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MAN/00EQ/LSC/2011/0043

RE: VARIOUS PROPERTIES AT WYCHWOOD PARK, KENDAL WAY, CHORLTON, CREWE, CHESHIRE CW2 5SA

LANDLORD AND TENANT ACT 1985, SECTIONS 27(A) AND 20C.

Applicants:	Mr W Millward and others
Respondents:	Countryside Properties (UK) Limited Wychwood Park (Management) Limited Delves Keep Management Limited
Properties	Apartments 1 – 8 at Brackenwood Mews, Wychwood Park, Crewe, CW2 5SA
Date of applications	19 May 2011
Date of preliminary hearing	24 November 2011
Date of Final Hearing	15 May 2012
Present:	Mr W Millward, Mr D Davenport and Ms J Bell (representing the Applicants) Ms Dawn Reynolds (of Hill Hofstetter, solicitors, (representing Countryside Properties (UK) Ltd and Wychwood Park (Management) Limited Mrs Karen Kilcourse of Lamont Commercial Ltd Nantwich (Managing Agents)
Tribunal	Mr M Davey LL.B (Chairman) Mrs E Thornton-Firkin

Reasons for Decision

Introduction

1. Following applications to the Leasehold Valuation Tribunal ("the Tribunal") under sections 27A and 20C of the Landlord and Tenant Act 1985 ("the Act"), which were received on 19 May 2011, a preliminary hearing as to whether the applications raised matters within the Tribunal's jurisdiction was held at the Tribunal's hearing room in Manchester on 24 November 2011. The reasoned decision of the Tribunal on those jurisdictional matters was issued on 13 December

2011 (and is annexed to this decision). The Tribunal subsequently issued Directions for the full hearing of the remaining substantive matters within the Applications. Those Directions were amended on 1 February 2012. Following an exchange of written submissions between the parties, the hearing was held on 15 May 2012 at Crewe Magistrates' Court.

The Section 27A Application

2. The Application relates to service charge years from and including the year ending 31 December 2002 to the year ending 31 December 2011 in respect of the leases of flats at Brackenwood Mews, Wychwood Park, Kendall Way, Chorlton, Crewe, Cheshire CW2 5SA, held by the Applicants.

The hearing

3. At the oral hearing, Ms Dawn Reynolds, of Hill Hofstetter, Solicitors, represented the First and Second Respondents, viz; Countryside Properties (UK) Limited ("Countryside") and Wychwood Park (Management) Limited ("WPML"). Mr Millward, Mr Davenport and Ms Bell (who are residents on the development) represented the Applicants. Mr Davenport and Ms Bell are freeholders of their respective properties (and therefore are not parties as such) and Mr Millward, who is a party, is a leaseholder of 2 Brackenwood Mews and a Director and Company Secretary of Delves Keep Management Limited, which is the Management Company for Brackenwood Mews.

4. At the end of the oral hearing the matter was adjourned until 1 June 2012 when the Tribunal met to consider its decision in the light of further evidence submitted and commented on by the parties at the request of the Tribunal.

The Estate

5. The estate with which the application is concerned ("the Estate") is part of a development that began in 1999 when the land was purchased and developed by a company then known as Countryside Properties plc. The Estate consists of a residential development, in the form of several small hamlets, surrounding a hotel and golf course. There are amenity lands and roadways on the estate the use of which is shared by all owners on the Estate. ("the Amenity Areas").

6. In 2005, Countryside Properties plc was re-registered as Countryside Properties (UK) Limited ("Countryside"). In 2000 Wychwood Park (Management) Limited ("WPML") was created as a wholly owned subsidiary of Countryside to manage the Estate. The Amenity Areas, which are privately owned and include roads which have not been

adopted by the local authority, were, in all material respects, subsequently transferred to WPML on 2 February 2011. The responsibility for maintaining these areas falls on WPML but, as detailed below, the cost is ultimately borne by freehold house owners and flat purchasers of properties on the Estate together with the owner of the hotel/golf course.

The estate rentcharge and the Lease

7. Most residential properties on the Estate were sold freehold and on those sales a rentcharge ("the estate rentcharge") was imposed on each purchaser which obliged the owner for the time being to contribute, in accordance with a formula in the deed of purchase, to the maintenance costs of the Amenity Areas incurred by WPML. However, there are also two blocks of apartments on the estate known as The Manor and Brackenwood Mews respectively. The Applicants in the present case are the long leaseholders of apartments 1 to 8 in Brackenwood Mews ("the Block") the freehold of which is at present held by Sanda Corporate Projects Limited ("Sanda"), who acquired it by purchase in April 2011.

