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H M COURTS & TRIBUNALS SERVICE

LEASEHOLD VALUATION TRIBUNAL

In the matter of an application under Section 24 of the Landlord and Tenant Act 1987 (Appointment of Manager)

Case No: CHI/00ML/LAM/2012/0007

Property: **Shanklin Court, 132 Hangleton Road, Hove, East Sussex BN3 7SB**

Between:

(1) Mrs DM Nottage – Flat 3
(2) Ms KM Geal – Flat 1
(3) Mr and Mrs G Frost – Flat 4
(4) Mrs W Whiley – Flat 5
(5) Mr G Sanders – Flat 10
(6) Mrs VE Tomlins – Flat 11
(7) Mrs S Goodson – Flat 19

(the Applicants)

-and-

SHANKLIN COURT HOVE RTM COMPANY LTD

(the Respondent/RTM Company)

Members of the Tribunal:	Mr MA Loveday BA(Hons) MCIArb	Lawyer/Chairman
	Mr N Cleverton FRICS	Valuer Member
	Mrs M Phillips	Lay Member

Date of the Decision: 19 December 2012

INTRODUCTION

1. This is an application for the appointment of a manager under section 24 of the Landlord and Tenant Act 1987 s.27A in respect of a block of flats at Shanklin Court, Hove. The applicants are the lessees of seven flats. The respondent is a Right to Manage Company. The matter also raises issues dealt with in a previous Tribunal determination (CHI/00ML/LIS/2011/0021) dated 7 October 2011.

2. The application is dated 29 June 2012. Directions were given on 26 July 2012 and a hearing took place on 30 October 2012. At the hearing, the applicants were represented by Mr Nottage, the husband of the first applicant. The respondent was represented by Ms A Cafferkey of counsel instructed by Messrs DAC Beechroft LLP. The applicants principally relied on a detailed Statement of Case (undated) with supporting documents and called their proposed manager Mr Mark Carter MRICS who gave evidence to the Tribunal. The respondent relied on a detailed Statement of Case (again undated) and supporting documents.

INSPECTION

3. The Tribunal inspected the premises before the hearing on 30 October and also noted the description of the condition of the property set out in the decision of 7 October 2011 and the report of Mr David Smith MRICS dated 12 October 2012 referred to below.

4. Shanklin Court is one of three blocks c.1970 on a sloping site in Central Hove. The block itself is on 7 stories with garages on the ground floor and 28 flats on upper floors (4 per floor). The grounds are largely laid to grass and shrubs. The building itself has brick elevations and a flat roof (which included aerial masts and cabling) with areas of painted wooden panelling and a mix of uPVC and timber framed windows. The Tribunal noted that the condition of the paintwork to the north elevation was poor. The southern elevation at ground floor level was missing render above the ground floor window. The garages at ground floor

level on the west side of the block were also in a poor decorative state. The grass was neatly mown and the hedges well-trimmed. At ground floor level were three paladin bins for refuse and recycling. There was a halogen spotlight unit outside the front door to the block. Internally, the ground floor entrance hallway was dark, with a single ceiling mounted light/emergency light. This light was switched off when the Tribunal first inspected, but it could be switched on by way of a switch inside a locked meter cupboard in the hallway. There were no fire precaution systems evident in the common parts other than fire safety notices marked "Jacksons".

THE LEASES

5. The previous Tribunal recorded that the original lease of each flat in the block was in similar form, although two had been surrendered and replaced by new leases. The new lease of flat 21 was granted under Leasehold Reform Housing and Urban Development Act 1993 s.176, whilst the new lease of Flat 24 appears to have been a voluntary lease extension outside the 1993 Act. The remaining terms of the original lease of each flat were in substantially the same form.

6. The Tribunal was referred to the lease of Flat 1 dated 18 April 1997 which was said to be typical of the rest. The material obligations on the part of the landlord are as follows:
   a. By clause 4(B)(i) that the lessee was obliged to "pay and contribute in manner hereinafter provided the Lessee's proportion as defined in Recital (5) hereof of all moneys expended by the Lessor in complying with its covenants in relation to the Block as set forth in Clauses 6(B) and (D) hereof."
   b. By clause 6(B) that the Lessor "will at all times during the said term insure and keep insured comprehensively the Block in some insurance office of repute in the full replacement value thereof and whenever required produce to the Lessee a copy of the policy or policies of such insurance or the relevant part or parts thereof and the receipt for the last premium for the same ..."
   c. By clause 6(D)(i) that the Lessor would "Remedy all defects in and keep in good and substantial repair and condition throughout the term hereby

granted the parts of the Block not comprised in the Flat or any of the flats in the Block and not the subject of the Lessee's covenant in Clause 4(A) hereof or any similar lessee's covenant in any Lease of any other flat in the Block including without prejudice to the generality of the foregoing ... (b) the main structure of the Block (including the foundations and exterior walls) excluding the glass and all moveable and opening parts of the windows of the front doors of all the flats and of all garage doors and excluding also all garage door frames."

d. By clause 6(D)(iii)(a) that the Lessor would "So far as practicable keep the entrance entrance halls passages stairs landings and other communal parts of the Block clean and reasonably lighted and the gardens properly cultivated."
e. By clause 6(D)(iii)(c) that the Lessor would "(subject to the Lessee providing a suitable receptacle) arrange for the collection and removal of the household refuse or rubbish from the Flat once every day (except Saturdays and Sundays) at such time or times as the Lessor shall appoint from time to time."
f. Clause 6(D)(iii) was subject to two provisos that followed on from clause 6(D)(iii) but which plainly applied to the whole sub-clause. The second proviso "...PROVIDED FURTHER that the Lessor may alter or modify the services referred to in this sub-clause and the number of staff and servants referred to in Clause 6(D)(v) hereof if by reason of any change in circumstances during the term hereby granted such alteration or modification is in the opinion of the Lessor reasonably necessary or desirable in the interest of good estate management or for the benefit of the occupiers of the block."
g. By clause 6(D)(iv) that "if so required by the Lessee and upon the Lessee indemnifying the Lessor against all costs and expenses in respect thereof and providing such security in respect of costs and expenses as the Lessor may reasonably require enforce the covenants similar to those hereinbefore contained ..."
h. By clause 6(D)(xi)(a) that the Lessor would "Comply at all times with any requirements orders or regulations now or hereafter made by any local or

other authority in relation to the Block or any part thereof pursuant to any statutory power or authority ..."

