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Ref: LON/00BK/LSC/2009/0493

LEASEHOLD VALUATION TRIBUNAL
FOR LONDON RENT ASSESSMENT PANEL

DETERMINATION
RE APPLICATION UNDER SECTION 27A OF THE LANDLORD AND TENANT ACT 1985

Premises:	Frances Court, 64 Maida Vale, London W9 1PN	
Applicants:	Mr Eaman Sammakie (Flat 2) Mr Gary Shaw (Flat 3) & Mrs Beryl Leitch (Flat 5)	[*Tenants*]
Representatives	In person with Mrs Adrienne Shaw Also Mr R E Raye FRICS	
Respondents:	Mr Jonathan Malka MRICS & Frances Court Ltd	[*Landlords*]
Representative	Justin Bates of Counsel Also Mr D E Harding MRICS & Mr Simon Gorst BA (Hons) MSc MRICS of Cubit Property Management Ltd and Mrs C L Kreiger (Flat 6).	
Hearing:	26, 27 & 28 April 2010 and 15 & 16 June 2010	
Inspection	16 June 2010	

Members of the Leasehold Valuation Tribunal:

Prof. J T Farrand QC LLD Solicitor [*Chairman*]
Mr P M J Casey MRICS
Mr J M Power MSc FRICS FCIArb

Introductory

1. The originating Application, dated 31 July 2009, sought a determination of liability to pay service charges for the years 2004 onwards. Numerous items were listed as in issue and questions or challenges indicated in handwriting on the standard form.
2. In pursuance of Directions made by a procedural Chairman following an oral Pre-Trial Review on 15 September 2009, the Applicants prepared a Statement of Case, dated 26 October 2009. This document consisted of nearly 30 typescript pages and served to detail and clarify the matters in dispute.
3. In outline, these matters concerned the costs of certain items of a recurring nature included in the service charges for some or all of the years 2004 - 2009: gardening, repairs, management fees, professional fees, pest control, bank charges and insurance. However, a number of exceptional and comparatively major matters of complaint should be noticed as raising questions of law which needed answers:
    i. In 2001 and 2002, amounts had been charged for 'Common Parts Renovation' totalling (£3,605.03 and £1,878.75 respectively) £5,483.78. Liability to pay these sums was disputed on the ground that they were for works in respect of which a consultation had been required under s.20 of the 1985 Act but had not happened. The consequence of non-compliance would be a 'capping' of the Applicants' individual liability at the appropriate percentage under each of their leases of the limit on costs then in force (ie £1,000).
    ii. Liability to pay charges for 2005, 2006 and 2007 was disputed by reference to s.20B of the 1985 Act which imposes a time-limit of 18 months after costs have been incurred for making service charge demands.
    iii. The service charges demanded for 2007 included a substantial amount for Major Works (£132,000) but: "Section 20 procedures were not followed for the expenditure". This refers to the consultation requirements and the 'capping' consequences of non-compliance under s.20 of the 1985 Act (as amended in 2002).

iv. In addition, as to these Major Works, it was asserted: "The Landlord did not execute his "Duty of Care" to Lessees' interests causing significant distress and losses to all the applicants". This aspect was compellingly elaborated over two pages of the Statement (A21 & A22) but without citing any legal authority in support or making, quantifying and evidencing any (counter) claim to damages against the Respondents. In their Conclusion, the final paragraph is:

> "Also, we believe that the Landlord is in breach of covenants to the Lessees between the years between 2000 - 2009. Allowing the building to deteriorate, not allowing the Applicants the "quiet enjoyment" of their flats and communal gardens. Also, for example, the extension of front and back light wells into the communal gardens, and now wanting to extend his parking bay into the right hand hedgerow and boundary wall."

v. The service charges for 2008 similarly included an amount for 07 Major Works, totalling more than £30,000, including nearly £20,000 for surveyor's fees. In the Application, the question had been asked: "Have Section 20 procedures been followed?" In the Statement, there is a page (A27) challenging the validity of "Year 2008 and 2009 Major Works Notices" but only because of the Determination mentioned below.

vi. The Applicants' Statement of Case refers from time to time to the Determination of a differently constituted LVT, dated 31 January 2007 [LON/00BK/LSC/2006/0358]. This considered an application made, in effect, by the present Respondents under s.27A(3) of the 1985 Act for the LVT to determine that, if costs were incurred in respect of proposed major works, they could be taken into account in calculating the present Applicants' service charges. The LVT made a number of specific decisions and, in particular, approved costs as contained in an amended copy Schedule of Repairs and Redecorations. The Applicants contended that, notwithstanding subsequent changes of contractor

and specifications, this Determination remained binding on the Respondents as to works within its scope.

4. A Reply to the Applicants' Statement of Case was prepared by Mr Malka for the Respondents, dated 17 November 2009. This began with a helpful account of the factual background (see below para.9) and also dealt with the recurring service charge costs mentioned. As to the exceptional matters noticed above, the Reply (para.6) accepted that the service charge for 2005 was not demanded until 15 September 2006 but submitted that a carried forward surplus covered costs incurred up to 14 March 2005.

5. In addition, the Reply (para.8(ii)) included a denial that s.20 procedures were not followed for the 2007 Major Works with the comment that the Applicants were further consulted by applying to the LVT for the 2007 Determination referred to by them.

6. The Reply also submitted (para.8) that service charges were held by Respondent (2) as Landlord on Trust for the Applicants, continuing: "I would add, that the Landlord has discharged his duty as Trustee in passing the test of conducting the business of the Trust with the same care as an ordinary prudent man of business would extend to his own affairs". In support, it was stated that professional and reputable chartered surveyors had been instructed in respect of the 2007 Major Works and the Applicants fully consulted.

7. The Applicants made a Response, dated 24 November 2009, to the Respondents' Reply. The Response was detailed and personal but in general it reiterated and elaborated the Applicants' Case in the light of the Reply without submitting new points. However, it should be noted that the Applicants disputed the Respondents' implicit submission that the "generic demand" on 15 September 2006 satisfied s.20B of the 1985 Act, making the point that details of costs incurred had not been provided. In addition, although the Applicants accepted that "consultation process was conducted reasonably up to and including the LVT Hearing and the Decision" in 2007, they asserted that the consultation became improper immediately afterwards. In particular, they stated that "Mr Malka reverted back to type, he did not cooperate or consult at all regarding the contractor selection".

Background

8. The brief description of the Premises given in the Application was as follows:

"SMALL BLOCK OF SIX FLATS CONSTRUCTED AROUND 1950, THREE FLATS OWNED BY THE APPLICANTS, WITH REMAINING THREE FLATS OWNED/BENEFICIARY TO THE LANDLORD"

This was not elaborated in the Applicants' Statement of Case.

9. However, the Respondents' Reply made by Mr Malka began less briefly:

> "I have lived at 4 Frances Court since 1995. In the, year 1998 I acquired the Head Leasehold interest of the block. The property was originally built about 1900 as a single dwelling. Following apparent war damage, the building was converted into 6 flats suitable for letting. When I purchased the flat, the property was managed by a company called Sandrove Brahams, who were managing the property as part of a portfolio of a company in liquidation.
>
> The agents agreed to continue management on my acquisition of the Head Leasehold interest as a temporary measure until such time as the liquidator had disposed of the remainder of the portfolio.
>
> In early 2000 I took over the management. I set up a special Barclays Bank Trust and Charities Account in the name of Frances Court Management through which the financial transactions for the management of the building were conducted.
>
> At this stage, four of the flats - including my flat (4) - were held on under leases, Flats 1 and 6 were let to Statutory Tenants.
>
> In 2005 the Freehold interest was acquired by Frances Court Limited of which I am the sole director and majority shareholder."

10. This account of ownership should be supplemented by adding that in 2005 the headlease was merged into the freehold so that Frances Court Ltd became both the freeholder and the Applicants' landlord. Further, the statutory tenant of Flat 1 – in the basement – moved to a nursing home and gave up her tenancy in 2005. In 2009, a lease of Flat 1 was granted to Miss Michelle Malka (Mr Malka's sister) in consideration of the surrender of her existing lease but for no premium and at a peppercorn rent for a term of 999 years.

11. As to the Premises, the LVT Determination in 2007 contained (para.s 3 and 4) the following description of the building and its condition at that time:

> "Frances Court is a 4-storey building, built approximately 70-100 years ago. It was apparently damaged in the Second World War and partially rebuilt. The property has been subdivided into 6 flats. The lower floor is a semi-basement with a light well (variously described in the papers and at the hearing as a walkway or patio) to the front and rear. The elevations are rendered masonry under a pitched and slated roof to a mansard design.
>
> Upon inspection by the Tribunal, the outside of the building was found to be in poor condition. The rendering was cracked in places and there was peeling paint on the woodwork. The retaining wall of the front basement light well was cracked and bowed and the steps leading down into the front light well were broken. Most of the paths in the gardens were cracked or broken. An internal inspection of the basement flat showed extensive signs of damp and blown plaster, rotten skirting boards and rotten parquet flooring. The building was clearly in need of major works to improve its condition."