8. The relevant parties to the lease of each apartment ("the Lease") are (1) the lessee (2) "the owner" (Countryside) (3) the developer lessor (a subsidiary of Countryside) (4) Delves Keep Management Limited, ("Delves") which manages services relating to the Block (5) WPML.

   The Lease places the obligation to provide the Block Services to Brackenwood Mews on Delves and reserves a payment, described as a service charge, which is payable to Delves by the lessees to cover the cost of the services provided to the block by Delves. Part 1 of the Fifth Schedule of the Lease provides that one of the purposes for which the service charge is to be applied is "To pay all Rentcharges due in respect of the Block for maintenance of the Amenity Areas to the Estate Management Company" (paragraph 3.3). The Lease accordingly provides that the service charge payable to Delves includes a sum to reflect the lessee's proportion of the Annual Rentcharge Provision ("the Rentcharge Proportion"), as calculated in accordance with the Lease.

9. The Rentcharge Proportion is defined in Clause 1.1 of the lease and is effectively 1/380 of the Annual Rentcharge Provision being the amount expended by WPML on maintenance of the Amenity Areas. In practice the Applicants are charged 1/390. The same proportion is paid by all freeholders and lessees of the residential properties on the Estate.

The dispute and parties

10. At the preliminary hearing The Tribunal had ruled, with the agreement of the parties, that the named Respondents to the application should

be Countryside Properties (UK) Limited ("Countryside"), Wychwood Park (Management) Limited ("WPML") and Delves Keep Management Limited ("Delves") and the application was amended accordingly. The Tribunal also ruled that the Applications made by the freehold house owners on the development be rejected as being outside the jurisdiction of the Tribunal.

11. Following the Tribunal's preliminary ruling, the Application, as amended, disputed only the contributions which the Applicants are obliged to pay under the terms of their leases in respect of the Rentcharge Proportion payment which is paid by each of them direct to WPML. By contrast, the Applicants have no objection to payments which they make to Delves by way of service charge in respect of services specific to the Block.

The Applicants' case

12. At the heart of the dispute is the fact that the Estate includes, as noted above, not just freehold and leasehold residential properties but also a hotel and golf complex owned at present by De Vere Hotels. All owners on the Estate contribute, by way of the estate rentcharge, to the costs incurred by WPML in maintaining the Amenity Areas. At some time after purchasing their properties the Applicants discovered, they say for the first time, that De Vere contributes 10% of the total of those costs leaving the remaining 90% to be paid by the freehold and leasehold owners of the residential properties on the estate. The Applicants believe that this apportionment is "inflexible" because it has been applied across all heads of expenditure "regardless of their different characteristics." In other words, they say that although between them the owners pay 90% of the costs of the amenity areas the estate services provided do not benefit them to that extent. They also challenge the amounts of some charges on the basis that they were unreasonably incurred and/or unreasonable in amount.

13. The Applicants raised a number of other matters including:

(1) Protection of the sinking fund and the legitimacy of certain payments made from the fund. The Applicants ask in particular why the sinking fund was used in respect of road repairs in 2010. They also ask why the sinking fund is not "ring fenced" and why only £1000 interest has been earned in the last 6 years when significant sums have been placed on deposit. The Applicants say that they "believe that the sinking fund account is being raided to pay for general expenses during the financial year." They do not believe that the sinking fund should be used for the payment of general expenditure such as security, landscaping and administration each year.

(2) Whether the consultation requirements provided for by section 20 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") and The Service Charges (Consultation Requirements) (England)

Regulations 2003 had been satisfied in respect of a three year landscaping contract dated 1 January 2011 and a three year security contract dated 1 January 2012;

(3) Whether the appointment of the current managing agents by WPML should be reviewed and put to the residents for consultation.

(4) Whether consultation should have taken place in respect of road repairs. Furthermore, the Applicants submit that the invoice, dated 18 June 2010, of £61,730.83 from Keble Heath Construction in respect of road resurfacing related to damage caused by contractor's traffic when copmpleting the development before the handover to Countryside. Thus, they submit, the latter should have contributed to this cost. Indeed they say that such a contribution was promised but that promise has not been fulfilled.