THE FACTS

7. The background to the dispute appears in the previous decision. Shanklin Court originally comprised one of three blocks (the others being Sandown Court and Ryde Court) built in about 1973. The three blocks together comprised 60 flats, 35 garages and 6 parking spaces. The leases of each of the flats in the three blocks had originally apportioned the landlord's relevant costs between the 60 flats, with the percentage service charge contributions in the leases being calculated as a proportion of the total costs for the estate. These original apportionments (45/2340) still appeared in the leases of flats 2, 8 and 9 at Shanklin Court. The freehold of Shanklin Court had later been severed from Sandown Court and Ryde Court and from that point the freeholder undertook management for Shanklin Court alone. The total relevant costs of the landlord were split between only the 27 flats involved. As was explained at the previous tribunal, for so long as the service charge apportionments in the leases remained unaltered, the landlord was therefore only able to recover about a third of her costs from the lessees, and this led to an inevitable shortfall on the service charge account. In some cases, the landlord had subsequently been able to negotiate a variation of individual leases so as to increase the percentage contributions from the individual lessees. The new leases of flats 21 and 24 were examples of such cases. The apportionment in the new leases was based on an increased percentage contribution, but the definition of "the Block" was narrowed so as to include only Shanklin Court.

8. Mrs Philp employed a firm of agents Messrs Jacksons to manage the property. The respondent was formed in May 2009 and commenced management of the block on 23 November 2010. On the appointment of RTM company, Messrs Jacksons dealt with the handover of management to the respondent and identified a number of management issues in correspondence. However, no funds were handed over by the previous agent to the RTM Company. From April

2011, the respondent employed a firm of managing agents Pepper Fox & Co to manage the property.

9. Notice under s.22 of the Act was served on 2 May 2012. The notice referred to "unsatisfactory performance" by the respondent in 16 specified categories. The application to the Tribunal dated 29 June 2012 referred to some 12 grounds of complaint.

THE ISSUES

10. The relevant statutory provision is at s.24 of the 1987 Act:

> **"24 Appointment of manager by the court.**
> (1) A leasehold valuation tribunal may, on an application for an order under this section, by order (whether interlocutory or final) appoint a manager to carry out in relation to any premises to which this Part applies—.
> (a) such functions in connection with the management of the premises, or.
> (b) such functions of a receiver,
> or both, as the tribunal thinks fit.
> (2) A leasehold valuation tribunal may only make an order under this section in the following circumstances, namely—
> (a) where the tribunal is satisfied—
> (i) that any relevant person either is in breach of any obligation owed by him to the tenant under his tenancy and relating to the management of the premises in question or any part of them or (in the case of an obligation dependent on notice) would be in breach of any such obligation but for the fact that it has not been reasonably practicable for the tenant to give him the appropriate notice, and
> .....
> (iii) that it is just and convenient to make the order in all the circumstances of the case;
> (ab) where the tribunal is satisfied—
> (i) that unreasonable service charges have been made, or are proposed or likely to be made, and
> (ii) that it is just and convenient to make the order in all the circumstances of the case;
> (ac) where the tribunal is satisfied—
> (i) that any relevant person has failed to comply with any relevant provision of a code of practice approved by the Secretary of State under section 87 of the Leasehold Reform, Housing and Urban Development Act 1993 (codes of management practice), and
> (ii) that it is just and convenient to make the order in all the circumstances of the case; or

(b) where the tribunal is satisfied that other circumstances exist which make it just and convenient for the order to be made."

11. The words "relevant person" in s.24(2)(a)(i) include the landlord: see LTA 1987 s.24(2ZA) and s.22(1)(i). It should also be noted that this reference is extended to an RTM Company such as the respondent by Sch 7 para 8 to the Commonhold and Leasehold Reform Act 2002.

12. The applicants' Statement of Case dated 20 August 2012 referred to 7 alleged breaches of covenant ("Statements" 1-6 and 10). In addition, the Statement of Case referred to a further 8 matters of complaint ("Statements" 7-9 and 11-16). Mr Nottage confirmed that the applicants were relying on ground 24(2)(a) alone and that the issue of excessive service charges under ground 24(2)(ab) or breaches of a relevant code of conduct under ground 24(2)(ac) did not arise. The primary issues were therefore whether (1) there were breaches of covenant and (2) whether it was "just and convenient" for an order to be made. If so, the questions arose whether Mr Carter should be appointed as manager and the terms of his appointment. The former were dealt with in 'Statements' 1-6 and 10 of the Statement of Case. The other 'Statements' dealt with the Tribunal's discretion to make an order if it was just and convenient to do so.

BREACHES OF COVENANT: THE APPLICANTS' CASE

13. Insurance. Mr Nottage relied on correspondence starting with a letter of 23 November 2010 (the day the RTM commenced) requesting a copy of the building insurance policy. The managing agents Classic Properties replied by email the same day stating that the documents were not available. On 2 December 2010, the agents forwarded an email from the brokers RT Williams Insurance Brokers confirming that "cover is arranged ... through Aviva Insurance with effect from 23rd November 2010" and enclosing a copy of a cover/debit note. A request was made for a copy of the policy schedule on 21 December 2010. On 24 December there is an email explaining that the brokers would not release a copy of the policy documents until the premium was paid. The premium was then paid, and the Aviva policy schedule was eventually provided

on 12 January 2011. The policy schedule stated that cover was effective from 23 November 2010.

