Respondent made a disclosure to HMRC, which led to an imposition of taxation for the previous six years, which was deducted from the 2006/07 reserve fund. The increase in reserve fund contributions in 2008 followed an independent building survey carried out in April 2007 and the revised projection; it was not as a result of the tax paid to HMRC in 2007. The adjusted 2008 projection was discussed at the 2008 budget meeting and implemented for the 2008/09 invoice

The Tribunal finds, in short, that there was here a claim by HMRC for tax due in respect of interest earned on the reserve fund, and that the Respondent was entitled to reclaim that tax from the leaseholders via the service charge, in accordance with the lease. Mr Evans explained that there had been no legal requirement, at the relevant time, for the fund to be held in trust, because the Respondent was exempt by reason of being a registered social landlord. He further explained that, at the time, the practice employed by the Respondent appeared to lead to a greater increase in the value of the reserve fund due to lower taxation. Again, what was missing here was a simple explanation to the leaseholders at the time as to what was happening to their money.

In the event, the leaseholders became suspicious that there was underhand practice at play. The Tribunal is satisfied by Mr Evans' assurance that the

Respondent itself paid the penalty imposed by HMRC and that the leaseholders were required to pay, by the deduction from the reserve fund, tax which HMRC determined had always been due.

It was argued that newer leaseholders would suffer a loss because of the reduction in the size of the reserve fund arising from the deduction of past tax due. Whilst the Tribunal can appreciate that there would be some loss of expectation, there was, in fact, no actual loss because the reserve fund had been artificially inflated by the presence of unpaid tax.

23. Contribution Formula

The Applicants argue that a mathematical analysis of the contributions formula reveals that the Respondent receives more from the leaseholders than the value of the service charge. The addition of 12 small flats at 2.785% and 20 large flats at 3.33% leads to a figure of 100.02%. The Applicants argue that the overcharged sum should be reimbursed.

The Respondent says the additional 0.02% surplus is de minimis and equates to £5 in 2009/10 and 20p in 2008/09.

The Tribunal was told by Mr Singer that the Applicants did not require any order in respect of the formula, but included this element within the claim so as to illustrate an inaccuracy, and so as to illustrate how 100% could be achieved by the inclusion of a contribution from the retail units. Accordingly, Mr Singer accepting that the Tribunal could not make any change to the terms of the leases under this claim, **the Tribunal makes no order in respect of the contribution formula.**

24. Car Parking

The Applicants argue that as the ground upon which the car park stands is already paid for by the residents by way of a peppercorn rent, and because the leaseholders pay for the painting, lighting, cleaning and maintenance of the space, the car space rent of £100 per space should be credited towards the upkeep of the scheme.

The Respondent says that legal advice has not been charged to the scheme. Clause 8.1 of the third schedule of the lease requires the lessees not to use the car parking spaces comprised in the development. The leaseholders have no rights over the car spaces, which remain within the ownership of the

Respondent to use as it sees fit. Any income from the spaces is rightly that of the Respondent. Although, in accordance with the terms of the lease, the Respondent could require the leaseholders to contribute by share to costs incurred on the car spaces, in practice those costs are met by the Respondent from the rental income. Costs to access ways remain chargeable to leaseholders.

The Tribunal finds that the lease is clear, and that use of the car parking spaces is excluded from the leases of the individual Applicants, and available outside the terms of the lease only by the payment of a licence fee. **The Tribunal cannot interfere with clear terms of agreement in a lease.**

25. **VAT Payments**

The Applicants ask to know whether the Respondent is registered for VAT. Cyclical works and maintenance work, mostly for the upkeep of the landlord's building, should be issued by one of the Respondent's companies registered for VAT, so as to save costs for the leaseholders. Have the applicants being charged VAT needlessly?

The Respondent says the Respondent is registered for VAT. VAT cannot be recovered, as the costs of works and services to the scheme are deemed exempt supplies and, therefore, VAT is not charged by the Association.

The Tribunal finds that the vagaries of VAT liability can be complex and, at times, seem to be unfair, but everybody is subject to the law, and **the Respondent is entitled under the lease to recover by way of the service charge lawful demands for VAT.**

26. **Management and Administration Charge**

The Applicants say that the quality of service exhibited by the Respondent has been poor and point to other providers, who charge considerably less to manage properties similar to this property. They perceive the Respondent's role as both landlord and managing agent as a disincentive to minimise charges. The Respondent had implemented a step increase spread over three years following the forming of a separate division operating from offices in Bristol. This led to increased management overheads. They argue that leaseholder views are often ignored or incorrectly recorded at consultative

meetings. Prices charged by comparative management services are below those charged by the Respondent prior to 2007.