(5) Whether litigation costs incurred in enforcing a restrictive covenant against a freeholder on the estate at Freshwater Drive were excessive and whether they should in any event be borne by residents through the rentcharge. An estimate of £65,000 in respect of these costs is included in the estate charge estimates for 2012. It is alleged by the Applicants that the action is, without any reference to residents, being brought by Countryside, whose costs are reimbursed by WPML through the estate charge funds.

(6) The applicants also dispute the use of the estate charge funds for WPML's legal costs in the current LVT proceedings.

The Respondents' case

<u>The rentcharge payment split between residents and De Vere</u>

14. The Respondents say that the 10% contribution to the estate rentcharge provision, which is made by De Vere, is designed to reflect the benefit the hotel/golf course owner receives from the estate services provided in respect of the Estate by WPML.

15. Its source lies in a Transfer dated 21 September 2001 ("The Transfer") between the developer and the buyer of the land on which the hotel and golf course were later built. The Transfer provides for the rentcharge proportion of the Annual Rentcharge Provision payable by the hotel owner to be 10%. The Respondents say that the fact that the hotel owner makes a contribution to the rentcharge costs was clear from the lease of each property as well as the Transfer. In respect of the Applicants' properties, Ms Reynolds referred to Part II of Schedule 6 of the Lease which sets out the Annual Rentcharge Provision and concludes that that Provision may be "reduced by such amount (if any) as [WPML] at the date of computation intends to draw from reserve during the Rent Charge year (*net of contributions anticipated to be receivable from the operators of the Golf Course and commercial*

areas.....)." (Emphasis supplied). The proportion of the Annual Rentcharge Provision payable by each lessee is 1/380 of the total. This is the same proportion as is borne by the freehold house owners on the estate. In practice as noted above residents are charged 1/390.

16. The Respondents say that, following the preliminary hearing, the Tribunal had ruled that it did not have power to alter the terms of the Transfer or the terms of the lease in so far as those documents provide for the respective proportions of the hotel owners and residents of properties on the estate to be 10% and 90% of the Annual Service Charge Provision. It follows therefore, say the Respondents, that any submission by the Applicants to the effect that the respective contributions towards the service charge costs should be varied by the Tribunal ought to be rejected.

The sinking fund matters

17. The Respondents state that clause 4.5.3 of the lease provides for the rentcharge funds to be held on trust for the lessees and other owners and contributors in the proportions of the payments received from each of them. WPML considers that it has complied with this covenant. The funds are paid into a bank account and any reserve funds at the end of the year are held in a separate account. This is currently the Liquidity Manager 30 Day Account which was opened on 17 February 2012. Before this date the funds were held in the Treasury Reserve Deposit Account ("the TDA") at Natwest Bank and linked to the current account. Both accounts are held on trust for the lessees and other rentcharge payers. WPML calculates that, based on a thirty year life cycle for most of the infrastructure it maintains, it is appropriate to make provision for a minimum of £53,000 plus VAT per annum into a sinking fund.

18. There have been two payments from the reserve fund relating to repairs undertaken to roads on the estate. A third payment was for the discharge of two invoices for CCTV upgrades and the installation of additional static bollards at the entrance of the estate. Two payments were withdrawn from the TDA and the other was made from monies in reserve held in the current account pending transfer to the TDA.

19. The first payment, of £14,881 including VAT, for road repairs was made to Keble Heath Construction. It was taken from reserves held by WPML at the end of 2008 before the balance of the reserves was transferred to the sinking fund account. The second payment in respect of remedial roadworks, which was made to the same company, was £61,780.83 including VAT. This was taken from monies intended for the sinking fund. WPML contends that the works were necessary, reasonably incurred and the amounts expended were reasonable.

20. The Respondents say that payment of £8,123 plus VAT for CCTV upgrades was necessary because of the outdated nature of the system equipment and the need to resite cameras. The static bollards were

installed, at a cost of £955 plus VAT, at the entrance of the estate in order to prevent drivers leaving the estate by using the grass verge to either side of the exit lane. This followed a security incident which had revealed the deficiency which this measure was designed to remedy.

21. The Respondents state that it is never possible to reconcile the "cash at bank" shown on the balance sheet of the service charge account with the sinking fund because of cash flow. They say that the cost heading of sinking fund is collected as part of the service charge and as such forms part of the working capital. Only at the end of the year is the sinking fund contribution paid into the Liquidity Manager Account.