12. Apart from the major works with which that Determination was concerned, an application for planning permission was made on behalf of Francis Court Ltd and approved in 2007 in relation to the basement of the Premises. In 2008 another such application was made in respect of "a revised scheme for the conversion of the existing vacant basement area into a residential flat". The 2008 application contains the following site description:

> "The site consists of a part 3, part 4 storey residential premises over basement, ground, first and part second floor converted loft space. As exiting [*sic*] the site accommodation consists of 6no. residential flats, complete with communal amenity space externally and communal access internally to each residential unit.
>
> The site area measures 1,152m^2 with a building footprint of some 235m^2. The site fronts Maida Vale with a total frontage of approximately 18.5m with a vehicle crossover to the southwest corner of the site

The front external areas consist of a grass covered garden, driveway and access to the basement garage area. A side passageway affords access to the rear garden which is currently communal amenity space for all the residential flats.

The site is orientated southwest, northeast and is bounded by a combination of timber fencework and brickwork walls.

The existing basement is currently vacant and the basement garage is also unused."

From the site and footprint areas stated, it will be appreciated that comparatively large communal gardens existed at the rear and front of the building. The potential impact on enjoyment of these gardens may be deduced from the following statement of Proposals:

"We propose to convert the existing basement into a stand alone residential flat with private amenity space to the rear to provide a 3 bedroom dwelling.

The external alterations are to consist of a retaining wall to the front with adjacent staircase access to the basement flat front entrance. The existing vehicular ramp is to be resurfaced and repaired to provide parking and a secondary means of escape from the basement flat.

The existing openings to the front elevation at basement level are to be altered to provide access into the basement flat. These new door apertures are to be adapted within the existing window layout in order to preserve their vertical alignment. The existing garage doors are to be removed and provided with a new door and window, fixed to new cavity wall reveals.

To the rear we propose to provide double French doors to the basement flat, accessing a private patio, bounded by a retaining wall with steps up to the main garden level and associated planting."

13. However, the ultimate impact of the basement conversion works is not the sole concern of the Applicants. In a nutshell, their basic concern is twofold. First, they fear that a substantial part of the costs of these works may be borne by them by inclusion within their service charges. This fear is coupled with a suspicion that other major works to the building may have been undertaken, in effect, not to discharge a landlord's obligations but to enhance the marketability of the

Respondents' flats. Second, the Applicants' flats have actually been above and in the middle of a building site since the conversion works started in 2007. On inspection of the Premises, the Tribunal was able to understand the reality of their complaints of disturbance, mess and noise, for anyone living there and to observe the extremely limited extent and potentially dangerous use of the gardens left to them during the works. Access to the building for any visitors, as for residents, was by means of a raised metal cat-walk above yellow-hatted workers. Assertions about the sale and/or letting value of the Applicants' flats having been substantially depressed could not be dismissed as exaggerated.

Leases

14. So far as material, the Applicants' leases are essentially identical.

15. Mr Semmakie owns Flat 2 at the Premises under a lease granted to him by Frances Court Ltd in 2007 for a term expiring in 2139 in consideration of the surrender of his existing lease and payment of a premium and a peppercorn rent. Except for the term and rent (also immaterial scheduled alterations), the terms and covenants are incorporated by reference and therefore the same as in the surrendered lease, dated 7 July 1978.

16. In that lease, as to service charges, the relevant Tenant's covenant is Clause 4(2):

> "Contribute and pay on account the sum of ONE HUNDRED AND FIFTY POUNDS (£150.00) on the signing hereof and thereafter annually on the anniversary of the date of this Lease the sum of One hundred and fifty pounds towards or one fourth of (whichever is the greater) the costs expenses outgoings and matters mentioned in the Fifth Schedule hereto expended or incurred in respect of the Building."

This covenant was varied by deed between the original parties in 1979 as follows: "the words one quarter [presumably one fourth] shall be deleted and the figures 18 per cent substituted to take effect as from 7th July 1978".

17. In the lease of Flat 3 similarly held by Mr Shaw for a term expiring in 2139, Clause 4(2) is substantially the same except that the annual payment date is expressly 28 February and the contribution either £100 or 15.5%.

18. In the lease of Flat 5 held by Mrs Leitch for a term expiring in 2049, for Clause 4(2) the payment date is 17 May and the contribution is either £150 or 17.5%.

19. The Schedule referred to in Clause 4(2) of all three Leases is as follows:

"THE FIFTH SCHEDULE above referred to

Costs expenses outgoings and matters in respect of which the Tenant is to contribute -

1. All costs and expenses incurred by the Lessor for the purpose of complying or in connection with the fulfilment of his obligations under Clause 5 of this lease.
2. All rates and outgoings payable by the Lessor in respect of the common parts of the Building.
3. A reasonable sum to be transferred to a reserve fund for future anticipated maintenance such sum in each year to be determined by the Surveyor of the Lessor.
4. The costs of –
    a. Complying with the Lessor's obligations in the Lease in contrast to the Headlease dated the Sixth day of November One thousand nine hundred and fifty-one;
    b. Complying with notices regulations or orders of any competent or local authority;
    c. Reasonable or proper fees and expenses of Lessor's Managing Agents (if any) solicitors accountants and surveyors employed or instructed in connection with any maintenance or management of the Building pursuant to the provisions of this Lease save fees incurred in the collection of Ground Rent
5. As soon as practicable after the expiration of each accounting year the Lessor or his Managing Agents will ascertain and certify the amount of the actual maintenance charge for the preceding year and the amount standing to the credit of the reserve fund including (if possible) an estimate of the amount required for the following year and serve a copy of such certificate (which shall be binding on the Lessor

and Tenant) on the Tenant and any balance will be paid by the Tenant after giving credit for payments made pursuant to Clause 4(2) of this lease and any excess shall be credited to the Tenant against the payment on account for the next accounting year.

6. The account required for the purposes of the last preceding paragraph shall (if so required by the Tenant) be prepared and audited by a qualified accountant who shall certify the total amount of the actual maintenance charge and estimate aforesaid for the period to which the same relates and in respect of all the subsequent periods during the term of this lease".

20. As to service charge costs, Clause 5 of the leases, referred to in para.1 of the Fifth Schedule, contains the following relevant Lessor's covenants (with slightly different numbering):

(5) That (subject to contribution and payment as hereinbefore provided) the Lessor will maintain and keep in good and substantial repair and condition -

(i) the main structure of the Building including the foundations and the roofs thereof with its gutters and rain water pipes;

(ii) all such gas and water pipes drains and electric cables and wires tanks and other conducting media in and under the Build as are enjoyed or used by the Tenant in common with the owner or lessees of the other flats;

(iii) the main entrance passages landings and staircases and the meter area of the Building enjoyed or used by the Tenant in common as hereinafter provided and the boundary walls of the Building;

(iv) the common gardens and dustbin area

(6) That (subject as aforesaid) the Lessor will so far as practicable keep clean decorated and reasonably lighted the basement area passage landings staircases and other parts of the Building so enjoyed or used by the Tenant in common as aforesaid

(7) That (subject as aforesaid) the Lessor will so often as reasonably required decorate the exterior of the Building in the manner in which the same is at the time of this demise decorated or as near thereto as circumstances permit.

(9) To keep proper books of all costs charges and expenses incurred by the Lessor in carrying out its obligations hereunder and produce the same to the Tenant on request.

Claim for Damages

21. As to the Applicants' concerns about the basement conversion works (see para.13 above), it appears to the Tribunal that they should take legal advice about making claims in tort for nuisance and/or of derogation from grant, particularly in respect of the right to enjoy the garden area at the Premises conferred by para.1 of the Third Schedule to their leases. The copy leases in front of the Tribunal were lacking plans defining the extent of the demises, so that a view cannot be formed as to encroachments allegedly created by the basement conversion works, but it was obvious on inspection that the works themselves were rendering any use or enjoyment of the gardens currently impracticable. In addition to such claims, reference can be made to other relevant covenants in their leases for other possible causes of action against the Respondents.

22. First, there is the common covenant by the Landlord (Clause 5(1)) that:

> "The Tenant paying the rent hereby reserved and performing and observing the several covenants on his part and the conditions here contained shall peaceably hold and enjoy the demised premises during the said term without any interruption by the Lessor or any person rightfully claiming under or in trust for him"

For illustrative decisions of the Court of Appeal, supporting possible claims that the Respondents have breached this covenant, see *Matania v Nationa Provincial Bank & Elevenist Syndicate Ltd* [1936] 2 All ER 633 and *Hunte v E Bottomley & Sons Ltd* [2007] EWCA Civ 1168.

