



## **Preliminary**

- 1 On 3<sup>rd</sup> February 2012 Michael Daniel Roberts ('the Applicant') applied to the Leasehold Valuation Tribunal ('the Application') for a determination under section 27A of the Act of the liability for and reasonableness of service charges in respect of Flat 318 The Atrium, Morledge Street, Leicester LE1 1ST ('the Property'). The Respondent was named as OM Property Management Limited, but subsequently amended to the Lessor, C. G. Three Limited ('the Respondent'). The Application sought a determination for the period 1<sup>st</sup> September 2010 to 31<sup>st</sup> December 2010, 1<sup>st</sup> January 2011 to 31<sup>st</sup> December 2011 and 1<sup>st</sup> January 2012 to 23<sup>rd</sup> April 2012, when the Right to Manage was acquired by a RTM Company. During the whole of this period The Atrium was managed by OM Property Management ('OM'), on behalf of the Respondent. The Application also requested that an order under section 20C of the Act be made to the effect that the Respondent's costs relating to the Application are not to be regarded as relevant costs in determining the amount of any service charge payable by the Applicant.
- 2 A Pre Trial Review was held on 2<sup>nd</sup> April 2012 and Directions issued on 2<sup>nd</sup> April 2012. The Tribunal subsequently directed that the period in respect of which it would make a determination would be limited to the period 1<sup>st</sup> September 2010 to 31<sup>st</sup> December 2011, as the accounts for 2012 will be prepared by the RTM Company and not the Respondent. Any disputed items for 2012 would therefore have to be the subject of a further application with the RTM Company and C. G. Three Limited both being named as Respondents.
- 3 Following the Pre Trial Review an application was made by both parties requesting the Tribunal to make an order for costs under paragraph 10 of Schedule 12 to the 2002 Act. The Applicant also requested an order reimbursing the fees paid in respect of the Application and the Hearing.

## **Inspection**

- 4 The Tribunal inspected the communal areas of The Atrium on 4<sup>th</sup> December 2012 in the presence of the Applicant, the Applicant's father, Mr A Roberts, Mr Andresen of OM and Ms Davenport of OM.
- 5 The Tribunal inspected the interior of the Property first, for the purposes of gaining an overview of the type of accommodation within The Atrium. It then inspected the common parts. Altogether there are 80 flats within The Atrium, which is a converted industrial building in the 'cultural quarter' of the city of Leicester. The flats are in three separate areas within the building known as 'Centre House', 'Kaycee House' and 'The State House' (situated in which is the Applicant's Property). There are eight entrances in total from Morledge Street and from Wimbledon Street. The main pedestrian entrance and the vehicular entrance are both in Morledge Street.
- 6 The following items were pointed out to the Tribunal during its inspection:

01. The empty light fittings in the communal areas. These are a type of tube light which are also fitted in the individual flats. The Tribunal was told that so many of the tubes were stolen for use in the flats that the tubes were removed, leaving the empty fittings, which have been disconnected. There are other communal lights.
02. The entrance system to The Atrium. There are both fobs and a keypad system.
03. The main entrance door from Morledge Street. This has now been fitted with a steel plate but it was demonstrated to the Tribunal that it was not secure before this modification.
04. The car park areas and the doors from the car park into the main building. This has now been made secure but the Tribunal was told that trespassers used to be able to climb the gate from the car park into the main building.
05. Lids now fitted to conduit trays which carried the earth wiring to the building. The Tribunal was told that the earth cabling was regularly stolen before the lids were fitted.
06. The electricity cupboards, now fitted with steel doors.
07. The fire alarm panel in the main entrance

#### **The relevant Lease provisions**

- 7 The Property is held under a Lease ('the Lease') dated 11<sup>th</sup> May 2005 and made between Blenheim Chambers (Leicester) Limited (1) and Tribeca Holdings Limited (2). The term is 125 years from 1<sup>st</sup> January 2004. The service charge proportions are:

- 2.94% of the Building Service Costs
- 2.05% of the Parking Bay Service Costs
- 1.54 of the Development Service Costs