<u>The three year landscaping contract dated 1 January 2011 and the three year security contract dated 1 January 2012.</u>

22. WPML admits that the consultation procedure in section 20 of the Commonhold and Leasehold Reform Act 2002 and The Service Charges (Consultation Requirements) (England) Regulations 2003 had not been satisfied in respect of a three year landscaping contract dated 1 January 2011 and a three year security contract dated 1 January 2012. It conceded that each contract was a qualifying long term agreement under section 20ZA of the 2002 Act.

23. Before 2011 the landscaping contract had run from year to year. In 2011 WPML carried out a tendering process and used the lower tenders submitted by two of the invitees to negotiate a lower price for the contract with the existing provider, ISS Facility Services Limited. The decision to enter into a three year contract was to keep the price fixed for three years and to permit the contractor to plan a maintenance programme that would run over that period and benefit the estate as a whole. The contract price was £55,000 plus VAT per year. It amounts to a charge of £152. 31 per tenant. The contract was confirmed by a letter dated 16 November 2010 from Lamont to the supplier.

24. Ms Reynolds explained that in the case of the security contract, until 2012, this had run from year to year or for a shorter period. In January 2012 a three year renewal of the contract at no increase in the cost was negotiated with the existing provider, Priority Tipek Services Ltd., for a sum of £183,923.35 plus VAT per annum. (This amounts to £509.33 per lessee per annum). A tender process in 2009 had shown Priority to be a provider whose charges were well within the market rates for the services provided and the Respondents had therefore considered the deal to provide good value to the residents. Furthermore, the matter had been discussed at the WPML quarterly meetings open to all residents and whose minutes are circulated to all.

25. The Second Respondent requested that, for the above reasons, it be granted dispensation, under section 20ZA of the Act, from compliance with the consultation requirements.

26. Furthermore, Ms Reynolds explained that the security contract had been terminated, by mutual agreement of the parties in 2012 and replaced by a 12 month contract which did not attract the consultation requirements in the 1985 Act. Thus the failure to comply in relation to the 3 year contract only affects the sums payable by tenants in respect of the period during which that contract was operative.

Legal costs

27. On behalf of the Second Respondent, Ms Reynolds submits that paragraphs 6 (a) and (b) of Part II of the Sixth Schedule to the Applicants' leases permits the costs of the Freshwater Drive proceedings and the current LVT proceedings respectively to be recovered through the service charge. The reference to Part II seems to be a clear typographical error and the reference was obviously intended to be to Part 1.

The Law

28. Section 27A(1) of the Act provides:

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

29. Section 27A(3) of the Act provides:

"An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to:-

(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which it would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable."

30. A "service charge" is defined in section 18(1) of the Act as:

"an amount payable by a tenant of a dwelling as part of or in addition to the rent:-

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
(b) the whole or part of which varies or may vary according to the relevant costs."

31. Section 19(1) of the Act provides that:

"Relevant costs shall be taken into account in determining the amount of a service charge payable for a period-

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

and the amount payable shall be limited accordingly."

32. "Relevant costs" are defined for these purposes by section 18(2) of the Act as "the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

33. Section 20C of the Act provides that a tenant may apply to a leasehold valuation tribunal for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a .... leasehold valuation tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

Discussion and determinations

<u>The apportionment of the rentcharge</u>

34. The first matter is the respective contributions to the rentcharge provision made by De Vere and the house and flat owners on the Estate respectively. At the preliminary hearing, the Tribunal was told that these contributions were fixed in legally binding agreements, including the Transfer. The Tribunal held that it could not interfere with such documents so as to alter the contribution made by the transferee. At the main hearing the only such document provided was the Transfer (to the hotel owner) of 21 September 2001. The Transfer, made between Countryside Properties plc as transferor and Initial Style Conferences Limited (owner of De Vere) as transferee, fixed that

contribution, once the hotel had been constructed, at 10% of the annual service charge provision.

35. The contribution of the lessees is fixed in their respective leases. It is a proportion of the Annual Rentcharge Provision, that proportion being defined in clause 1.1 of the Lease as 1/380. Part II of Schedule 6 of the Lease provides that the Annual Rentcharge Provision is the estate rentcharge costs incurred by WPML in providing the Estate management services listed in Part 1 of that Schedule but subject to the proviso that that Provision may be "reduced by such amount if any) as [WPML] at the date of computation intends to draw from reserve during the Rent Charge year (*net of contributions anticipated to be receivable from the operators of the Golf Course and commercial areas of the Estate*.....)." (Emphasis supplied).

36. The combined effect of these two documents is that because the contributions anticipated to be received from De Vere is limited, by the Transfer, to 10% of the Annual Rentcharge Provision, the residents must collectively pay the remaining 90%.