23. Then there is the Covenant (Clause 5(3)):

> "That the Lessor will require every person to whom he shall hereafter grant a Lease of any flat in the Building or a sale

> thereof by demise to covenant to observe (mutatis mutandis) the restrictions and covenants set forth in the Second Schedule hereto and in Clauses 3 and 4 hereto and in respect of any vacant flat in the Building the Lessor shall be deemed to be under like covenants thereof"

This includes the Tenant's covenant in Clause 3(h):

> "Not to make any alterations or additions whatsoever to the demised premises or any part thereof either externally or internally or remove any of the landlord's fixtures therefrom"

Consistently with this, Clause 3(5) of the current Lease of Flat 1 provides:

> "Not at any time during the said term to make any alterations in or addition to the Demised Premises or any part thereof or to cut maim alter or injure any of the walls or structure thereof or to alter the landlord's fixtures therein PROVIDED that the Lessee may with the Lessor's written consent (not to be unreasonably withheld) make non-structural internal alterations to the Demised Premises"

24. The basement conversion works appear to constitute a serious breach of the covenant in the Lease of Flat 1. On the face of it, the Respondents, as the Applicants' Landlord, could be required by them to enforce such a breach (see Clause 5(8) of their leases). Alternatively, the Applicants might be able to take direct enforcement proceeding by virtue of para.6 of the Third Schedule to their lease, which grants to them the benefit of restrictions and covenants in the leases of other flats. There is no provision in the Applicants' leases entitling their Landlord to waive the covenants in leases of other flats absolutely prohibiting structural alterations or to consent to such works. If a flat is vacant, the Landlord is deemed to be subject to the covenant itself (see Clause 5(3) quoted above). The only provision in the Applicants' leases reserving to the Landlord the right to rebuild or alter relates to adjoining or neighbouring properties (see para.6 of Fourth Schedule).

25. Arguably, the Respondents have laid themselves open to various claims for damages as a consequence of undertaking the basement conversion works without taking into account the rights and interests of the Applicants. However, it may be that they did not do so without first obtaining their consent. The Tribunal has no knowledge of any

such consents by the Applicants but also has insufficient evidence about the relevant circumstances to consider whether or not the Respondents would be able to argue that the Applicants were now estopped from objecting to the works.

26. Generally, the determination of such claims for damages is outside the jurisdiction of an LVT. However, HH Michael Rich QC has said (sitting as the Member of a Lands Tribunal in *Continental Properties Ventures Inc v White* (2006) LRX/60/2005 at para.15):

> "I accept that the LVT has jurisdiction to determine claims for damages for breach of covenant only in so far as they constitute a defence to a service charge in respect of which the LVT's jurisdiction under s.27A has been invoked."

He added that he saw no reason of principle why such jurisdiction should not extend to determining a claim for loss of amenity or loss of health arising from breach of covenant. However, he drew attention to what he had said in another case about the desirability of an LVT exercising restraint in the exercise of the extended jurisdiction given to it by the Commonhold and Leasehold Reform Act 2002. In his view, it might be regarded as convenient for an LVT to adjourn if, in effect, there are court proceedings as to the matter. By implication, where there are no court proceedings, the LVT could determine claims for damages against landlords in order to be able to set off the amount, if any, against tenants' liability to pay service charge.

27. In the present case, the Applicants are lay litigants in person and should not be expected to formulate their case for this Tribunal in the language of lawyers. The complaint in their Statement of Case (pp.A21/A22), headed '*Landlord's Duty of Care – Impact on Lessees*' (referred to in para.3(iv) above), can reasonably be regarded as a claim for damages but one that was not substantiated and quantified by evidence. Nevertheless, the Tribunal's inspection of the Premises may be thought to suffice for present purposes (see para.13 above). The Respondents' Reply to the claim (see para.6 above) did not deal with the real bases of liability identified in the preceding paragraphs.

Preliminary Issues

28. In his Skeleton Argument, presented just before the Hearing, Mr Bates did not address the Applicants' claim for damages as perceived in the previous paragraph. Instead, he raised four preliminary issues potentially affecting the jurisdiction of the Tribunal to consider the

Application. The Applicants were allowed time to discuss their position. Initially, they objected to these issues being raised at such a late stage and sought their exclusion. It was explained that excluding challenges to the jurisdiction of the Tribunal could not confer jurisdiction in relation to matters which were outside that jurisdiction. After this, they expressed a preference to continue with the Hearing without the further delay of an adjournment for legal advice.

29. The Tribunal received and considered submissions as to those preliminary issues. None of them was found to deprive the Tribunal of jurisdiction for reasons which were reserved and are stated below.

30. The first preliminary issue was as to the proper Respondents to the Application. This arose because documents produced after the Application did not name Mr Malka as a Respondent. However, the Application itself did so name him. Therefore no determination joining him as a party was required.

31. The second preliminary issue related to the service charge years 2000-2005. Mr Bates submitted that the charges for that period should be "deemed to be admitted" and, therefore excluded from the Application. He relied on s.27A(4)(a) of the 1985 Act as applied by HH Judge Huskinson in *Shersby v Grenehurst Park Residents Co. Ltd* [2009] UKUT 241 (LC).

32. Section 27 provides:

> "(4) No application under subsection (1) or (3) may be made in respect of a matter which—
>
> > (a) has been agreed or admitted by the tenant,
> >
> > (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
> >
> > (c) has been the subject of determination by a court, or
> >
> > (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
>
> (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment."

33. The major part of the decision in the *Shersby* case concerned a manager's power under a lease to vary service charge percentages. A

subsidiary issue concerned insurance premiums as to which the passage in the decision relied on by Mr Bates is (para.44):

> "As regards the years 1997 to 2004 inclusive I accept [landlord's counsel's] argument that the Appellant is not entitled to make an application under section 27A in respect of these payments. I find that he has agreed or admitted these sums and that section 27A(4) prevents his application in respect of these years. As regards section 27A(5) this provides that the Appellant is not to be taken to have agreed or admitted any matter by reason only of having made any payment. However, the Appellant has done substantially more than merely make payments in respect of these years. He has not only made the payments but has waited a long time (namely until the 2007 application) before seeking to challenge them, and has in the meantime made a separate application to an LVT raising various matters regarding services charges but not raising any matter as regards these insurance premiums. The 2005 proceedings were then withdrawn without the insurance premiums ever being raised as an issue. The combination of these repeated payments, without any complaint or reservation, coupled with the lapse of time and with the express challenging in formal 2005 proceedings of certain matters (but not these insurance matters) leads me to conclude that the Appellant must be taken to have agreed or admitted these premiums.

34. On examination, this short passage is difficult to follow. It might have been thought that the statutory provision (ie s.27(4)(1)(a) quoted above) called for an express agreement or admission on the part of the tenant rather than an implication from silence. This thought seems strengthened by the context: it is unlikely that a landlord could rely on a deemed reference to arbitration or a deemed determination by a court etc (cp sub-para.s (b) (c) and (d)), whilst making payment explicitly under protest has been made doubly unnecessary (see subss.(2) and (5)). Plainly Mr Shersby had never expressly agreed or admitted that the premiums were payable and had done nothing other than make payment. Counsel for the landlord in that case based his unprecedented submissions on what Mr Shersby had not done for a long time (para.34) and HHJ Huskinson accepted that this meant he had "done substantially more" than make payment.

35. However, neither counsel nor judge indicated the legal principle on which Mr Shersby "must be taken to have agreed or admitted these premiums". It could not be suggested that delaying an application under s.27A is subject to any statutory limitation period or to the doctrine of *laches* - undue delay defeats rights - since this only applies to claims for equitable relief whereas "the Respondents have made an application to the LVT under a statutory provision giving them power to do so" (per HHJ Huskinson at para.60 in *Warwickshire Hamlets Ltd & B Woodward (Harbonne) Ltd v Olive Gedden & Others* [2010] UKUT 75 (LC)). Although it might have been suggested that the doctrine of estoppel applied, on the basis that the landlord had acted to its detriment in reliance upon Mr Shersby's inaction, apparently no such suggestion was made.

36. Contrary to the terms of HHJ Huskinson's decision (quoted above), also somewhat unusually, Mr Shersby did not challenge the insurance premiums themselves as unreasonable. The matter which he had raised in his application was the proper percentage of his contribution ("matter" is the word used in s.25(4)). This depended upon the correct construction of the relevant provision in his lease, which would be a matter of law not fact. There is no indication in the decision as to when Mr Shersby, a layman litigating in person, became aware of the matter, ie that there was an arguable question of construction of his lease, but it may be inferred that this was not until after his 2005 application, because it did not raise the matter. No submissions or evidence by Mr Shersby about whether he "must be taken to have agreed or admitted" the premiums, nor any information about whether he had had or was required or even presumed to have had knowledge of the question of construction in the critical period, are referred to in HHJ Huskinson's decision. Thus the unfortunate impression is given that, without the benefit of full argument, Mr Shersby was deemed to have admitted a matter of law of which he had been ignorant, which he had not challenged because of that ignorance.