- 8 In paragraph 28 of the Fourth Schedule the Lessee covenants to pay the Service Charge (calculated in accordance with the Sixth Schedule) in the following manner:

- a. The service charge estimate is to be paid by one equal yearly instalment on 1<sup>st</sup> January each year
- b. Any shortfall between the certified sum as provided for in paragraph 6 (c) of the Sixth Schedule is to be paid within 14 days of the demand
- c. Any excess provided for in paragraph 6 (e) (end of term provisions) shall be repaid within 14 days of the issue of the account

In paragraph 29 the Lessee is to pay to the Lessor a fair and reasonable proportion of the insurance premium for the building.

In Paragraph 2 of the Fifth Schedule the Lessor covenants to insure the building and in paragraph 4 it covenants

'to provide manage and operate such of the services (or procure the carrying out provision management and operation of the same) as shall be deemed necessary by the Lessor from time to time.'

There is a proviso (e) to the covenant in paragraph 4 as follows:

(e) The Lessor shall not be liable to the Lessee for any want of repair for which it is otherwise responsible or other breach of this covenant unless the Lessor shall have failed to carry out such work within a reasonable time after written notice of such want of repair shall have been given by the Lessee to the Lessor.'

- 9 The Sixth Schedule is reproduced in Appendix 1. Briefly, it sets out in paragraphs 1, 2 and 3 the services to be provided in respect of the building, the access ways and common parts and the parking bays. Paragraph 4 gives power for the Lessor to review and vary the heads of service and paragraph 5 obliges it to keep proper records. Paragraph 6 sets out the mechanism for providing the estimate prior to the commencement of the service charge year and the provision of the accounts and certificates at the end of each year so that any shortfall or surplus can be calculated.

#### **The relevant statutory provisions relating to the service charges**

- 10 Section 27A (1) of the Act provides that application may be made to a Leasehold Valuation Tribunal for a determination whether a service charge is payable and, if it is, as to the person by whom it is payable, the person to whom it is payable, the amount which is payable, the date by which it is payable and the manner in which it is payable. The subsection applies whether or not a payment has been made.

Section 18 of the Act defines a 'service charge' as an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly, for services repairs, maintenance, improvements, or insurance or the landlord's costs of management, and the whole or part of which varies or may vary according to the relevant costs.

Section 19 of the Act provides that relevant costs shall be taken into account in determining the 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 carrying out of works, only if the works are of a reasonable standard and in either case the amount payable is to be limited accordingly.

#### **The Hearing and the submissions of the parties**

- 11 Immediately after the Inspection a Hearing was held at Leicester Magistrates Court. The same persons attended this as attended the Inspection. Both Mr Roberts and his father made oral submissions, and Mr Andresen presented the case for the Respondent.

#### **The Applicant's opening submissions**

- 12 In accordance with the Directions of the Tribunal, the Applicant had identified the costs headings from the service charge accounts which he wished to challenge. These were listed in a document he termed his 'Scott Schedule', which effectively lists the totals for the various headings and their percentage

increases over the years 2009 to 2012. The Applicant did not specifically identify Management Charges within his Schedule, but Mr Andresen very fairly acknowledged that he 'took it as read' that the Management Charges were contested by the Applicant.

- 13 In his submissions, Mr Roberts makes reference to four management reports ('the Reports') issued to the leaseholders and tenants at The Atrium by OM. These reports identify many of the problems at The Atrium. The dates and authors of each of the Reports are:

01. 16<sup>th</sup> May 2010 – Sarah Davenport
02. An unknown date in 2010 – Sarah Davenport
03. 19<sup>th</sup> September 2011 – Mehtab Mughal
04. 3<sup>rd</sup> October 2011 – Mehtab Mughal

- 14 Mr Roberts considers that the level of the service charges during the period of the Application is unreasonable. In particular, high costs are associated with the period following the appointment of Estates Maintenance Services (Midlands) Limited.