14. The applicants relied on clause 6(B) of the lease and contended that (i) it was not known whether the lessor had insured or kept insured the Block between November 2010 and some time in December 2010 and (ii) it had, when required in 23 November 2010, not produced to the lessee a copy of the policy of insurance until 12 January 2011.

15. Fire precaution works. Mr Nottage relied on an email from the former managing agents Jacksons to the respondent dated 22 November 2010, which was the day before the RTM commenced. This email suggested that the agents and the local fire brigade had previously agreed a scope of works in order for the property to comply with the Regulatory Reform (Fire Safety) Order 2005. Details of the required works were set out in a fire risk assessment by Brighton Fire Alarms Ltd dated 24 May 2010. The email of 22 November 2010 stated that these works had to be carried out by 1 April 2011 if "prosecution is to be avoided". The gist of the complaint was that the respondent had not carried out those works, but had instead commissioned a further fire risk assessment dated 6 June 2012.

16. The applicants relied on clause 6(D)(xi) of the lease and contended that (i) the works set out in the fire risk assessment dated 24 May 2010 had not been done and (ii) those works were a requirement under the 2005 Fire Safety Order. The failure to undertake the works was therefore a failure to comply at all times with "requirements orders or regulations" made by a public authority.

17. Lighting. Mr Nottage contended that lighting in the hallway had always been a problem. He referred to a letter from Mr Turner (Flat 3) dated 25 January 2011 complaining that the hallway light was on a timer and unlit between 9am and 4pm and that the light used a low energy bulb which provided little light. In early 2011 a petition was signed by 20 residents complaining that "the main entrance to the building remains unlit every day during these winter months". On 31

January 2011, the respondent replied stating that there had not been 24/7 lighting in the foyer for over 40 years, and essentially rejecting the complaint.

18. The applicants relied on clause 6(D)(iii)(a) of the lease. They contended that the entrance hall was not kept reasonably lighted. Mr Nottage asked the Tribunal to rely on its inspection and the switch arrangements in the hallway.

19. Rubbish. Mr Nottage stated that it was agreed that there were only three collections of rubbish a week from the flats.

20. The applicants relied on clause 6(D)(iii)(c) of the lease. They contended that the respondent failed to arrange for the collection and removal of the household refuse or rubbish from the flats every weekday. It was not reasonably necessary or desirable to reduce the frequency of the collections and the onus was on the respondent to establish that they satisfied the proviso to clause 6(D)(iii)(c).

21. Repairs and maintenance. Mr Nottage argued that the block had been in poor state of repair for some time. He relied on the findings of the previous Tribunal regarding the condition of the block at the date of inspection in August 2011. There were also photographs of the block in the bundle taken in January and February 2011 which showed defective and damaged panelling, and scaffolding erected to the third floor level. However, the respondent had not planned to remedy these problems. Mr Nottage referred to an "expected expenditure analysis" for the year ending September 2011 that allowed only £5,000 for general repairs and a contingency sum. Nothing was allowed for major works in that year. Mr Nottage also asked the Tribunal to rely on its inspection on the day of the hearing of the present matter.

22. The applicants relied on clause 6(D)(i) of the lease. They contended that the respondent had failed to remedy defects in the block and that it had failed to keep the block in good and substantial repair and condition.

23. Gardening. Mr Nottage asked the Tribunal to ignore the inspection on the date of the hearing, since gardeners had come round recently. Instead, he asked the Tribunal to consider the condition of the gardens shown in photographs taken on 20 June 2012. These showed grass approximately 5 inches high with flowers and weeds in the middle of the lawn and an untrimmed hedge. In July 2012, the respondent had written to say it was taking advice from a gardening expert. Mr Nottage also relied on a provision of £450 for gardening costs in the "expected expenditure analysis" for the year ending September 2011, which he said was plainly inadequate.

24. The applicants relied on clause 6(D)(iii)(a) of the lease. They contended that the respondent had not kept the gardens properly cultivated.

25. Service charge collection. On this point, Mr Nottage contended that the respondent had failed to collect arrears of service charge owed by various lessees, amounting to some £14,000. Mrs Nottage requested information about arrears on 1 August 2012, but the managing agent declined to provide it on the instructions of the respondent: see email dated 10 August 2012.

26. The applicants argued that the leases of each flat included an obligation for every lessee to pay a service charge at clause 4(B)(i). When asked to identify a provision in the lease which tied this to an obligation on the part of the lessor, Mr Nottage relied on clause 4(D)(iv) of the lease.

BREACHES OF COVENANT: THE RESPONDENT'S CASE

27. The respondent relied generally on a Statement of Case signed by Ms Philp and supporting documents.

28. Insurance. The respondent contended that the block was insured at all times. None of the correspondence suggested that the property was not insured and the broker confirmed on 2 December 2010 that the block was insured.

29. The correspondence also showed that the delay in producing the insurance policy documents was down to the insurer withholding the policy documents. The requirement in clause 6(B) of the lease "to produce ... a copy of the policy" whenever required by the lessee was subject to an implied term that this should be reasonable.