The Respondent says invoices have been in line with the terms of the leases after an annual budget review meeting. The Respondent has also worked with a residents' forum and in September 2009 recognised a residents association, which took over from the forum. The Management and Administration charge was reviewed in 2006 following an internal costing exercise and benchmarking with other retirement housing managers. It was recognised that the charges were not covering costs and were below the market rate. The increase required was phased in over a three-year period ending in 2009/10. The charges are within the Housing Corporation published limits for retirement leasehold accommodation. In light of the current economic conditions, the charge for 2010/11 was frozen at the 2009/10 level.

The Tribunal was told by Mr Evans that the Respondent has adopted a policy of outsourcing to consultants, but the Tribunal noted that this was contemporaneous with a considerable increase in management costs charged to the leaseholders. In other words, it looked very much as though the leaseholders were being charged twice for the same thing, albeit in the case of the Respondent's in house unit, the service was, at times, poorly performed.

Mr Evans told us that the Respondent had calculated its own costs by way of internal benchmarking, but he also told us that the majority of the Respondent's portfolio consists of rented accommodation, which we know carries a higher level of work than leasehold management. He told us that the Respondent had then benchmarked with an annual Circular, "Leasehold Schemes for the Elderly – Management Charge Limits". It was apparent, however, that the Respondent was mixing apples with pears, because the Circular was concerned with properties where there was a much higher level of "care", and where there might be 24 hour warden presence, laundry facilities, shared lounges, etc, whereas a scheme such as this property was of a quite different nature.

He also told us that management of the property from the Respondent's Bristol hub was an expensive way of managing the property; and that the team there did not consist of dedicated property managers to leasehold property and that there were, in the team, no qualified chartered surveyors.

We find that the size of the Respondent's operation, its mixing of internal disciplines to benchmark and its inappropriate external benchmarking has led it to error. What is reasonable for the property starts from a much different base.

The Respondent should have been asking itself what was needed at the property and benchmarking its costs with providers of such a service. Had it done so, costs would have been considerable lower. Had the Respondent then gone on actually to manage the needs of the property rather than rely upon consultants, simple works, like gutter clearance, could be performed at a reasonable rate, using local contractors, rather than being allowed to deteriorate and then be rolled up into so-called major works.

The Applicants had obtained a quotation from Greenslade Taylor Hunt, as well as a firm quotation from Hillsdon Management. The per unit price from the latter company, including VAT, is £212.23. This equates to £189.14 for a 1 bed unit and £226.15 for a 2 bed unit. The stated charges made by the Respondent in y/e 07 were £197.88 and £236.21 respectively, remarkably close to Hillsdon Management Except that the Hillsdon Management figure would in comparative terms be for y/e 11, 4 years on.

The charge made by the Respondent in y/e 07 was unreasonable and in subsequent years wholly disproportionate even for a good service. Using our own knowledge of costs in the industry for a property of this nature, and comparing and contrasting how the Respondent reached its own costings with costings available locally, and having regard to what we are told was required in the period, **we have concluded that a reasonable management charge for each of the 5 years is as follows:**

Y/e 07 unit price £200, gives price per 1 bed £178.24 and 2 bed £213 12.

Y/e 08 unit price £205, gives price per 1 bed £182.69 and 2 bed £218.44.

Y/e 09 unit price £210, gives price per 1 bed £187.15 and 2 bed £223.78.

Y/e 10 unit price £215, gives price per 1bed £191.61 and 2 bed £229.10.

We agree with the Respondent that it is proper to freeze the y/e 10 figure in y/e 11.

27. **Year 2010/2011**

The Applicants argue that until they received the invoice for this year and substantiating documentation, they were unable to agree that charges are reasonable. The Respondent did not appear to have recognised the current financial circumstances of recession. The Respondent planned to keep the contributions to the reserve fund at the same level as 2008/9 and 2009/10, which was inflated by the Respondent's mistake over tax on interest, referred to above. The Respondent has made an arbitrary assessment of £400 per unit for the reserve fund.

The Respondent says final invoices for 2010/11 were issued on August 10 as scheme costs were already being incurred. Reserve fund contributions are at a level identified by the independent survey carried out in 2007 and are, by their nature, only estimates. The Respondent has a responsibility to current leaseholders and also future residents. Last year, the proposed cyclical maintenance plan was based upon an independent assessment by Kendall Kingscott, and was then competitively tendered. Following consultation, the scope of the works was considerably reduced at the request of the residents association, following which the reduced contract was awarded and final details of agreed works were given to residents on 28 September. The Skinner Construction invoices for the works are supported by the consultants' payment certificates. The Kendall Kingscott invoice for Supervision/Management of the works is based on the original tender sum and reasonably covers the work involved to get to initial tender. The reserve fund contributions are based on the long-term projection identified in the independent survey. It is recognised that the interest rate used is above that currently available in the market and that the fund projection will be reduced.