37. Further, it might be thought odd, at first sight, that HHJ Huskinson should exclude this matter, ie the question of construction, as deemed to be agreed or admitted by Mr Shersby within s.25(4)(a) for the years 1997-2004, and then proceed to consider the very same matter for 2005 onwards. But an explanation could be that it was because he decided the matter against Mr Shersby anyway: difficulties could be

foreseen only if the correct construction of his lease meant that he had overpaid his contribution to insurance premiums in the earlier years, since he might still have sought to set off the overpayments in calculating his current service charge liability (see the *Warwickshire Hamlets* case, above para.35).

38. Accordingly, in lieu of any clear guidance as to its *ratio decidendi*, the facts of the *Shersby* case must be considered and compared to those of the present case to see whether they are so similar that the decision must be followed by the Tribunal despite its failure to discern an applicable legal principle.

39. Apart from the nature of the "matter" in issue, Mr Shersby had, for whatever reason, never ever queried his contribution to the insurance premiums in the seven years before 2005 in which year he had himself made an application under s.27A challenging service charges for the years 2001-2007 but without complaining about insurance premiums and withdrawing the application in 2006. There was no suggestion that his landlord could have known that he had any relevant complaint before 2005.

40. In the present case, the challenges as to service charges in 2000-2005 did not concern the correct construction of the Applicants' leases, a matter of law which might be better considered by a court, but raised various matters of fact as to the service charge costs in that period, matters which come well within the expertise of the Tribunal. According to the Applicants, they had complained to Mr Malka during 2000-2005, orally often and once in writing by a hand-delivered letter dated 11 December 2002. The Applicants had not made a previous application which had not included challenges as to service charges in 2000-2005. They had been respondents to an application by Mr Malka as to the costs of proposed major works in which proceedings they had acted cooperatively without mentioning their service charge complaints. However, this was accepted and explained by the Applicants as being because they had supported the major works as necessary and had not thought that service charge complaints were relevant to those proceedings. They also stated that Mr Malka, although claiming not to have received their letter of 11 December 2002, had never claimed to be unaware that they had complaints about service charges during 2000-2005. In the Reply to the Applicants' Statement of Case, Mr Malka had stated (p.1) only that, from the start of his management: "I feel that there were

generally good relations between the applicants and myself. I was not aware of any discontent voiced by any of the applicants with regard to the management."

41. In the light of the above considerations, the Tribunal concluded that the Applicants, who had never actually agreed or admitted the matters raised by their Application in relation to 2000-2005, cannot sensibly be taken to have done so. There is no evidence to indicate that Mr Malka had ever believed that the Applicants were satisfied as to those service charges or had incurred expenditure out of advance payments in reliance upon an absence of complaints. In the circumstances of the present case, which were regarded as significantly if not substantially dissimilar to the peculiar facts of the *Shersby* case, the Tribunal was of the opinion that there is no sufficient legal or factual basis for finding that any of those matters should be excluded because of a so-called deemed agreement or admission coming within s.27A(4)(a).

42. The third preliminary issue was, in effect, an alternative submission by Mr Bates that, in so far as the Application related to service charges for 2000-2005, it constituted an abuse of process and should be dismissed. This submission was based on the fact that the present Applicants had not challenged those charges in the 2007 LVT proceedings. In support he quoted Sir Anthony Clarke MR (as he then was) as saying at para.96 of his judgment in *Stuart v Goldberg Linde* [2008] 1 W.L.R. 823:

> "For my part, I do not think that parties should keep future claims secret merely because a second claim might involve other issues. The proper course is for parties to put their cards on the table so that no one is taken by surprise..."

43. On the basis, not so much of surprising the Respondents, but that the Applicants had led the LVT in 2007 to believe that all was well with landlord and tenant relations, Mr Bates requested the Tribunal to dismiss the relevant part of the Application under reg.11 of the LVT (Procedure) (England) Regulations 2003.

44. That regulation empowers the Tribunal to dismiss an application in whole or in part where a respondent requests dismissal "as frivolous or vexatious or otherwise an abuse of the process of the tribunal". However, before dismissal of their Application, the Applicants would

have been entitled to a 21-day notice from the Tribunal followed, at their request, by an oral hearing (reg.11(2)-(4)).

45. The Tribunal was not minded to dismiss any part of the application as an abuse of process. It was noted that Lord Clarke (as he now is) had earlier in his judgment outlined the proper approach as follows (at para.79):

> "I agree that the question in a case of this kind is whether the second set of proceedings is an abuse of process and that that question must be decided by the application of the principles set out in *Johnson v Gore Wood & Co* [2002] 2 AC 1 . Thus, as Lord Bingham of Cornhill observed, the crucial question is whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it an issue which could have been raised before. The burden is on the party asserting the abuse to establish it. Moreover, as Lord Bingham put it, there will rarely be a finding of abuse unless the later proceedings involve what the court regards as the unjust harassment of a party. There may be such harassment if...a party fails to rely upon a point which properly belonged to the first litigation and which, with reasonable diligence, he might reasonably have brought forward at the time. However, the question must be resolved by a consideration of all the circumstances of the case."

46. The Tribunal does not consider that the Applicants' conduct could conceivably be classified as "unjust harassment" of the Respondents. In *Stuart v Goldberg Linde* the same person had been the plaintiff in the previous proceedings and the actual decision was that there had been no such abuse. Here, the Respondents had made an application in 2006 as to the costs of proposed major works which the present Applicants supported. In the opinion of the Tribunal, it was reasonable for the Applicants to regard their challenges as to recurrent service charge costs in previous years as irrelevant to the costs of future major works being considered in the 2007 proceedings.

47. The fourth preliminary issue related to the current major works begun in 2007. The submission made by Mr Bates in his Skeleton Argument (para.s 40/41) was brief:

> "As set out above, no application may be made in respect of a matter which has been admitted. The clear evidence of David

> Harding is that he and Ronald Raye (on behalf the applicants) agreed both the necessity and the scope of the major works on December 1, 2008, subject only to minor amendments to reflect the effect of the 2007 LVT decision (w/s David Harding, para 22, R1441-R1451, A957, R1486).
>
> Accordingly, the applicants are not entitled to pursue a challenge to these matters."

48. In order to decide this issue, the Tribunal heard oral evidence from each of Mr Harding and Mr Raye.

49. Mr Harding had been appointed by Mr Malka in 2008 to act as "building surveying consultant" for the major works. These works had commenced after the 2007 LVT Determination but had been discontinued because of failings and defaults of the surveyor and contractors employed. Because of the aborted works and revision of the specifications questions arose as to "rechargeable works" (ie the costs of which could properly be included as service charges). Accordingly, a meeting was arranged with Mr Raye, a surveyor instructed by the Applicants. In his Witness Statement (para.22), Mr Harding gave this account:

> "The meeting took place on the 1st of December [2008] at my offices in London and during that meeting I discussed with Ronald Raye the detailed schedule breakdown that had been prepared by Simon Gorst reflecting the rechargeable works. Ronald Raye and I agreed that the works contained within the current specifications were required and should be undertaken, that the tenders were competitive and acceptable and that the costs were satisfactory subject to the recharge being amended to reflect the cap of £20,000.00 for the front retaining wall works and there are to be no recharge for the rear retaining wall works all as per the 2007 LVT decision."

50. At the Hearing, reference was made to a letter, dated 3 December 2008, from Mr Raye to Mr Harding as evidencing this agreement. The relevant paragraph reads as follows:

> "Further to our meeting last Monday, I confirm that based on the lowest Tender received and after looking at the apportionment costs, we agreed that these figures are incorrect and a revised breakdown of the cost will be provided, taking into account items that need to be excluded."

51. In his oral evidence, Mr Raye did not agree that he had concluded any agreement with Mr Harding at the meeting on 1 December 2008.

52. The Tribunal was unable to find that there was an agreement by or on behalf of the Applicants about the necessity and the scope of the major works, as asserted by Mr Bates, which would preclude them from making an application challenging their service charge liability under s.27A of the 1985. At its very highest, the evidence suggests that Mr Raye came close to agreeing with Mr Harding, but subject to revisions of figures, the principles which he would be able to recommend to the Applicants for agreement.

53. Accordingly, the Tribunal decided that this fourth preliminary issue too did not deprive the Tribunal of any jurisdiction to consider the Application in relation to the current major works.

Legalities

54. Apart from the Claim for Damages issue raised by the Applicants' Statement of Case and the Preliminary Issues raised by Mr Bates for the Respondents, the Tribunal has also considered the other questions of law already indicated as arising from the Statement of Case (see para.3 above) as well as additional legal issues becoming apparent from the papers and during the Hearing.