30. Fire precaution works. The respondent referred in some detail to the dealings between Messrs Jacksons and the fire brigade in 2010 to show that the information given by Messrs Jacksons to the RTM company on 22 November 2010 was incorrect. Although the former agent had arranged a fire risk assessment in 2010, it appears that the fire brigade considered that this assessment was "not sustainable". The applicant referred to a record of inspection dated 8 July 2010 prepared by the fire officer Mr Martin Combs to this effect. Instead, the fire officer's record of inspection included a "fire safety note" listing various matters that he required Ms Philp to deal with by 14 April 2011 in order to comply with the Regulatory Reform (Fire Safety) Order 2005. However, the status of this "note" did not amount to any regulatory requirement. The document itself expressly stated that the "note" was not a formal Enforcement Notice under the 2005 Order. As a result of the inadequacy of the original fire risk assessment, the respondent chose to prepare a fresh one in June 2011. This advised three 'high priority' items. The fire brigade had agreed that the respondent had two years to carry out the works in the 2011 assessment, and these works were now in hand. The works would be undertaken once there was sufficient money in the service charge account.

31. Ms Cafferkey submitted that in the light of the above, there were at no time any "requirements orders or regulations" that the respondent had to comply with under clause 6(D)(xi)(a) of the lease.

32. Lighting. The respondent contended that the hallway lights had never been operated by a switch in the entrance hallway. They had always operated by a timer and switch in the locked meter cupboard. Historically, there had been no

complaints about poor lighting before the RTM company came on the scene. Indeed, historically many lessees made it clear that the entrance hall lighting was excessive. For example, the respondent referred to a letter dated 1 March 2008 from Mr Goodson (the husband of the lessee of Flat 19, who was one of the applicants). In that letter, Mr Goodson asked whether in order to reduce costs "we can reduce the hours per day the lights remain on in the public areas by scheduling more regular timer updates?" Once the respondent was appointed to manage the property, the issue of lighting was raised for the first time in the petition (although the number of 'genuine' names on the petition was disputed). The lights now respond to a movement (or "PIR") sensor.

33. Ms Cafferkey submitted that in the light of the above, the respondent had operated a reasonable system for lighting the hallway in accordance with clause 6(D)(iii)(a) of the lease.

34. Rubbish. The respondent explained that a cleaner came in three times a week and removed refuse from outside the flats. It accepted that rubbish was not collected from each lessee every weekday, but this would mean that the cleaner would have to be paid to come in every day, just to collect the rubbish. Many lessees had made it clear that they wanted to see a reduction in the cost of a daily refuse collection. The respondent again referred to the letter dated 1 March 2008 from Mr Goodson where he suggested that it was possible to "reduce rubbish collection to alternate days now that more [was] being recycled". The present managing agent agreed with this approach. The respondent referred to minutes of a meeting of the focus group dated 15 january 2012 attended by representatives of Pepper Fox. The agent explained that residents could have keys enabling them to access the bin store, "a 5 day a week collection should not be required".

35. Ms Cafferkey relied on the proviso to clause 6(D)(iii)(c). Although the lease provided for daily collections during the week, the lessor could alter this arrangement if (in its opinion) a change was reasonably necessary by reason of a

change in circumstances. The circumstances had been changed by the low level of refuse resulting from an increase in recycling rates.

36. Repairs and maintenance. The respondent accepted that there had been issues with repairs and maintenance. Indeed, the RTM Company was largely formed because the many lessees did not consider that the previous managing agents were adequately addressing this issue. The respondent had commissioned a report from David F Smith MRICS, a chartered building surveyor, dated 12 October 2012. To summarise his report, he concluded that:
    a. The main roof asphalt was in poor condition;
    b. The last works to the eastern elevation were carried out in 2009/10 and this was in satisfactory condition;
    c. The south (front) elevation was last decorated in 2003. This was again in satisfactory condition, although missing areas of render were unsightly and required immediate repair.
    d. The west elevation was last decorated in 2003. This was again generally in satisfactory condition. However, the lower ground floor garages required redecoration in the foreseeable future.
    e. The north (rear) elevation was last decorated in 1994, and was looking "tired".
    f. Mr Smith advised a 20 year redecoration cycle, with immediate works to the roof, north elevation and the garages in 2013/14. The west elevation would follow in 2018, with the south and east elevations in 2023 and 2028.

    The Statement of Case stated that Mr Smith's report would form the basis of compliance with the repairing obligations in the lease.

37. Ms Cafferkay submitted that there was no reason to dispute Mr Smith's report. The respondent had not received any reserve funds from the previous managing agents when it took over management. It had inherited issues with works, a situation which would often be the case with RTM companies. Ms Cafferkay submitted that the block was now managed by good managing agent, there was

a programme of maintenance in place and commitment to follow this programme.

38. Gardening. The respondent continued with a gardening programme that had originally been devised by one of the applicants and professional advice has now been sought about gardening. The main issue is about how frequently the grass should be cut, but this was a matter of opinion. The respondent did not consider that cutting grass on a weekly basis was reasonable and the cost of doing so was not acceptable to most leaseholders.

39. Ms Cafferkay submitted that the applicants' photographs did not show the garden was other than "properly cultivated". The inspection showed that the garden was kept neatly. Whatever the various opinions about the standard of gardening, it was clear that the garden had not been allowed to "run wild".

40. Service charge collection. Ms Cafferkay submitted that the obligation to pay service charges was an obligation on the part of the lessees not an obligation imposed on the lessor. A failure to pay service charges was not therefore a breach of covenant by a "relevant person" under LTA 1987 s.24(2)(a)(i). As far as the obligation in clause 4(D)(iv) is concerned, the conditions precedent to the lessor being required to enforce the service charge covenants had not been met.

BREACHES OF COVENANT: THE TRIBUNAL'S FINDINGS

41. Insurance. The Tribunal finds as a fact that the property was insured at all material times between 24 November 2010 and February 2011. The emails from the broker dated 2 December 2010 (enclosing the cover note) and 12 January 2011 (enclosing the policy schedule) are unambiguous on this point.