37. It follows that in so far as the Applicant seeks to (a) obtain a reconfiguration of the Transfer document and/or (b) a change in the lessees' 1/380 proportion, as specified in the lease, to some other basis of calculation, the Tribunal agrees with the Respondent that it does not have jurisdiction to make such alterations to the relevant agreements.

38. At both the preliminary hearing and the main hearing, the Applicants were concerned to stress that, until some time after signing their leases, they were not aware of the fact that the Hotel owner paid only 10% of the estate service costs. Indeed they say that they had been led to believe that a very different apportionment would be employed. By contrast, Ms Reynolds said that the true position should have been clear to the Applicants and other purchasers of properties on the Estate. She said that because the Transfer document was a public registered document and because the closing words of Part II of Schedule 6 to the lease (quoted above) indicate that the hotel/golf course operator was contributing to the rentcharge costs purchasers could have worked out the actual apportionment.

39. The Tribunal finds this to be a very tenuous argument. Residents might legitimately respond, as they do, that there is no express reference in the lease to the Transfer nor the amount provided for in that document by way of the hotel owner's 'contribution'. Thus it is difficult to see how the lessees could have been aware of that amount at the time they signed their leases unless they had made enquiries regarding the same.

40. Nevertheless, by the terms of their leases their 1/380 proportionate payment is a proportion of the total annual rentcharge costs less the

hotel's contribution and as noted above the Tribunal has no power to alter that contract, notwithstanding the assertion by the lessees that in reality some of the services paid for by WPML afford De Vere a disproportionate benefit having regard to their limited10% contribution.

41. However, the Application before the Tribunal does raise the payability and reasonableness of the charges made in respect of the Annual Rentcharge provision via the Applicants' leases. In its reasoned decision following the preliminary hearing, the Tribunal ruled that this was a matter within its jurisdiction for the reasons set out in that decision. In essence the Tribunal ruled that in so far as the rentcharge payments made by lessees were in respect of matters falling within the definition of a service charge contained in section 18 of the Landlord and Tenant Act 1985 they could be challenged by an application under section 27A of that Act, and for this purpose WPML is a landlord.

42. So the first question that the Tribunal is able to address, in so far as the overall estate charges are concerned, is whether it was reasonable for the hotel to incur the costs in question for the benefit of the Estate as a whole. Each of those costs can therefore now be examined.

Security

43. There is no dispute that it was reasonable to incur costs on security. But were those costs reasonable? The Applicants say that they were not, partly because they disproportionately benefited the hotel owner and partly because they had not been put out to tender since 2009. As explained above the first reason is not arguable because in essence it is asking the Tribunal to determine that the Applicants' contribution should be based on a share less than 90% of the annual rentcharge provision. However, the Tribunal does understand the basis of the tenant's concerns because the security arrangement do seem to benefit the hotel owner disproportionately when one has regard to the owner's contribution to the costs. Nevertheless, with regard to the second point the Applicants have not provided any evidence that the sums paid for security for the Estate were unreasonable or unreasonably incurred *per se*.

44. However, with regard to the three year security contract which was negotiated in October 2011 with the existing provider, the Second Respondent admits that the consultation procedure in section 20 of the Commonhold and Leasehold Reform Act 2002 and The Service Charges (Consultation Requirements) (England) Regulations 2003 had not been satisfied. It conceded that the contract was a qualifying long term agreement under section 20ZA of the 1985 Act. It follows that the amount recoverable from each of the Applicants in respect of this contract is limited to £100 per service charge year unless the Tribunal dispenses with the need to have complied with the consultation requirements.

45. The Second Respondent says that the Tribunal should so dispense because a tender process in 2009 had shown the contractor selected for the current contract to be a provider whose charges were well within the market rates for the services provided. The Respondent had therefore considered the deal to provide good value to the residents. Furthermore, the matter had been discussed at the WPML quarterly meetings open to all residents. The minutes of those meetings are circulated to all residents.

46. The Tribunal may dispense with the consultation requirements in whole or in part if satisfied that it is reasonable so to do. In the decision of the Court of Appeal in *Daejan Investments Ltd v Benson and* others [2011] EWCA Civ.38 Lord Justice Gross stated that "For my part, I readily accept Mr Dowding's submission, as far as it goes, that significant prejudice to the tenants is a consideration of first importance in exercising the dispensatory discretion under section 20ZA(1)." He went on to say that a proper consultation process is of the essence of this statutory scheme, devised as it is to protect the interests of tenants such as the Respondents." The Court held that curtailment of the consultation process in that case was a serious failing.