55. *Advance payments* – Mr Malka sent identical letters, dated 28 June 2000, to each of Mr Semmakie and Mr Shaw (also presumably to Mrs Leitch although no copy has been seen). This letter confirmed that he had taken over the management of the Premises and informed the addressee that he had changed the accounting period to the calendar year. It then stated:

> "All future service charge payments will be collected on a 6-monthly basis in advance on the 1st of January and 1st July of each year. The yearly accounts will then be balanced at the beginning of each year following the annual audit. I have set the annual in-advance service charge payments at £1000 per half year in the hope that this will cover the day-to-day running and maintenance of the building as estimated in the enclosed budget expenditure schedule."

As well as enclosing a budget estimate for the year 2000 (totalling £10,150), there was also an Invoice for the period 1 October 1999 to 31 December 2000 including the sum of £2,500 in respect of

"Advance Service Charge". In Mr Semmakie's case, a sum of £93.75 was included for "Ground Rent".

56. This was a bad start for a new manager, revealing a failure to read and/or understand the relevant provisions of the Applicants' leases. These are set out above (see para.s 14-20). They do not entitle the Landlord to demand advance payments of service charges in the way or on the dates purportedly imposed by Mr Malka.

57. Taking Mr Semmakie's lease as amended to illustrate the point, he has only covenanted to pay service charges on 7 July in each year (Clause 4(2) in para.16 above). Then the amount to be paid is whichever is the greater of £150 or 18% of "the costs expenses outgoings and matters mentioned in the Fifth Schedule hereto expended or incurred in respect of the Building". This is worded in the past tense. Paragraph 5 of the Fifth Schedule requires the Landlord to prepare a certified account of service charge costs etc and of reserve fund amounts after the end of each accounting year and serve a copy on the Tenant (ie Mr Semmakie). That paragraph states that "any balance will be paid by the Tenant" but it does not provide for payment on demand or within a specified time. It follows that the Tenant is only bound to pay a service charge of 18% of the certified amount in arrears on 7 July.

58. In fact, Mr Malka sent Mr Semmakie a letter, dated 10 July 2001, enclosing uncertified service charge accounts and informing him that his actual liability was £1,979.91 and that since he had paid £2,500 on account a credit of £520 was carried forward. However, overlooking the variation of his lease, Mr Semmakie's liability had been incorrectly calculated at 25%.

59. It should be noted that the leases do not define the "accounting period", so that it is open to the Landlord to choose an appropriate period. However, the leases do provide for the date of payment of service charges: on the anniversary of the date of the lease. It is not a matter for the Tribunal to consider, but Mr Semmakie's lease did provide and Mrs Leitch's still does for the dates for payment of rent: equal instalments in advance on 24 June and 25 December in each year.

60. More importantly, it should also be noted that the Applicants' leases do contain a provision which would enable the Landlord, in effect, to obtain payment of service charges in advance. Paragraph 3 of the

Fifth Schedule includes in the list of costs etc in respect of which the Tenant is to contribute: "A reasonable sum to be transferred to a reserve fund for future anticipated maintenance such sum in each year to be determined by the Surveyor of the Lessor". However, the Respondents have never taken advantage of this provision and no reserve fund has been established.

61. The pattern of demanding a substantial 'round figure' payment in advance each year with service charge accounts sent to Mr Semmakie the following year continued for 2001, 2002, 2003 and 2004, showing a credit or balance payable still incorrectly calculated at 25%. For none of those years was a budget estimate sent in purported support of the demanded advance payment. In 2005, however, Mr Malka sent no demands of that sort to Mr Semmakie or to the other Applicants. In oral evidence, he attributed this omission to a major bereavement.

62. However, on 30 October 2004, Mr Malka sent to Mr Semmakie a letter demanding payment of £8,486.58 as his 25% contribution towards the estimated cost of roof works plus surveyor's and management fees. Despite the incorrect percentage and the lack of any provision in his lease obliging him to make such an advance payment, on 9 December 2004 Mr Semmakie paid the sum demanded.

63. Then, by letter dated 15 September 2006, Mr Malka sent to Mr Semmakie service charge accounts for 2004, still uncertified. In the letter, Mr Malka stated:

"Under the terms of the lease, you are responsible for 25% of the total expenditure and your account for the year ending 31" December 2004 is therefore as follows:-

Amount brought forward from year-end Dec	£800.10
Amount paid on account in 2004	£1274.90
Service charge payable for year-end Dec 2004 as per attached accounts	£1611.00
Ground rent for year end 2004	£ 75.00
Total balance brought forward from year-end 2003	**£389.00**
Service Charge on account for year-end Dec 2005	£2000.00
Ground rent for year 2005	£ 75.00
BALANCE PAYABLE NOW	**£1686.00**"

Similar letters of the same 2006 date were sent to Mr Shaw and Mrs Leitch. These letters had the correct percentages for calculation of liability but each showed a sum of only £1,500 as payable "on account" for 2005. The letter reproduced above to Mr Semmakie was sent again, dated 10 April 2007, as a "Second Application".

64. With regard to the year 2005, a Demand Invoice, dated 20 March 2009, was sent to Mr Semmakie by the Respondents' manager for the time being (Cubit Property Management). It related to one item: "Balancing Service Charge – 01/01/2005-31/12/2005 £1,183.61". Attached to the Demand Invoice was a so-called "Service Charge Reconciliation" for the accounting period (ie the calendar year 2005). This listed amounts as costs incurred for recurring service charge items, such as Insurance, Gardening, Repairs etc, totalling £8,736.70, plus nil for Major Works. Then it stated Mr Semmakie's proportion at 18% to be £1,572.61 from which a credit from 2004 of £389 was deducted. The Reconciliation purported to be certified by Francis Court Limited "As Managing Agents for and on behalf of Francis Court Limited". Similar Demand Invoices and Reconciliations were sent to Mr Shaw and Mrs Leitch. None of the Demand Invoices was accompanied by the prescribed summary the rights and obligations of tenants and, therefore, payments could properly be withheld under s.21B of the 1985 Act (in force 30 November 2007).

65. In unacceptable contrast, the Services Charge Accounts for 2005, certified after audit by Martin + Heller on 13 November 2009 (see para.67), showed a total of £39,835.52. This sum included £33,156.63 for Major Works with recurring service charge items totalling only £6,678.89.

66. With regard to the years 2006 and 2007, Mr Malka sent the following letter, dated 10 April 2007, to Mr Semmakie:

> "I am currently in the process of having the service charge accounts for the years ending December 2005 and 2006 prepared and will let you have them as soon as they are received from the bookkeeper.
>
> In the meantime I realise that I have not yet demanded the service charges for the years 2006 and 2007 and therefore would ask you to take this letter as a formal demand for each of these periods as follows:

Service charge for period 1st January to 31st December 2006	£1500.00
Service charge for period 1st January to 31st December 2007	£1500.00
Total	£3000.00

Please note that the above demands do not include any amount towards the forthcoming major works to the building, which has of course already been demanded separately."

Identical letters were sent to the other Applicants and, as for 2005, Demand Invoices with Service Charge Reconciliations were issued by Cubit Property Management, dated 29 March 2009, followed by certified Services Charge Accounts from Martin + Heller, dated 13 November 2009.

67. Despite the various service charge demands sent to Mr Semmakie (as also to the other Applicants), with one substantial exception, no payments have been made since 2004. The exception occurred in 2007. Following the LVT Determination, service charge demands, dated 28 March 2007, were sent by the Respondents to the Applicants "in respect of proposed major repair works". Service charge liability for each Applicant was calculated at the appropriate percentage of the total sum of £132,000 ruled reasonable by the LVT plus VAT and fees. Thus, correctly calculated at 18%, the sum of £32,160 was demanded as payable ostensibly "under the terms of your lease". As already found, the Applicants' leases do not provide for such payments in advance (see para.s 55-59). Nevertheless, apparently with a view to enabling windows to be ordered so that works could commence, on 21 August 2007 Mr Semmakie paid £10,870 on account of the sum demanded. For the same reason, the other Applicants each paid £10,000.

68. The confusion caused by the Respondents' practice of issuing improper service charge demands for advance payments with uncertified end of year accounts coupled with the Applicants' recourse to withholding payments has been greatly clarified after the Application to the Tribunal. On instructions by the Respondents, a firm of Chartered Accountants called Martin+Heller has undertaken an audit and produced certified 'Services Charge' [*sic*] Accounts for the years 2000-2008 inclusive on the basis of actual costs etc incurred.

69. The totals shown in those Accounts have been adopted by Atlantis Estates Ltd, the current managing agents appointed by the Respondents, to calculate the "service charge deficit" owed by each Applicant. The Tribunal has only seen the resulting letter, dated 12 February 2010, sent to Mr Semmakie. This enclosed an Invoice for the deficit demanding payment of £10,020.44 within 30 days or else "the fees listed below may be charged" plus interest. The letter explained that in calculating the demand some downward adjustments

have been made to figures in the accounts, primarily "following your freeholder's surveyor reworking of the figures to take into account the proportion of rechargeable works according the 2007 LVT decision". Given that an Application had been made to this Tribunal about those figures, as well as others in the Accounts, and not yet determined, the demand itself must be regarded as unacceptably premature.