42. As far as the allegation that the respondent failed to produce a copy of the policy schedule "whenever required", the Tribunal is not satisfied that any term as to reasonableness should be implied into clause 6(B) of the lease. That implication would be inconsistent with the requirement to produce the policy "whenever

required". It is also inconsistent with the express use of the words "as soon as reasonably required" in the remaining parts of clause 6(B). However, the obligation to produce a copy of the policy "whenever required" plainly cannot extend to an obligation to produce a copy of a policy which the respondent does not have in its possession or control. In this case, the insurer withheld a copy of the policy documents and did not provide a copy of the schedule until after the premium was paid early in January 2012. The emails show that the schedule was emailed to Mrs Nottage directly by the broker by 12 January 2012. This was within a very short period of the premium being paid and the insurer releasing the policy documentation. The Tribunal finds that the respondent did not breach clause 6(B) of the lease on this basis either.

43. Fire precaution works. The Tribunal does not consider that there has been a breach of "requirements orders or regulations" made by a public authority in respect of fire precaution works under clause 6(D)(xi)(a) of the lease. On consideration of the document produced by the respondent, it is clear that the information given to the RTM company on 22 November 2010 was incorrect. The fire risk assessment dated 24 May 2010 had in fact been rejected by the Fire Officer, and it would plainly have been wrong for the respondent to have carried out the works in the 2010 assessment in these circumstances. The email was also incorrect where it suggested that there was a threat of "prosecution" under the 2005 Fire Safety Order. The deadline of 1 April 2011 for carrying out works appears in the Fire Officer's "note". This note was in the context of a document which expressly states that it did not amount to a formal Enforcement Notice under the regulations. It follows that there was no regulatory "requirement" to carry out the works in the 2010 fire risk assessment or the note.

44. Lighting. The Tribunal essentially reached its conclusions on this point based on the inspection. There was no evidence on inspection that the internal lighting in the hallway operated by a PIR sensor. There was no other method for a user, who did not have a key to the meter cupboard, to switch on the hallway light. The entire operation was wholly reliant on the efficacy of a timer switch in the

meter cupboard. This inflexible system means that any person who enters or leaves the block cannot manually switch on a light when the natural lighting in the hallway is inadequate (for example, when the weather is poor or at certain times of the day just before or after the timer switch operates). This problem could be resolved effectively and cheaply by installing a wall mounted mechanical 'time delay' switch in the hallway or a PIR switch linked to the lighting unit. Both these options are now available at very modest cost. Moreover, the Tribunal's inspection suggested that even when switched on, the illumination provided by the single ceiling mounted light unit was poor, and a more powerful bulb or lighting unit is needed.

45. The respondent is required by clause 6(D)(iii)(a) "so far as reasonably practicable [to] keep the ... entrance halls ... reasonably lighted." The Tribunal concludes that the hallway was not and is not "reasonably lighted". The hallway is not lit at all at certain times of the day when there is poor natural daylight. It is and was "practicable" to adopt other systems to light the hallway to deal with this problem, such as using a 'time delay' switch in the hallway itself, a PIR operated lighting unit and/or a more powerful bulb or lighting unit. The Tribunal therefore finds that the respondent is in breach of clause 6(B)(iii)(a).

46. Rubbish. There is no dispute that refuse is collected only three times a week, whereas the lease specifies a collection every day. The respondent relies on the proviso to clause 6(D)(iii), which permits the lessor to "alter or modify" services if "by reason of any change in circumstances during the term" the alteration is "in the opinion of the Lessor reasonably necessary or desirable in the interests of good estate management or for the benefit of the occupiers of the block".

47. In this case, the Tribunal accepts there has been a reduction in the volume of general refuse generated by flats in the block as a result of increased recycling. The Tribunal finds that this is capable of amounting to a material "change in circumstances" under clause 6(D)(iii) of the lease. The Tribunal also finds that the lessor has decided to alter or modify the refuse collection services by reason of

this change. Such a reduction in collection rates can fairly be described as being "in the interests of good estate management or for the benefit of the occupiers of the block". In particular, the reduction benefitted occupiers because daily collections from each flat would require the cleaner to come in every day of the week, leading to increased and unnecessary costs for the lessees. Moreover, it is noted that some occupiers (for example Mr Goodson) had asked for this reduction. The Tribunal therefore finds that the respondent is entitled to reduce the rubbish collection service under rely on the proviso to clause 6(D)(iii). In short, there is again no breach of covenant in relation to rubbish collection.

48. Repairs and maintenance. The requirement of clause 6(D)(i) is to "remedy all defects" in the block and to keep it "in good and substantial repair and condition". The Tribunal finds that there are significant areas of repair outstanding, as identified by Mr Smith in his report dated 12 October 2012. In particular, there are significant defects to the roof asphalt, to the north elevation and to the garages on the west elevation. The latter two were confirmed by the Tribunal on inspection and were not disputed by the respondent.

49. The Tribunal accepts the respondent's explanation for this want of repair, and in particular that it has taken steps to prepare a proper programme of maintenance for the future. However, this does not change the fact that there are breaches of the repairing obligations in clause 6(D)(i) of the leases.

50. Gardening. There is very little evidence on this point. The photographs taken on 20 June 2012 certainly show that grass and hedges were untrimmed, but they did not suggest that the garden had been allowed to "run wild". On inspection, the garden was neat, but whether this was representative of the general condition is disputed. Moreover, a budget of £450 for gardening costs in any one year for maintenance of limited grounds such as in this case is not plainly inadequate. On balance, the Tribunal finds that there was no breach of clause 6(D)(iii)(a) of the lease. The requirement is a limited one, namely "so far as practicable [to] keep... the gardens properly cultivated" and there is no absolute requirement to keep

the grass and hedges neat or in good appearance. The Tribunal cannot say that there is any conclusive evidence either from the photographs or other material put before it to show that the gardens were not properly "cultivated".