The Tribunal heard from Mr Evans that the Respondent's own consultants, Kendall Kingscott, had recommended that internal decoration not be included within cyclical works, yet had then gone on to seek a tender for works including internal decoration. It was the sensible observation of the leaseholders which prevented this unnecessary work going ahead. Notwithstanding that, Kendall Kingscott was then allowed by the Respondent to supervise the works at a charge rate commensurate with the original pricing, some £48,849, which included the unnecessary work which was not

performed, a considerably different price to the price of the actual works, some £29,385, of which £9800 was accounted for by scaffolding. That the Respondent could not tell us how that had been allowed to happen, with the consequent extra cost to the leaseholders, is, we find, symptomatic of the real problem here. The Respondent wishes to charge ever increasing sums to manage the property, and yet they also outsource the management and yet do not supervise properly those to whom they have outsourced. As Juvenal wrote: "Sed quis custodiet ipsos custodes?" (But who will guard the guardians?). It would be wholly wrong and wholly unreasonable to require the leaseholders to pay for such poor overseeing on the Respondent's part. **We find that the charge of £3054.58 by Kendall Kingscott for preparing the specification of works, invitation of tenders and reporting to the Respondent is not a reasonable charge and not payable by the Applicants.** The work was not major work, but an aggregation of minor works, which the Respondent should have managed contemporaneously with the need for those works arising and for which management it was already charging the residents. The leaseholders cannot be expected to pay twice for the same service and to pay also for the Respondent's mismanagement of an outsourced supervision contract.

28. The Reserve Fund: Level of Contribution

The Tribunal was informed that the 2008 budget was produced "in house". A careful examination reveals that it was fatally flawed and prepared with complete disregard to the implications it would have on the "elderly" residents in flats of relatively low values. The consultation process was merely a process undertaken because, as in other "consultations", the Respondent ignored the residents' pleas and imposed a drastic increase anyway when there was already more than £90,000 in the pot.
In private management a balance has to be struck between ideal 30 year budgets and the practical budget acceptable to the residents who have to pay towards the reserve fund. Older residents are loathe to pay, for instance, for a new lift to be installed long after they have departed. It is important for managers to ensure that there is a sufficient fund available for foreseeable expenditure in say the next 5 years and to look ahead to the following 5 years. It is important for the budget to be reviewed every year, and if a large

expenditure is looming, such as a major overhaul of a lift or roof covering, early action can be taken. Any significant increase should be subject to consultation well before it is implemented. We are mindful that a steep increase was made in the year beginning 1/4/08 and note that the balance at 1/4/10 was similar to that 2 years previously, even after payment of most of the "Skinner Account". **We urge the Respondent to prepare a fresh budget now to take account of standard private management practice.**

General

29. The Tribunal finds it unfortunate that this matter should have had to be brought before it. It was very apparent that there was here close to a complete breakdown of mutual trust and confidence between the parties, and that there is a need for much greater communication. Poor communicators tend to blame the audience rather than the medium. Communication consists more of understanding and quality than it does of quantity; sometimes less is more, and it is possible to convey messages in simpler form. Communication consists of more listening than talking.

30. This property is a relatively small property, but it forms a part of a large estate portfolio managed by the Respondent. It suits the Respondent's business to outsource contracts and to operate, when possible, across the whole of its estate. There is a balance, however, to be achieved, such that the individual needs of one property are not subsumed within the Respondent's search for what suits it as an organisation. By way of example, when the Tunstall's contract expires, there may be far greater value for the leaseholders to be given the choice as to whether they want a comprehensive emergency call system, or whether there is some scope for cheaper local schemes.

31. Similarly, any competent management company or agent would be aware of repair and replacement requirements by using sound communication and inspection mechanisms. If gutters need cleaning or a handrail needs replacing, these should be items which readily come to the attention of the agent, and which can be speedily remedied at reasonable cost, without the

need to employ consultants and to aggregate works within major contracts. **Effectively, we noted that the Respondent's preferred method of working had a propensity to lead to extra and unreasonable costs falling upon the Applicants.**

Section 20c Application

32. The Applicants have made an application under Section 20C Landlord and Tenant Act 1985 in respect of the Respondent's costs incurred in these proceedings. The relevant law is detailed below:

Section 20C Landlord and Tenant Act 1985: Limitation of service charges: costs of proceedings

(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 ... ... leasehold valuation tribunal, ...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 ... tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

33. Because the Applicants appear to have been forced before the Tribunal by the landlord's attitude to its role as manager of the property, the Tribunal has no hesitation in allowing their application under Section 20c Landlord and Tenant Act 1985. The frustration of the Applicants was palpable. **The Tribunal directs that the Respondent's costs in relation to this application are not to be regarded as relevant costs to be taken into account in determining the amount of the service charge for the current or any future year.**

Andrew Cresswell (Chairman) **Date 12 December 2010**
A member of the Southern Leasehold Valuation Tribunal
Appointed by the Lord Chancellor