70. Be that as it may, attached to the letter is a Statement which lists as debits sums which are 18% of the adjusted totals in the Accounts. Listed as credits are all the sums actually paid by Mr Semmakie since 2000. The adjusted totals for some or all of the years will require further adjustment, but if this set-off calculation is carried out again using 18% as the contribution share then this will rectify the incorrect charge at 25% and consequent overpayments in earlier years (although not any loss of interest).

71. However, the Tribunal should observe that this demand for a "service charge deficit" to be paid was not compatible with Mr Semmakie's covenant in his lease to pay service charges on 7 July following the service of certified accounts (see para.56 above). Further, the Tribunal is not aware of any provision in his lease under which interest or fees can be charged in the event of late payment.

72. The letter of 17 February 2010 from Atlantis Estates Ltd to Mr Semmakie also enclosed two other Invoices: Service Charge for the period 01/01/10 – 31/12/10, net amount £2,610.45; and Major Works (including Professional Fees), net amount £44,947.85. So, regrettably, another manager makes a bad start: if someone at Atlantis had troubled to read Mr Semmakie's lease, they might have understood that there is no provision obliging him to pay these service charges in advance (see para.14-20). In any event, it was again unaceptably premature to demand payment in respect of the current Major Works whilst an application relating to them had been made and not yet considered by this Tribunal.

Common Parts Renovation 2001-2002

73. As noted above (para.3(i)), in their Statement of Case, the Applicants disputed their liability to pay amounts charged for 'Common Parts Renovation' in 2001 and 2002 totalling (£3,605.03 and £1,878.75 respectively) £5,483.78. This was on the ground that they were for works in respect of which a consultation had been required under s.20 of the 1985 Act which had not occurred. Consequently, they would

not be completely exonerated from liability but it would be 'capped' at the appropriate percentage under each of their leases of the limit on costs then in force (ie £1,000).

74. Non-compliance with statutory consultation requirements in relation to these works has not been conceded by or on behalf of the Respondents. Nor, however, has it been denied. No statements have been made, much less supported by evidence, as to such a consultation taking place. Nor has any submission been received that one was not required or that the Renovation constituted more than one set of works qualifying or otherwise. Dispensation from the consultation requirements as at that time is not a matter for the Tribunal but still one for a County Court.

75. The certified Accounts for 2001 and 2002 produced by Martin + Heller have a slightly different figure for the former year: £3,567.56 instead of £3,605.03. However, the decision of the Tribunal is that for each year the relevant sum in the Account should be replaced by £1,000 (see s.20(3) of 1985 Act, pre 2002 Act amendments, and Service Charge (Estimates and Consultation) Order 1988).

Section 20B Limitation re 2005, 2006 and 2007

76. As noted above (para.3(ii)), in their Statement of Case, the Applicants disputed their liability to pay amounts charged for 2005, 2006 and 2007 by virtue of s.20B of the 1985 Act. Section 20B provides:

> *"Limitation of service charges: time limit on making demands.*
>
> (1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.
>
> (2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge."

77. The facts relating to service charge demands for 2005, 2006 and 2007 are set out in paragraphs 63-667 above. Mr Malka's Reply to the

Applicants' Statement of Case on this dispute and their Response were indicated at paragraphs 4 and 7 above.

78. In his Skeleton Argument for the Respondents, Mr Bates submitted (para.59):

> "Quite simply, where (as here) the lease provides for on-account payments and an end-of-year balancing charge, s.20B has no application to the sums which are payable on account."

79. In support of this simplistic submission, Mr Bates relied principally on the decision of Etherton J in *Gilje v Charlesgrove Investments Ltd* [2003] EWHC 1284. In that case, properly in compliance with the terms of the lease, a landlord gave the tenant notice before two accounting periods requiring service charge payments on account based on anticipated expenditure for the period in question for which projected budgets were supplied. The final service charge accounts were not supplied until after 18 months had expired for both periods. Those accounts showed that the landlord's expenditure for the two periods had been less than the interim service charge demands for those years so that no further demand for payment was made. In these circumstances, it was held that s.20B had no application.

80. However, of present relevance, Etherton J concluded his judgment by observing (at para.s 26 and 27):

> "Further, I agree with [Counsel] that the provisions of section 20B fit extremely uncomfortably with the application of that section to payments on account. Such payments must necessarily, by virtue of section 19(2) of the Act, be related to particular contemplated costs of which the tenant is notified in advance.
>
> Finally, I agree with [Counsel] that, so far as discernible, the policy behind section 20B of the Act is that the tenant should not be faced with a bill for expenditure, of which he or she was not sufficiently warned to set aside provision. It is not directed at preventing the lessor from recovering any expenditure on matters, and to the extent, of which there was adequate prior notice."

81. In contrast, in the present case, the leases did *not* provide for the on account payments demanded, the demands were *not* made before the accounting periods in issue and they were *not* based on projected

budgets supplied to the Applicants. The demands were *not* "related to particular contemplated costs of which the tenant is notified in advance", which Etherton J stated as necessary by virtue of s.19(2) of the 1985 Act. The Applicants were *not* given "adequate prior notice" of the expenditure incurred, which Etherton J agreed was the policy behind s.20B.

82. At the Hearing, Mr Bates submitted that the belated on account demands for payments in advance for an already past or passing year, even though outside the terms of the Applicants' leases, should be treated as demands within s.20B effectively rendering recoverable service charges for costs incurred in the previous 18 months. The primary weakness in this submission appears to the Tribunal to be that these on account demands did not even purport to be taking any particular relevant costs, either estimated or incurred, into account as envisaged by s.20B. As the Applicants had contended, they were "generic" demands seeking payment of round sum totals without reference to any actual costs items. A secondary weakness is that the Tribunal does not accept that s.20B should be satisfied, as Mr Bates submitted, by a demand within the limitation period that a landlord is not entitled to make, but particularly not by one that gives the tenant no information about the costs taken into account.

83. Further, in the judgment of the Tribunal, the Applicants have not yet received any valid demands from or for the Respondents, complying properly with the terms of their leases, for payments of service charges for 2005, 2006 or 2007. When they do receive otherwise valid demands for these years, they will not be for payments on account but will reflect costs incurred more than 18 months earlier. Therefore, s.20B will apply and the Applicants "shall not be liable to pay" those service charges.

84. After overnight reflection, Mr Bates made an alternative submission at the Hearing. This was that s.20B was really a red-herring because, at the end of 2007, the Applicants had actually all been in credit for service charge purposes. The reason why they were then in credit was that they had each paid £10,000 or more during the year following a demand for payments in respect of the Major Works costs approved by the LVT. This money had not been used for those costs but was held, in Mr Bates' view, by the Respondents on trust to meet any service charge expenditure: he referred to s.42 of the Landlord and Tenant Act 1987. The fact that a contractor for the Major Works had

actually been paid and had then absconded with this money was disregarded. Evidently, Mr Bates considered that the existence of these credits meant that no demands needed to be made in relation to other already incurred costs in 2005, 2006 and 2007, which demands might be caught by s.20B.

85. The Tribunal rejected this submission as completely misconceived. Firstly, the trust imposed by s.42(3)(a) of the 1987 Act does not relate to service charge costs without qualification: the trust is specifically "to defray costs incurred in connection with the matters for which the relevant service charges were payable". Here, the "matters" for which the 2007 money was payable and paid can only be the Major Works costs, not general costs incurred in earlier years. Secondly, even if Mr Bates' view of the trust had been correct, the statutory consequence of there being no demands for payment of the earlier service charges within 18 months of the costs being incurred would still be that the Applicants "shall not be liable to pay so much of the service charge as reflects the costs so incurred" (s.20B(1) of the 1985 Act). It would be a breach of trust for the Respondents to use the credits for service charges which are not payable. Thirdly, the demand for an advance payment in respect of the 2007 Major Works was also outside the terms of the Applicants' leases and, therefore, repayable.

86. Accordingly, the Tribunal accepts the Applicants' Case in this respect and determines that, by virtue of s.20B of the 1985 Act, none of the costs itemised in the accounts certified by Martin + Heller for 2005, 2006 and 2007 as incurred in those years can be recovered from the Applicants by way of service charges.

87. However, those certified accounts included substantial sums for Major Works (including professional fees). The Tribunal's understanding is that these sums do not represent actually incurred costs but are merely derived from estimates for the purpose of demanding payments in advance to which, the Tribunal has found, the Respondents are not entitled. The Tribunal does not understand how estimated costs could properly be included, after audit, in certified service charge accounts. Nevertheless, if the costs had not actually been incurred, the 18 month limitation period will not apply to them (but see the following paragraphs as to 'capping').