51. Service charge collection. In essence, the Tribunal accepts there was no breach of covenant on the part of the respondent to the s.22 notice for the reasons given by Ms Cafferkay. Any failure to pay a service charge in clause 4(B) of the lease is not a breach of covenant by a "relevant person" under LTA 1987 s.24(2)(a)(i). As far as the obligation in clause 4(D)(iv) is concerned, there is no suggestion that any person has offered to indemnify the respondent against costs and expenses in pursuing lessees for failure to pay their service charges. It follows that the condition precedent to the respondent being required to enforce the service charge covenants has not been met.

52. Conclusions. The Tribunal therefore finds that two breaches of management obligations by the respondent have been established, namely breach of the obligation in clause 6(D)(iii)(a) of the lease to keep the entrance hallway "reasonably lighted" and the obligation in clause 6(D)(i) of the lease to keep the block in repair.

"JUST AND CONVENIENT": THE APPLICANTS' CASE

53. The applicants stated that since the RTM company was appointed to manage the property, they had sought to advise the directors via a "focus group". A great deal of documentation about the focus group was produced, included minutes of meetings and correspondence with the agent and the respondent. The minutes of each meeting of the focus group were copied to the respondent. However, the respondent had not replied to legitimate complaints raised by the focus group. Examples included complaints about insurance and fire safety (minutes 26 June 2011) and the roof (minutes 23 October 2011). The general concern was that the managing agent was not given enough rein by the respondent's directors.

54. The applicants relied on points raised in their Statement of Case to support the contention that it was "just and convenient" to appoint a manager.

55. Frequent change of managing agent. During the period since November 2011, there had been three managing agents for the block. The first (Classic Properties) lasted some six weeks. They ceased management because the agent found the building "too much to handle with a small team". The second (Ellman Henderson) lasted seven months. They resigned on 27 April 2011, stating in a letter that there was "so much discontent and concerns running through 'the camp' that it makes any managing agents position impossible". The third agent is Pepper Fox. The s.22 notice acknowledged that the present agent was "professional and highly competent": see s.22 notice para 9.1. When questioned by the Tribunal, Mr Nottage admitted that Pepper Fox was his "preferred" agent. However, the constant changes of agent meant there was a lack of stability and it reflected poorly on the respondent.

56. RTM not responsive to agent. The s.22 notice suggested (para 9.2) that the present agent was not being allowed to plan and make provision for essential maintenance work. This had been acknowledged by the respondent, who suggested that a new surveyor should be asked to deal with maintenance work: see reply to s.22 notice para 9(a). However, another "layer of management" was unnecessary: the present managing agent should be allowed to manage maintenance.

57. RTM membership. A number of lessees (Messrs Nottage, Sanders, Geal and Tomlins) had applied for membership of the RTM Company, but the directors had delayed their applications for membership. The RTM process was intended to provide power to leaseholders, but the directors had gone to great lengths to preserve their positions.

58. Lack of response to lessees. The various complaints by the applicants had been channelled through the focus group, but the respondent had failed to engage

with the group. The focus group had written to the directors and the agent, but the directors admitted they had been "advised not to respond": see email dated 21 November 2011. The reason given was that they had been "bombarded with 70+ demanding and threatening emails/letters". The directors had also been invited to focus group meetings, but Ms Hazanzadeh (one of the directors) admitted that she "won't be attending any meetings and have no intentions to plan one either."

59. Vote of no confidence. Following a focus group meeting, a number of residents decided to send a "vote of no confidence" in the RTM company dated 15 May 2011. The letter identified a number of management issues, and was signed by residents in 5 flats and one of the garages. It requested that management was handed over to someone else. The letter was ignored.

60. Repairs and maintenance. The applicants relied in particular on the lack of action on repairs and maintenance, as set out above. In particular, there was no provision in the accounts for the cost of major works.

61. Breach of trust. A number of directors had arrears of service charges. The agent had been restricted from collecting these arrears, which amounted to a breach of trust.

62. Summary. In summary, the service charges were not being collected from (amongst others) various directors, the building was in poor condition, the lighting was poor, fire precautions were sub-standard, the roof needed attention, the gardens needed attention and the directors were a self-appointed and undemocratic group. It was "just and convenient" to appoint a manager.

63. The Tribunal was also addressed by Mrs Geal (the second applicant) and Mrs Tomlins (the sixth applicant) who confirmed Mr Nottage's submissions.

"JUST AND CONVENIENT": THE RESPONDENT'S CASE

64. Ms Cafferkay submitted that the decision to appoint a manager is very much a remedy of last resort: see for example ***Petrou v Metropolitan Properties*** (1998) LVT/AOM/014/013/98. It was said to be a "draconian" remedy.

65. The respondent submitted that an important factor is the 'majority view'. In this instance, the majority of lessees in the block backed the RTM company. By contrast the applicants were lessees of only seven flats. Focus group meetings were attended by relatively small numbers of lessees. For example, the first meeting on 27 March 2011 was attended by lessees of 10 flats. They decided actively to canvas support, but the following meeting on 15 may 2011 was attended by lessees of six flats, and the next meeting on 26 June 2011 was attended by only seven. In addition, not all the applicants lived in the block – they included four flats that were occupied by tenants.

66. It was also a significant factor that a "reputable" managing agent was now in place. Pepper Fox were much better placed to manage the block than Mr Carter. Ms Cafferkay submitted that the respondent was dealing with historic issues and that it was "getting there". Minor remaining issues such as rubbish and cleaning were not a proper basis for the appointment of a manager.