47. In the present case the Second Respondent, by its own admission, did not carry out a statutory consultation. The Tribunal considers that discussing the matter at quarterly WPML meetings was not an adequate extra statutory consultation. Not all residents attend these meetings and it is not clear whether lessees are invited. Furthermore the meetings simply appear to report decisions made by WPML. The Tribunal finds that depriving the lessees of the opportunity to nominate an alternative contractor detracted significantly from the purpose of the regulations and as such caused significant prejudice to the lessees.

48. At the hearing Ms Reynolds explained that the three year security contract negotiated in January 2012 had been mutually terminated by the parties and replaced in April 2012 by a 12 month contract, although no copy of such a contract was put in evidence. It follows therefore that in such circumstances the limit on charges recoverable from the lessees in respect of the three year contract would be limited to the short period in which that contract operated. That is to say any payment in respect of that period in excess of £100 would not be recoverable from the tenants. The Applicants, not surprisingly, expressed the view that this step was a device specifically designed to avoid the consequences of non-compliance by WPML with the consultation requirements in respect of the 3 year agreement. Indeed the minutes of the WPML Meeting of 3 April 2012 make it clear that this was the object of the change. Minute 4.2 records "The security contract has now reverted to a 12 month contract to accord with the Landlord and Tenant Act 1985."

49. Once again the Applicants ask the Tribunal to reconfigure the landscaping charges to reflect what they perceive to be a more

equitable distribution of the costs in the light of the benefits received by the residents and De Vere from the landscaping services. For the reasons given above the Tribunal is unable to make such an order. However, there is also the matter of the three year landscaping contract with ISS Facility Services Ltd. dated 1 January 2011. WPML admits that the consultation procedure in section 20 of the Commonhold and Leasehold Reform Act 2002 and The Service Charges (Consultation Requirements) (England) Regulations 2003 had not been satisfied in respect of that contract.

50. As noted above, before 2011 the landscaping contract had run from year to year. Ms Reynolds stated that in 2011 WPML carried out a tendering process and used the lower tenders submitted by two of the invitees to negotiate a lower price for the contract with the existing provider, ISS Facility Services Limited. She says that the decision to enter into a three year contract of £55,00 plus VAT per annum (being £152.31 per annum per lessee) was to keep the price fixed for three years and to permit the contractor to plan a maintenance programme that would run over that period and benefit the estate as a whole. To that end therefore she submitted that the lessees had not been prejudiced and invited the Tribunal to dispense with the obligation to comply with the consultation requirements.

51. As in the case of the three year security contract no consultation with the tenants had been carried out in whole or in part thereby depriving them of the opportunity to participate in the process. The Tribunal finds that this detracted significantly from the purpose of the regulations and as such caused significant prejudice to the lessees. Dispensation is therefore refused by the Tribunal. This means that the amount recoverable from each of the Applicants in respect of this contract is limited to £100 per service charge year.

The sinking fund and its operation by WPML

52. Paragraph 2 of Part II of Schedule 6 to the Lease provides that the Annual Rentcharge Provision shall include "An appropriate amount determined by the Estate Management Company as a reserve for or towards those of the matters mentioned or referred to in Part 1 of this Schedule as are likely to give rise to expenditure after [the] Rentcharge Year being matters which are likely to arise only once or at intervals of more than one year." WPML have estimated the amount required to be in the order of £53,000 per annum and have budgeted and made account transfers accordingly. By clause 4.5.3 the Estate Management Company covenants to hold the rentcharge fund(s) on trust for the lessees and other contributors (e.g. the freehold house owners).

53. The Applicants say in effect that such earmarked payments should be separated out from the rest of the rentcharge payments made by the Applicants and placed in a ring fenced account to be used only for costs that fall within the ambit of Paragraph 2 of Part II of Schedule 6 to

the Lease. The Respondents say that it does not work exactly like that. There is a separate reserve account but the reserve sums are only transferred at the end of the rentcharge year. In the meantime if reserve fund costs arise during any one year, payment is made either from the reserve fund or from the funds in the general working capital account which are held pending transfer from that account to the separate reserve fund. The Tribunal does not find that that practice contravenes the RICS Service Charge Code.