Dispensation Re Major Works 2007

88. As already noted (see para.s 3iii and 67), following the LVT Determination in 2007, substantial payments in advance for Major Works were demanded (on 24 March 2007). The Tribunal has already found that there is no provision in the Applicants' leases entitling the Respondents to such payments. However, the Applicants' also complained in their Statement of Case that "Section 20 procedures were not followed for the expenditure". This refers to the consultation requirements and the 'capping' consequences of non-compliance under s.20 of the 1985 Act (as amended in 2002).

89. Mr Malka's Reply (para.8(ii)) included a denial that s.20 procedures were not followed for the 2007 Major Works with the comment that the Applicants were further consulted by applying to the LVT for the 2007 Determination referred to them. Despite this denial, in his Skeleton Argument (para.17), Mr Bates stated:

> "It is clear that, in placing the contract with Hodges Construction Ltd, the respondent has not complied with the consultation provisions of s.20, Landlord and Tenant Act 1985. It hereby applies for dispensation from those requirements, as set out below."

90. The statutory provisions as to dispensation are ss.20(1) and 20ZA(1) of the Landlord and Tenant Act 1985, as follows:

> "20(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either –
> (a) complied with in relation to the works or agreement, or
> (b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal."
>
> "20ZA(1) Where an application is made to a leasehold valuation tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements."

91. These provisions conferring jurisdiction on this Tribunal were inserted by the Commonhold and Leasehold Reform Act 2002 (s.151). Before the 2002 Act amendments there was a two-stage process under which the discretion to dispense with the consultation requirements arose

only if a Court was satisfied that the landlord had acted reasonably. In consequence of this change, it was decided by a Lands Tribunal (member Andrew J. Trott FRICS) that the conduct of the landlord should, in effect, be disregarded and that, in deciding whether dispensation would be reasonable: "The most important consideration is likely to be the degree of prejudice that there would be to the tenants in terms of their ability to respond to the consultation if the requirements were not met" (*Eltham Properties Ltd v Kenny* 2007 [LRX/161/2006] at para.26).

92. The prejudice test thus introduced and applied as if a statutory criterion in other Tribunal cases was reconsidered but confirmed by the Senior President of the Lands Tribunal (Lord Justice Carnwarh sitting with Mr N J Rose FRICS) in *Daejan Invesments Ltd v Benson & Others* [2009] UKUT 233. However, there is an important point to be borne in mind: in applying the prejudice test, the burden of proof appears to be on the landlord. In the *Daejan* decision, it was stated in the final paragraph (para.62 brackets supplied) that:

> "As to prejudice, the tribunal was entitled to start from the position that, given the seriousness of the breach, it was not for the lessees to prove specific [lack of] prejudice. It was enough that there was a realistic possibility that further representations might have influenced the decision."

In context, this statement plainly makes sense only if the bracketed words – "lack of" – are deleted.

93. In the present case, Mr Bates submitted in his Skeleton Argument (para.45) that dispensation should be granted for the following reasons:

> (a) the scope and pricing of the works was approved by the LVT after a contested hearing and after an otherwise compliance consultation process (A670, para.10, A678, para.56);
> (b) it was always going to be likely that the contract would be awarded to a company that had not formed part of the original consultation process, as two had dropped out and the other was more expensive than the replacement quotes obtained for the LVT:
> (c) the leaseholders were kept informed of developments at all stages (R2017, A861);

(d) there is no suggestion of default or wrong-doing on the part of the respondent (as opposed to Andrew Dorsett, on whom the blame should be focused);

(e) the prejudice is caused by the failings of Andrew Dorsett and falls equally on both the respondent and the applicant.

94. Mr Dorsett was a building surveyor appointed by Mr Malka to oversee the Major Works who was alleged to be responsible for placing the contract with Hodges Construction Ltd. According to Mr Malka's Witness Statement (para.45), following complaints from himself about lack of progress and queries about non-payment of a windows supplier: "Mr Dorsett wrote a letter to the contractor on the 4th of February 2008 requesting details of all payments and shortly after this letter the contractor absconded." So the Major Works were left abandoned.

95. At the Hearing, after Mr Bates had reiterated his reasons, Mr Semmakie made the crucial point that, in all the consultations leading to the LVT Hearing, the Applicants had investigated the reputation and reliability of all proposed contractors and had taken the opportunity, when felt appropriate, to nominate an alternative contractor. They had been deprived of the opportunity of checking-out Hodges Construction Ltd, an exercise in 'due diligence' which would have revealed the recent constitution of the firm and its lack of an established business. This would have enabled, he suggested, representations to be made as a result of which the difficulties experienced with the abandoned Major Works might have been avoided.

96. The Tribunal considered that, in the light of Lands Tribunal guidance, Mr Bates' submissions had been misdirected: the Respondents' conduct was not the decisive factor and prejudice did not depend on the actual consequences. The most important consideration was the degree of prejudice to the Applicants in terms of their inability to respond to and act upon a consultation about the change of contractor.

97. The Tribunal is satisfied that, in all the circumstances of this case, it would not be reasonable to dispense with the statutory consultation requirements. Since no dispensation has been determined by the Tribunal, the Applicants' individual contributions to the costs of the Major Works begun in 2007 are 'capped' at £250 each (see s.20(3) of

the 1985 Act, as amended, and reg.6 of the Service Charges (Consultation Requirements) (England) Regulations 2003).

Dispensation re Emergency Works 2008

98. Again, the Applicants had queried whether s.20 procedures had been followed in relation to the Emergency Works in 2008.

99. After the evident abandonment of the 2007 Major Works, as Mr Bates explained in his Skeleton Argument (para.22), Mr Harding was then asked to take over the works. He contacted the Applicants and their surveyor prior to putting in place a programme of emergency works which were completed by the end of April 2008. The works were carried out after tendering them with three contractors. However, as Mr Bates conceded (Skeleton Argument para.23):

> "These works cost £8920 plus VAT; they constitute qualifying works to which s.20, Landlord and Tenant Act 1985 applied and, accordingly, the respondent applies for dispensation in respect of those works."

100. He submitted in his Skeleton Argument (para.46) that:

> "Dispensation should be granted because:
> (a) it cannot be doubted that these works were necessary in order to make the building safe;
> (b) they were tendered with three companies prior to being awarded (w/s David Harding, para 17);
> (c) the leaseholders and their professional reprehensive were kept informed at all times (A941, R1413, R1414, R1423, R1425, R1427, R1429, R1431)."

101. Mr Bates submitted that it was clear that the Respondents had acted reasonably but had been let down by the professionals appointed to assist and advise them and that there was no basis for holding these failings against the Respondents. They had suffered financially as a result of these failings more than the individual Applicants.

102. It might be doubted whether there was really an emergency precluding consultation and even whether the Respondents were as innocent as they were painted. But this would be beside the point. The Tribunal considered that Mr Bates' submissions again missed the point: the test is the degree of prejudice suffered by the Applicants, not the degree of fault on the part of the Respondents.

103. However, the Tribunal also considered that there was no occasion to apply this test again. In the view of the Tribunal, these so-called "emergency works" were merely a continuation of the abandoned 2007 Major Works. Consequently, the Tribunal's decision that the degree of prejudice to the Applicants from the failure to consult them properly was too great for a dispensation to be determined continued to apply. It follows that the £250 limit on liability for each Applicant covers the so-called Emergency Works in 2008.

2007 LVT Determination Cap?

104. As already noted (see para.(3)vi above), in their Statement of Case the Applicants contended that, notwithstanding subsequent changes of contractor and specifications, a Determination by another LVT in 2007 remained binding on the Respondents as to works within its scope. This contention had not been disputed by Mr Malka in his Reply or by Mr Bates in his Skeleton Argument. Further, it appeared to the Tribunal to have been the starting-point for the discussions between Mr Raye and Mr Harding, since the former's appointment by the Applicants in 2007 had been "in my capacity as a quantity surveyor to assist them in checking the costs of the proposed building works in the light of the LVT 2007 decision" (Witness statement para.2). This was supported in correspondence: eg a letter dated 9 March 2009 from Mr Gorst to Mr Raye referred to a meeting with Mr Harding and continued: "We will revert to you shortly with revised notices and calculations in accordance with the LVT decision, as discussed with Mr Harding" [R1456].

105. Nevertheless, the Applicants must have become concerned about the acceptance of their contention during the first three days of the Hearing. After the adjournment, they produced Written Submissions of Applicants' Case for 15/16th June Hearing, para.129 of which was as follows:

> "The respondent raised the issue that the LVT Determination in 2007 no longer applies due;
>
> (i) alleged default/fraud of the contractor and surveyors, and
>
> (ii)the scope is completely different and a new contract."

After this, the Applicants proceeded to submit, at length, that the 2007 LVT Determination had been admitted by the Respondents as applying and that it was binding and could not be revisited. It was also submitted that the 2010 Proposed Works had "the same scope [as

the works approved by the 2007 LVT], though reworded and presented in a different way".