67. In relation to the specific considerations raised by the applicants, the respondent argued as follows.

68. Frequent change of managing agent. Ms Cafferkay accepted that it was not desirable to see a frequent change in managing agent. However, one had to ask why the first two agents resigned. The respondent contended that the first two agents resigned because of the "aggressive" or "direct" approach of the applicants. She relied on a letter dated 29 November 2010 from Mrs and Mrs Nottage to Classic Management, which was sent immediately after Classic had been appointed. The letter asked for details of the agent's insurance, confirmation from the agent's bank that money would be held in a client

account, details of "cover" for client's funds, details of relevant experience in managing flats, information about how they could check the agent's solvency and membership of professional organisations. She also relied on the fact that on 11 February 2011, Mr and Mrs Nottage had sent Ellman Henderson a solicitor's letter threatening litigation and requesting detailed information under eight separate headings. The letter from Ellman Henderson dated 27 April 2011 explained the reasons why that agent resigned. In any event, this was a "historical problem". Pepper Fox had been managing since July 2011 and the applicants were happy with the current agent.

69. RTM not responsive to agent. Ms Cafferkay submitted that much of this criticism was simply the opinion of the applicants, with no supporting evidence.

70. RTM membership. The respondent submitted that this was an issue of company law, and it had in any event been resolved.

71. Lack of response to lessees. The respondent contended that specific complaints had been dealt with promptly. Mr and Mrs Nottage met directors in November 2010 specifically to discuss management issues. Emails were replied to promptly. For example, an email about lighting from Mr Turner (Flat 3) was replied to in a letter to all lessees on 31 January 2011. The sheer volume of emails and letters from the applicants (the figure of 70+ in the email 21 November 2011 was not disputed) made responding to them individually quite difficult. The respondent endeavoured to focus on management as opposed to becoming bogged down in the "machinations" of the focus group. The focus group often chose to ignore the respondent's communications.

72. Vote of no confidence. The vote of no confidence letter was full of inaccuracies, and it was signed by the lessees of only six flats. It was intended to be overtly damaging and antagonistic.

73. Repairs and maintenance. The alleged failure to provide for future works was merely opinion.

74. Breach of trust. The applicant submitted that breach of trust issues were not within the remit of a s.24 application. The respondent was obliged to provide details of relevant costs, but no information about arrears owned by other lessees. The legal position was that in any event, the respondent was not able to pursue any arrears that accrued prior to the date of its appointment: see s.97(5) of the Commonhold and Leasehold Reform Act 2002. Pepper Fox had explained the position to the lessees by a letter dated 31 May 2012.

75. Summary. In summary, after a very difficult period, Pepper Fox were managing the property well. A sensible and comprehensive major works programme had been prepared. It was nonsense to suggest that the respondent (whose members were the lessees) did not want to have the block sensibly maintained and managed. No serious breaches of obligations in the lease had been identified.

"JUST AND CONVENIENT": THE TRIBUNAL'S FINDINGS

76. The Tribunal did not find any previous decisions of other tribunals of much assistance as to the exercise of its discretion. The factors that apply in one application may be very different to those in other cases.

77. Nevertheless, it is clear that a number of factors are relevant in this case. In most s.24 cases, a tribunal is aware of the expropriatory nature of Part 2 of the 1987 Act, in that it involves removing a landlord's right to manage its own property. Hence the frequent references in Tribunal decisions to s.24 affording a "draconian" remedy. That is not the case with an RTM Company, where the landlord has already 'lost' most of its rights to control its own property. However, in the Tribunal's view, there is a similar consideration at play in cases where an application is made to appoint a statutory manager of property that is already subject to the Right to Manage. One of the purposes of the introduction of the Right to Manage in the 2002 Act was to give residential lessees an opportunity to control the management of blocks of flats without the need to show 'fault' under Part 2 of the 1987 Act. Although it is clear enough from Schedule 7 to the 2002

Act that the right to appoint a statutory manager still applies where the Right to Manage has already been exercised, a tribunal will examine any application to do so with great care. It will only be in the clearest possible cases that the Tribunal will substitute rights of management granted by parliament with its own appointee under Part 2 of the 1987 Act. It is rare that a Tribunal appointment will be more "convenient" than management by an RTM company, let alone more "just" than management by a company where all the lessees are either members or have the statutory right to become members.

78. Allied to this is an assessment of the support for the two options in this instance. The views of the majority are never determinative since one may have an oppressive and unreasonable majority. However, the respective numerical support for and against the appointment is certainly a factor. In this instance, the applicants are the lessees of seven flats out of 28 in the block – approximately one quarter. The support for the respondent's position is not so clear cut, but the assumption must be that the directors have the support of at least a plurality of lessees. This assessment is therefore a minor (but not decisive) factor against making a management order.

79. In addition to this, the Tribunal is also conscious that the appointment of the respondent in this case was a relatively recent one. The appointment in November 2011 was made some 18 months before the s.22 Notice on 2 May 2012. As the respondent pointed out, the Right to Manage is frequently if not usually exercised where there have been historic management problems. In management terms, a period of only 18 months is a relatively short one to overcome what is accepted were historic management problems with this block.

80. A third important factor is the Tribunal's assessment of the seriousness and circumstances of the breaches established under s.24(2)(a). Here, the breach of the covenant relating to lighting of the common parts is a relatively minor one, which is capable of cheap and easy resolution. It is far from the kind of issue that would in itself justify the appointment of as manager. As far as the breach of

repairing covenant is concerned, much of this is historic. There is clear evidence that the respondent has commissioned independent professional advice from a competent building surveyor (Mr Smith) and drawn up a proper programme of cyclical maintenance. The works are apparently in hand, subject to raising the money through the service charges. This is not a case where the management has wholly ignored the need for maintenance and repairs since its appointment in November 2011. The circumstances and seriousness of the two breaches that have been established do not in themselves suggest that it would be "just and convenient" to appoint a manager.