54. The Applicants also dispute some payments made out of the reserve fund as being inappropriate for payment from that fund. The Second Respondent disagrees and says that the payments made in 2008 and 2010 for the road repairs fell within the ambit of Paragraph 2 of Part II of Schedule 6 to the Lease as did the payments made in respect of the CCTV upgrade and the bollards at the entrance to the Estate.

55. The Tribunal agrees with the Respondents that the payments in question do fall within the ambit of Paragraph 2 of Part II of Schedule 6 to the Lease, being non-recurrent expenditure. The Tribunal appreciates that the Applicants believe the services in question to be primarily for the benefit of the hotel owner but is unable to do anything about that for the reasons given above as to the apportionment of liability for the rentcharge.

The contribution to the costs of the roadworks

56. The Applicants argued that statutory consultation should have taken place in respect of road repairs. The Tribunal does not agree, because the costs of the works in question did not result in any Lessee being required to pay more than £250 in any one accounting period. However, the Applicants also submitted that the invoice, dated 18 June 2010, of £61,730.83 from Keble Heath Construction in respect of road resurfacing related to damage caused by contractor's traffic when completing the development before the handover to Countryside. Thus, they submit, the latter should have contributed to this cost. Indeed they say that such a contribution was promised but that promise has not been fulfilled.

57. The Tribunal would have expected surface repairs to be necessary after 15 years. Thus it is surprising that they should have proved to be necessary sooner than the expiry of that time period. The parties disputed how much the need for the works had been caused by heavy vehicle construction traffic. Nevertheless the Tribunal believes that an element of the repairs must have been attributable to such traffic. The promised unspecified contribution by Countryside is some indication of an acceptance that this was the case. Taking a necessarily broad brush approach the Tribunal believes that it would be just and equitable to attribute 30% of the cost of resurfacing to that element. Thus the

contributions of the tenants should be limited to £99.71 in respect of those repairs.

Litigation costs and the costs in connection with the tribunal proceedings incurred by WPML.

58. WPML has embarked on litigation against a freehold owner on the estate for breach of a restrictive covenant as to user contained in their conveyance. It has added the legal costs incurred in those proceedings to the estate rentcharge payable by all rent charge payers. It has done the same with the legal costs of the current LVT proceedings. The Applicants dispute the recoverability of both sets of costs via the rentcharge. On behalf of the Second Respondent, Ms Reynolds submits that paragraph 6(a) of Part I of the Sixth Schedule of the Applicants' leases and paragraph 6(b) of the same permits the costs of the Freshwater Drive proceedings and the current LVT proceedings respectively to be recovered through the rentcharge.

59. Paragraph 6 provides that it shall be an estate management service for the Management Company to make provision for the payment of all costs and expenses incurred by the Estate Management Company :

(a) in the collection of the rentcharges payable in respect of the houses within the Estate and the enforcement of the covenants conditions and regulations imposed in connection with the use and enjoyment of the Estate and the Amenity Areas.

60. The Tribunal finds that the legal costs of enforcing a covenant in the deed of a purchaser clearly fall within the rentcharge. However, in so as the Applicants are concerned it will be open to them, when the litigation in question is ended, to challenge by way of application to the LVT whether the costs in question were reasonably incurred or reasonable in amount for the purposes of section 19 of the Landlord and Tenant Act 1985. Thus the present Tribunal makes no ruling on those matters because the litigation has not yet ended and no appropriate evidence would need to be adduced by the parties on that issue.

61. With regard to the costs of the LVT proceedings, the Respondent relies on Para 6 of Part 1 of Schedule 6 to the Lease which provides that it shall be an estate management service for the Management Company to make provision for the payment of all costs and expenses incurred by the Estate Management Company :

(b) in making such applications and representations and taking such action as the Estate Management Company shall reasonably think necessary in respect of any notice or order or proposal for a notice or order served under any statute regulation or bye-law on the lessee or

any transferee or lessees of any other of the houses and flats on the estate or on the Estate Management Company.

62. The Tribunal finds that the costs in question do not fall within Paragraph 6(b). They are therefore not recoverable from the Applicants under the terms of the Lease. It is well established that clear wording is required if such costs are to be recoverable under the Lease. Nowhere in paragraph 6 is there any specific mention of lawyers, LVT or court proceedings or legal costs. On the contrary it is concerned with the effects of service of statutory notices.