106. At the earlier Hearing, in response to a Tribunal query, Mr Bates had unearthed a 2002 LVT Determination [LVTP/SC/008/091&092/01], where the first question considered was: "Could the Tribunal 'revisit' the costs of the 2001 Works?" In 2000 a different LVT had determined that it would be reasonable for the applicant-landlords to incur costs of £70,781 for these works (mainly roof repairs). However, the actual costs incurred in doing the works had totalled £90,301 and this had prompted a second application by the landlords. After concluding that an LVT was not an "arbitral tribunal" (matters already subject to the determination of such a tribunal are outside the jurisdiction of an LVT: see now ss.27A(4)(d) and 38 of the 1985 Act as amended), the LVT continued:

> "It follows that landlords or tenants are free to re-apply under [now s.27A(1) or (3)] if estimates prove optimistic or circumstances change or even if they simply seek a different determination (but an application which appears to be an abuse of the process of the tribunal may be dismissed)."

107. However, at the reconvened Hearing (on 16 June 2010), Mr Bates accepted that, in the present case, the 2007 LVT Determination should be treated as 'capping' rechargeable costs for items in the works which were within that Determination and had not been changed. He pointed out that, in the Scott Schedule prepared for the Hearing (referring to Version 7 dated June 2010), the column for Landlord's Comments stated, in relation to Year 2008/2009 Major Works (items 289-462), as appropriate either (item 322 onwards) "Capped contribution from LVT" or "The LVT did not cap this head of expenditure" with further observations to which the Applicants had responded in the column for Tenant's Comments.

108. The present Tribunal considers that the approach adopted by Mr Bates should be accepted as reasonable. The Tribunal regards a Determination by an LVT as final and binding between the parties, unless reversed on appeal, and as not open to revision by the LVT itself except as to clerical mistakes and accidental errors (see reg.18(7) of LVT (Procedure) (England) Regulations 2003). Nevertheless, it agrees with the earlier LVT that there is nothing explicit in the legislation precluding a second application by landlord

or tenant as to the same matter. If such a second application is, in substance, an appeal for a second opinion, it should be dismissed as an abuse of process (under reg.11 of 2003 Procedure Regulations).

109. In addition, the Tribunal would observe, as it did at the Hearing, that the application determined by the LVT in 2007 related to future costs to be incurred on major works at the Premises and that the issue for the present Tribunal is also as to future costs to be incurred on major works. If the Respondents or the Applicants had applied for a different determination from that in 2007, it might have been found to be an abuse of process. However, an application after the costs have been incurred, relating to actual expenditure, as in the 2002 case, might not be regarded as an abuse of process. Unless and until there is such an application and a different Determination, the parties will remain bound by the 2007 Determination, in so far as it can be applied to particular works. In law, that Determination does not expire and cease to have effect simply because estimates are optimistic or circumstances change. Nor is there a relevant statutory limitation period.

GENERAL CONCLUSION

110. The Tribunal is neither able nor willing to determine that any of the Applicants is liable to pay any amount of service charge to the Respondents. There are two overriding reasons for this.

111. irst, throughout all the years of Mr Malka's rule over the Premises (2000-2010), they have never received a demand for payment of service charges which complied with the terms of their leases. It is possible that this may be rectified, in the light of this Determination, and valid demands served, complying not only with the leases but also with all relevant statutory requirements, so that an amount of service charges does become payable by the Applicants to the Respondents. Support for this possibility can be derived from two Lands Tribunal decisions: *Warrior Quay Management Company Ltd v Joachim **&** **Others*** (2008) [LRX/42/2006] and *Bhambhani v Willowcourt Management Company (1985) Ltd* (2008) [LRX/22/2007]. However, in each of these cases, the flaw was that there were no certified accounts, the landlord only making on account demands, so the position might be different where, as here, there were other flaws. In particular, it is not clear to the Tribunal that s.20B of the 1985 Act will not apply if future otherwise valid demands for payments are

made by the Respondents relating to service charge costs incurred more than 18 months earlier. It should be noted that in the latter decision it was held that the tenant was not estopped from requiring certified accounts by payment of the on account demands. Further, it should be observed that the Tribunal would not consider it appropriate for future demands to take account of any unpaid amounts which had previously been demanded, validly or invalidly, in respect of costs which had not then been incurred but only estimated and which had become actually incurred. This is because s.19(2) of the 1985 Act not only provides that no more than is reasonable is payable in advance but also provides that "after the relevant costs have been incurred any necessary adjustments shall be made by repayment, reduction or subsequent charges or otherwise". Consequently, unpaid on account demands can only have historic relevance after the end of the relevant service charge year, with future liability depending on the certified accounts of actual costs incurred.

112. Lastly, with regard to future demands taking into account actual costs incurred, as distinct from demands based on estimates, the Tribunal would remind the parties that these may be challenged by the Applicants under s.19(1) of the 1985 Act. This subsection provides, in effect, that costs must be reasonably incurred for works or services of reasonable standard. These are matters which were not open to determination in relation to on account demands. In addition to those matters, the Applicants would be able to rely on any other grounds available to them to dispute their liability to make payments to the Respondents.

113. Accordingly, the second reason for declining to determine that the Applicants are liable to pay any service charge sum is the possibility that they may be advised that they have a good claim for substantial damages from the Respondents. This could include damages for nuisance as well as breach of covenant because of the basement conversion works and could exceed any service charge liability of the Applicants.

114. As a Conclusion to their Statement of Case the Applicants summarised the complaints as follows

"Between 2000 - 2007 the applicants have collectively paid Frances Court Management around £62,000 representing 51%, equating to approximately £125,000 for the whole building. We do

not believe the amount paid is reasonable given the current poor state of disrepair of the building and the management services provided. Even the basics have been neglected, gutters have only been maintained once in 9 years, the building has not even been painted. Mr Malka's initial argument for taking over the building in 2000 was Sandrove Brahams did a bad job and the building needed money spending on it to bring up back to standard. There has been no cleaning, very little gardening, a sub-standard roof and new carpets in 2002 and insurance. Moreover, to date, there is little proof of £125,000 spent on items relating to lessees' obligations and no proper financial records or audit. Given the very poor or absent management of the block, biased nature of work, excessive and unreasonable fees applied to the Service Charge from the Landlord and/or Landlord's appointed agents, surveyors, contractors and builders. The Landlord should not be entrusted with the continued management of the block or entrusted with Lessees money."

115. It is now established by a Court of Appeal decision that tenants can assert an equitable right of set off in respect of unliquidated damages against claims made by landlords for payments in arrears: *Muscat v Smith* [2003] EWCA Civ 962. In that case: "The house had suffered for many years from damp, but in 1995 the local authority served a disrepair notice ... From June 1995 to February 1997 – "far longer than any reasonable person would expect", said the judge - the lessor's builders did remedial work in the house, causing major disruption and inconvenience. In December 1995 Mr Smith began withholding rent (per Sedley LJ at para.2). He was held entitled to do this. Enduring years of neglect without suing the landlord does not mean that it would be unfair for a tenant to claim damages by way of equitable set-off: "The whole point of such a set-off - assuming that it was available - is that it entitled Mr Smith to await a claim for arrears and to plead his damage in answer to it" (per Sedley LJ at para.7). Consequently, a possession order was set aside and the current landlord's claim for arrears of rent and the tenant's counterclaim for unliquidated damages remitted to the county court for trial.

116. Accordingly, the Tribunal's general conclusion is to determine that the Applicants are not now and never have been liable to make any payments of service charges to the Respondents (except for the nominal sums of £150 or £100 annually stipulated in their respective

leases). In the light of this general Determination, together with the observations and findings in the previous paragraphs, the Tribunal has decided that no useful purpose would be served by attaching a copy of the agreed Scott Schedule supplied for the Hearing with an additional column detailing the Tribunal's view and assessment in respect of all the listed items.

Costs

117. The Tribunal only has power to award costs, limited to £500, against a party who or which "has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings" (para.10 of Schedule 12 to Common hold and Leasehold Reform Act 2002). Whatever view may be taken of Mr Malka's conduct as a manager and/or freeholder, in the opinion of the Tribunal none have the parties has behaved badly enough in connection with the proceedings themselves for any costs to be awarded.

118. However, the Tribunal also has power to require any party to the proceedings to reimburse any other party for the whole or part of any fees paid. The Applicants have paid an Application fee of £350 and a hearing fee of £150. On the ground that it is appropriate to do so in the light of its Determination, the Tribunal hereby requires Mr Malka to pay £500 to the Applicants forthwith in reimbursement of the fees paid.

119. The Applicants also applied for an order under s.20C of the 1985 Act, in effect precluding the Respondents from including their costs incurred in connection with the proceedings as a service charge. For reasons which will be obvious, the Tribunal is minded to find that it would be just and equitable in all the circumstances to make such an order. However, as indicated at the Hearing, the Respondents will be allowed to make written representations resisting such an order if seen fit. Any such representations must be received by the Tribunal and copied to the Applicants within seven days of the date of this Determination.

Julian Fawcett

CHAIRMAN **12 July 2010**