81. It is also a significant factor that a reputable managing agent is now in place and that the applicants consider Messrs Pepper Fox to be "professional and highly competent". This is not a situation where there is any argument about the conduct of the existing managing agent. Plainly, the managing agent may change, but there is no need to make any appointment under the 1987 Act to improve standards of day-to-day management of the block.

82. In relation to the specific considerations raised by the applicants, the Tribunal finds as follows.

83. Frequent change of managing agent. The Tribunal accepts that the changes of managing agent are historic, since Messrs Pepper Fox have been in place for over 18 months. The Tribunal also accepts that responsibility for previous changes in agent is not entirely or indeed mainly the fault of the respondent. Plainly, disagreements between lessees about management have caused problem for previous agents: see the Ellman Henderson's letter of 27 April 2011. Whatever the intention behind the emails and correspondence, the Tribunal does find that the approach adopted by certain applicants contributed to the turnover of agents. Most strikingly, the contents and timing of the letter of 29 November 2010 from Mrs and Mrs Nottage to Classic Management was calculated to be discouraging to the agents. Moreover, the sheer volume of emails, petitions and votes, 'focus group' meetings, votes of no confidence and the like will have

contributed to the atmosphere specifically cited by Messrs Ellman Henderson when they resigned as managing agents.

84. RTM not responsive to agent. The Tribunal found no evidence to support the argument made by the applicants. It appears that the gist of the complaint is that the respondent has brought in a building surveyor, Mr David Smith, to supervise the programmed maintenance. That cannot in any way undermine the position of the managing agent. Mr Smith has specialist skills to bring to bear on the maintenance of the building, and any competent managing agent will not be disturbed by this in the least.

85. RTM membership. This is an issue of company law. It is not a matter for this Tribunal or relevant to the exercise of its discretion. In any event, it appears that some at least of the four applicants referred to above who were originally not accepted as members have now been accepted as members of the respondent.

86. Lack of response to lessees. It is clear from the hearing and from the papers provided that there is a great deal of hostility between groups of lessees in the block. On the one hand, there is evidence that the respondent and its directors have responded to perceived provocation by refusing to engage in discussions with the focus group: see the emails referred to by the applicants above. On the other hand, the Tribunal has already noted that some of the applicants have behaved unreasonably in the nature and volume of complaints about services. On balance, and as a result of the findings in relation to s.24(2) above, the Tribunal finds that the respondent has not acted unreasonably. Ultimately, the Tribunal has found that the number of breaches of covenant by the applicants is fairly limited. The respondent has not therefore ignored well-founded complaints, because the complaints largely involved matters which did not amount to breaches of obligations by the respondent.

87. Vote of no confidence. The Tribunal does not consider that this adds anything to the application at all, other than to contribute to the general atmosphere of hostility referred to above.

88. Repairs and maintenance. The Tribunal has already commented on the repairs and maintenance above. It is satisfied that there is a programme in place to carry out programmed maintenance to the block.

89. Breach of trust. There is no real evidence to support the argument that certain directors have waived their own arrears of service charge in breach of trust. If there had been evidence to support the argument, the Tribunal considers that (contrary to the suggestion made by the respondent) it would have been a consideration material to whether it was just and convenient to appoint a manager. However, as stated above, there no evidence of impropriety by any of the directors, and insufficient information to say whether s.97(5) of the Commonhold and Leasehold Reform Act 2002 applies. The Tribunal also notes that Messrs Pepper Fox appear to accept the explanation given: see letter dated 31 May 2012.

90. In short, the Tribunal is satisfied that it is not just and convenient to appoint a statutory manager under s.24 of the Act.

THE PROPOSED MANAGER

91. Although the above conclusions mean that it is strictly speaking unnecessary to consider the merits of appointing the applicants' nominee and the terms of appointment, the Tribunal will consider these two matters in case the matter goes further.

92. Briefly, the Tribunal would appoint Mr Carter as manager. Although in many ways Pepper Fox are much better placed to manage the block than Mr Carter, and Mr Carter has not held an appointment under the 1987 Act before, he demonstrated a sufficient understanding of the relevant obligations to be appointed.

93. Of more significance is a complete lack of any proposed terms of appointment. The Tribunal was not presented with any proposed terms, other than Mr Carter's fee schedule. The Tribunal would not make any appointment without the applicants preparing detailed terms of appointment.

SECTION 20C

94. The applicants argued that legal costs in connection with the proceedings before the Tribunal were relevant costs to be taken into account in determining the amount of service charges payable by the lessees of Shanklin Court. Although the applicant did not produce details of those costs, they include the fees of DAC Beechcroft solicitors and counsel. The respondent applied for an order under LTA 1985 s.20C.

95. The previous LVT determined that there was no contractual right under the lease for the landlord to recover legal costs by way of service charges. This Tribunal repeats the reasoning of the other Tribunal in that respect.

96. However, the Tribunal will again give a brief determination on the s.20C point in case the matter proceeds further. The Tribunal considers that it would not be just and equitable to make an order under s.20C having regard to the guidance given by the Lands Tribunal in ***Church Commissioners v Derdabi*** [2010] UKUT 380. The applicants have failed in relation to their application. It was not unreasonable for the respondent to contest the application, given the significance of the issues. Moreover, it was not unreasonable for the respondent to use solicitors and counsel, given the wide ranging nature of the complaints and the insignificance of the issues.

CONCLUSIONS

97. The Tribunal determines that the respondent is in breach of obligations under s.24(2)(a)(i) of the Landlord and Tenant Act 1987. However, it is not "just and convenient" to make an order for the appointment of a manager under s.24(2)(a)(iii) of the Act.

98. If any costs in connection with proceedings before the Tribunal are recoverable as service charges, the Tribunal declines to make an order under s.20C of the Landlord and Tenant Act 1985.

MA Loveday BA(Hons) MCIArb
Chairman
19 December 2012