Other disputed matters

63. The Applicants queried whether WPML should have consulted on the appointment of Lamonts, who had been in situ for five years, as managing agents for WPML and whether they offered value for money. Lamonts were appointed under an agreement dated 12 February 2007. That agreement continued in force until it was replaced by a 12 month agreement on the same terms as the earlier agreement. Although the earlier agreement lasted in practice for almost four years the Tribunal finds that it does not fall foul of the consultation requirements in the 1985 Act. This is because, to be a qualifying long term agreement, the agreement must be entered in to for a term of more than 12 months (Section 20ZA(2)). In other words it must be an agreement that will definitely last for more than 12 months. Although the agreement of 12 February 2007 does not specify the period of the agreement, the definition clause in the agreement specifies the year to 31 December 2007 as being the accounting year referred to. Furthermore, by clause 7.1 the agreement was capable of being terminated from the outset by either party on three months' notice in writing. For these reasons, although it is not an easy point, the Tribunal finds that the agreement was not a QLTA. As to the level of charges the Tribunal did not consider, in the light of the management service provided, that the level should be reduced.

64. The Applicants also allege that provision is not made in the account for bad debts arising through non-payment of charges by residents. The Respondents state that this is because these debts are ultimately enforceable on sale of the relevant properties. The Tribunal does not consider that this is a matter on which it needs to make a determination.

The section 20C application

65. The Applicants seek an order under section 20C of the 1985 Act. Section 20C(1) provides that a tenant may apply to a leasehold valuation tribunal for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a .... leasehold valuation tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge

payable by the tenant or any other person or persons specified in the application. Section 20C(3) provides that the tribunal to which the application is made "may make such order on the application as it considers just and equitable in the circumstances."

66. In the present case the Tribunal has determined as a matter of construction of the Lease that the Respondents' costs in connection with the LVT proceedings are not recoverable from the Applicants via the estate rentcharge. Thus strictly the section 20C application could be said to be unnecessary. Nevertheless, notwithstanding its construction of the Lease, the Tribunal indicates below, for the sake of completeness, its decision on the section 20C application.

67. The Respondents submit that it would not be just and equitable for the Tribunal to make such an order. They say that WPML is an estate management company whose only income is derived from the receipt of rentcharges. The level of rentcharges paid by the tenants of Brackenwood Mews is fair and reasonable. The arguments made by the Applicants are largely outside the jurisdiction of the Tribunal. However, WPML has been put to the expense of having to represent itself before the Tribunal. If WPML is prevented from recovering the proportion of its legal costs under the rentcharge, it has no other way of financing the matter and logically the result would be insolvency which would not be in the interests of the residents.

68. The Applicants say that they have been driven to make the present application because of their inability to obtain redress of their grievances by negotiation. They also say that WPML is a wholly owned subsidiary of Countryside who should bear the costs.

69. Section 20C(3) gives the tribunal a discretion which is to be exercised by having regard to what is just and equitable in all the circumstances. This will include the conduct and circumstances of all parties as well as the outcome of the proceedings in which they arise. In the present case it is quite true that the Applicants failed in their argument that the apportionment of rentcharge payments between De Vere on the one hand and the residential owners and lessees on the other hand should be altered by the Tribunal.

70. However, as indicated above, the matter was only litigated because of the opaque nature of the relevant parts of the Transfer and the Lease Indeed it would seem to be the case that it was only the bringing of Tribunal proceedings that induced the Respondents to produce a copy of the Transfer of 2001. Furthermore, the proceedings revealed a total failure by the Respondents to comply with the consultation requirements in the Landlord and Tenant Act 1985 in respect of two important qualifying long term agreements. The Respondents' 20ZA application for dispensation was rejected in both cases by the Tribunal. The relationship between the parties has clearly been acrimonious at times and the Respondents have been very reluctant to provide

information about service charge costs and relevant contracts for services to the applicants. Although the Respondent says that WPML is financed entirely by the rentcharges and that if it had to bear the costs of the proceedings it would become insolvent, this does not sit easily with references in emails from the Company's solicitors to retained 'profits' in WPML's funds.

71. Taking into account all relevant circumstances the Tribunal has decided that, even had the Lease permitted recovery of the Respondent's costs of the proceedings it would have made an order under section 20C to the effect that the costs incurred by the Respondents shall not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the applicant lessees.

Reimbursement of Tribunal Fees

72. For broadly the same reasons as given in respect of the section 20C application the Tribunal has decided to exercise its power under regulation 9 of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, and orders that the Respondents shall reimburse the Applicants the sum of £500 being the fees paid by them in respect of these proceedings.

M Davey
Chairman of the Tribunal