- 15 Mr Roberts considers that the Respondent is in breach of its obligations under the 6<sup>th</sup> Schedule to the Lease as detailed in the paragraphs which follow. The details of the particular paragraphs of the Sixth Schedule to the Lease relied upon by the Applicant are highlighted in bold in Appendix 1. On 17<sup>th</sup> January 2011 he wrote to Ms Davenport complaining of the lack of security. Paragraphs 2 and 3 of the letter are as follows:

'Apart from insurance I know the building has not been secure (vandalism and theft vehicles and the gates appear to be always breaking down) my post is not secure and I have my mail delivered to my parents' home and finally the public areas are often dirty.

It strikes me that the main problem arises from the security, where outsiders have easy access to the building. I have therefore been paying for services I have not received. Which means that the management is in breach of the contract it has made with me.'

- 16 Access to the building should be secure in terms of the main entrances and car park gates.

Mr Roberts says that there was never any security in place whilst OM managed The Atrium. During this period the car park gates have been regularly forced open and abused, entrance doors have been forced and kicked in and the main entrance has been almost permanently open. The residents' post boxes have been ransacked twice. The Applicant has been the victim of identity fraud, he believes arising from the theft of his mail from The Atrium. The only other address he used was his parents' address in St Albans, and the police have traced the source of the fraud to Leicester. In addition, Mr Roberts has causes for concern about the security of his car. He states that he has also been given parking tickets when parking in his designated space, leading to threats of debt collectors.

- 17 The internal common parts should be kept clean, safe, secure and serviceable

As is detailed in the Reports the common parts have not been kept clean. Soon after any cleaning the development is filthy again. There are threats to safety caused by the possibly defective fire alarm and by the repeated thefts of earth cabling. The lifts were continually breaking down, which has caused particular distress to Mr Roberts, as his mother is in a wheelchair and has been unable to visit. The entry phone has been continually out of action which has caused great frustration for visitors, as they have to ring on mobile phones to obtain access, and obviously causes problems with deliveries.

18 The service media should be well maintained, safe, secure and in good working order

The theft of the earth cabling has caused a threat of electrocution to the residents. The system should have been made secure earlier by the covering of the trays upon which the cabling sits. There have also been problems with the plumbing at the building.

19 The surveillance and security systems should be in good working order

The CCTV has never worked properly. In June 2010 DC Walker wished to see footage in connection with an incident, but none was available. There was a report from Hunnington Ltd regarding the system in September 2010, but this was not acted upon.

20 The mains electricity should be sure and safe and the communal lighting should be in working order

As was pointed out at the Inspection, the fluorescent tube lighting is no longer in use. It is not known whether the fittings are live or not, but in any case they should be removed. The recessed bulbs do not work, as they regularly need replacing. Approximately £12,500 has been spent on lighting in 2010 and 2011(including £5000 on bulb replacements alone). The system has been downgraded and should be upgraded along with the CCTV.

21 The Management Company has responsibility for abating nuisance

The Reports detail many instances of nuisance in the communal areas, including tramps and vagrants sleeping there, human excrement and vomit in the lifts and communal areas, drug addicts using the building and on one instance a flat being used as a brothel. The Respondent has done nothing to abate these nuisances.

22 The fire alarms should be serviceable and in good working order

There are a number of reports identifying faults with the fire alarms, but work on them was discontinued in November 2010. The fire brigade have issued a statutory notice and there have been periods when the alarm was not working.

23 Having identified the above matters, the Applicant went on to explain that, when money was spent upon items within the development it did not represent good value for money. Often work was done to cure an immediate problem, when if attention had been given to securing the building in the first place, the problem would not have arisen. Examples of this are the large and continuing accounts for clearing up excrement and vomit, and replacing like for like door equipment,

when a completely new approach, perhaps involving a larger outlay at that point, would have saved a great deal of money in the long run.

- 24 The Applicant's submissions on the specific instance of this are set out under the heading the Scott Schedule items, commencing at paragraph 30 below.

### **The Respondent's opening submissions**

- 25 Mr Andresen commenced by pointing out that The Atrium was always a buy to let development, as is evidenced by the 'light' alienation restrictions in the Leases. The services provided were reasonable in the circumstances, given the problems at the development and the severe shortage of funds caused by leaseholder default in paying the service charges. In support of this Mr Andresen refers to the letter produced by Walton and Allen, the new management agents employed by the RTM Company, which disclose an arrears position at April 2012 of £147,000. The accounts for the year-end 2011 show service charge debtors of £76,196.45.
- 26 Against this background it should come as no surprise that funding major items of expenditure was a problem for the Respondent. Mr Andresen says that OM, as is evidenced by the Reports and other correspondence and newsletters disclosed in the Respondent's bundle, were aware of the problems and tried to start the major works to address them. In particular reference is made to the CCTV system and the door entry equipment.
- 27 The Application relates to the period after the Applicant purchased his property in September 2010 to the RTM handover on 24<sup>th</sup> April 2012. The Tribunal has ruled that the period 1<sup>st</sup> January 2012 to RTM handover is not part of the Application, as the new managers will provide the accounts for that period.
- 28 The Applicant says that he paid, through his solicitor on purchase, the sum of £450.50 towards the service charges for 2010. This would be an apportionment of the advance service charges paid by his vendor. At the end of 2010 there was a credit refund of £71.18, which was received by the Applicant, meaning that for 2010 he paid a total of £379.32.
- 29 For the service charge year 2011, the Applicant received a demand for £1,919.44 in accordance with the lease covenants. He also received a demand for an additional levy of £369.50. The final accounts for 2011 disclose that a small deficit arose against the advance payment, but the additional levy was repaid. The result was a total service charge of £1,930.60 for the year.

### **The Scott Schedule Items**

- 30 In accordance with the Tribunal's Directions the Applicant had provided a list of the service charge headings he wished to challenge. Also in accordance with the Directions (although these were not fully complied with as to the timescale laid down by the Tribunal), the Respondent provided two bundles containing its witness statements, its documentary evidence and all of the relevant invoices. The submissions of the parties in respect of the service charges within the

relevant headings are set out sequentially below, along with the Tribunal's findings.

### Insurance

- 31 The Applicant says that there was an increase in premiums from 2009 to 2010 of 69% and from 2010 to 2011 of a further 50%. The increases are caused by the claims history, which is a direct result of the poor security at The Atrium. This is the result of the Respondent's failures and they should be held to account for this. The Respondent relies upon the witness statement of Mr Charles Bettinson, who is employed as head of insurance at Estates and Management ('E and M') who act as agent for the Respondent with regard to insurance. Unfortunately Mr Bettinson was not able to attend the Hearing. In his statement Mr Bettinson says that the increase is not as large as the Applicant alleges, because the insurance renewal dates do not coincide with the accounts year- end dates. The insurance is actually placed by Locktons, who are FSA registered brokers.
- 32 Mr Bettinson provided a schedule of the insurance premiums, landlord and broker remuneration and a further schedule showing the claims history. The former is reproduced below:

Policy Period	Declared Value	Premium	Landlords remuneration	Broker remuneration	Average cost per unit
10/02/08 – 09/02/09	£8,762,460	£13,340.84	£4,315.51	£635.28	£166.76
10/02/09 – 09/02/10	£9,277,693	£14,125.29	£4,569.27	£672.63	£176.57
10/02/10 – 09/02/11	£9,277,693	£14,125.29	£3,867.87	£429.09	£176.57
10/02/11 – 09/02/12	£9,277,693	£21,271.70	£2,586.34	£1,503.26	£265.90
10/02/12 – 23/04/12	£9,760,133	£4,820.04	£590.36	£341.99	£60.25

- 33 With regard to the claims, Mr Bettinson's schedule shows a total of £64,980 paid out during the periods of insurance shown above. The schedule also discloses that the majority of the claims are in respect of escape of water, rather than the thefts and malicious damage referred to by the Applicant. However, by far the largest of these, occurring on 5<sup>th</sup> May 2010, is for £24,782.53. Mr Roberts referred the Tribunal to a letter from OM enclosing the 2012 statement of anticipated expenditure, believed to be from Mr Mughal dated 5<sup>th</sup> December 2011, in which is stated:

"You will note the buildings insurance premiums have increased for this year compared to last year. This has been as result of the claims history of the scheme. One claim paid out by the insurers was in excess of £24,000 which related to the replacement of the earthing cables which were stolen from the car park. We also had a number of claims relating to the ingress of water across the scheme as well as the replacement of the letter boxes as a result of malicious damage'.

- 34 The Applicant considered that this must mean there was a mistake at E and M. He recalculated the various claims headings (applying the £24,782.53 to Theft) with the following result:



1. Theft:	£27,449.78
2. Escape of water:	£8,313.28
3. Malicious Damage:	£6,581.00
4. Accidental damage:	£620.00

- 35 Mr Andresen disputed the above. There were a number of different instances of the cabling being stolen. A burst boiler could cause damage to a number of flats, resulting in the large water claim. Unfortunately Mr Bettinson was not present to clarify this point.
- 36 Mr Roberts said that in any case the thefts of the cabling and the malicious damage arose because of poor security, causing increases in the premiums and multiple excess charges.
- 37 On the question of landlord's remuneration, Mr Bettinson said in his statement that he was told that the matter was not raised by the Applicant, but was raised by the Tribunal at the PTR. He objected to any sum being determined in the absence of a positive case by the Applicant (and with the benefit of disclosure of the sums received).
- 38 The remuneration schedule was disclosed to the Applicant on 1<sup>st</sup> August 2012 following the Directions of the Tribunal. Mr Bettinson said that the amount received was in line with the market range for such services and is not unreasonable or excessive. E and M and Locktons between them handle all of the matters relating to insurance except four items: liability claims, building claims over £100,000, subsidence claims and the issuing of the settlement cheques.
- 39 The Applicant, in his statement of case, said he was concerned about the large amount of landlord remuneration, which totals £11,613.84 from 2009 to April 2012. This is money which is paid from residents without their knowledge.
- 40 Mr Bettinson referred to the principles in *Forcelux v Sweetman* [2001] EGLR 173. He believed the premium had been reasonably incurred in accordance with the terms of the lease, the market was tested regularly (triennially) and the costs are not excessive. He also referred to *Havenbridge v Boston Dyers Ltd* [1994] 49 EG 11 which opines that the premium does not have to be the cheapest. Reference was also made to *Williams v Southwark BC* [2000] LGR 646 which establishes that a payment for services is acceptable in return for such services and is not the same as 'commission'. Two London LVT cases were also mentioned as establishing that 25% is not unreasonable. Although the statement referred to these cases and *Williams* as being exhibited, they are not in fact present in the bundle.
- 41 Mr Roberts said that he objected to the premise that he was not concerned about insurance in general or the landlord remuneration. The Application mentioned the service charges in general, which includes insurance. With regard to the landlord remuneration, until it was mentioned at the PTR, he had no idea that, in addition to the management charges, there was a sum being paid in this way. He objects to the amount as excessive, and requires a determination from the Tribunal as to the amount that would be reasonable, as he has no expertise in the matter.

- 42 Mr Andresen was questioned by the Tribunal as to the disclosure of these sums. Mr Andresen referred to note 5 in the Accounts, which is set out below. He said that a more transparent disclosure is now practised.

**5. Service and Product Suppliers**

Peverel Group and OM Property Management Limited occasionally have bulk buying/national supply agreements with certain suppliers to primarily provide competitive pricing for their customers. This may include insurance. Alongside these agreements there are some cases where the supplier may contribute to OM Property Management's administrative costs incurred in creating and maintaining the contract. Further information will be provided on request, where applicable.

**The Tribunal's Determination regarding the Insurance Premiums**

- 43 There are three items within the Insurance Heading which are to be determined by the Tribunal:

- a) Are the premiums actually charged within a band of reasonableness?
- b) Was the increase in the premium for the year 2011/12 caused by a failure by the Respondent to adequately secure the building and in which case should the increase or part of it be disallowed as not reasonably incurred?
- c) Is the Landlord remuneration/commission reasonable?

**44 a) The reasonableness of the gross premiums**

The Tribunal notes that Walton and Allen, on behalf of the RTM Company have arranged insurance from 24<sup>th</sup> April 2012 for an annual premium of £17,856. However, the Tribunal is satisfied that the gross premiums in respect of the insurance arranged by the Respondent, given the claims history, are within a band of reasonableness. The evidence of Mr Bettinson regarding the regular testing of the market is accepted. The policies are arranged by reputable registered brokers in the ordinary course of business and the Tribunal finds, following the guidance from *Forcelux* and *Havenbridge*, that the premiums in respect of the policies are reasonable.

**45 b) The increase in 2011**

Mr Roberts argued that the premiums had increased because of the poor claims history, particularly with regard to theft, and that the Respondent is responsible for this, because it has not provided adequate security for the building as is required under its covenants in the Lease. The Respondent says that the main cause of the increase was the remarketing, premiums in general having risen, and if any part of the increase is due to the claims history, the effect of the thefts is minimal, because the major claims related to water penetration.

- 46 Central to this is the issue of whether the £24,782.53 claim was in respect of water penetration as alleged by Mr Bettinson, or as a result of cabling thefts as alleged by Mr Roberts. It is a pity that Mr Bettinson was not available for cross-examination, because it is evident that either he is mistaken, or the property managers, Sarah Davenport and Mehtab Mughal are. Ms Davenport in her Report dated 16<sup>th</sup> May 2010 said:

'Over the past eighteen months we have had 5 different situations whereby the earth cabling which lies in the metal trays in the ceilings of the car parks have been cut and fully removed from the estate.....We have been fortunate in replacing the cabling via our insurance company however we do have an excess to pay on each claim which is attributed to the scheme as a whole. The costs of the repairs to date (covered by insurance) has run into tens of thousands of pounds, this simply cannot continue to increase as we run the risk of the insurers refusing to cover this risk in future years'.

Mehtab Mughal reported the claim as in respect of cabling in the letter of 5<sup>th</sup> December 2011 referred to in paragraph 33 above.

- 47 An examination of the Claims schedule exhibited with Mr Bettinson's statement reveals that there were 4 items listed as thefts prior to Ms Davenport's report of 16<sup>th</sup> May 2010. If the claim dated 5<sup>th</sup> May 2010 was in respect of the theft of cabling, this would make the fifth, and it might also account for the timing of the 16<sup>th</sup> May 2010 report, (which does, however, cover many other items as well as the cabling thefts).
- 48 The Respondent was aware of Mr Roberts' position with regard to the premium increase, as he had fully complied with the Tribunal's Directions. It would have been a simple matter for the Respondent to produce documentary evidence to establish precisely what the £24,782.53 claim was in respect of. In the absence of any such documentary evidence the Tribunal is obliged to decide, on the balance of probabilities, whether this claim was in respect of a cabling theft or ingress of water. The Tribunal finds, that it is intrinsically more likely that this large single claim was in respect of a cabling theft, rather than an ingress of water. The amount is improbably large for such a single claim, which was not mentioned in any of the Reports and for which no documentary evidence has been provided. The Tribunal's determination, therefore, is that it is in respect of a cabling theft.
- 49 The other four items listed as thefts on Mr Bettinson's schedule are as follows:

04/09/08	Theft	£8072.75
08/10/08	Theft	£5782.68
11/05/09	Theft	£990.00
15/11/09	Theft	£1001.25

The total of the above is £15,846.68. At the Hearing Ms Davenport disputed that the last two were in respect of cabling, but there is no doubt that they relate to theft of some sort. Added to the £24,782.53 Claim, the total of the thefts exceeds £40,000, and the Tribunal finds as a matter of judgement, that at least part of the large premium increase at February 2011 must have related to the claims history, and that had there been improved security at an earlier date, at least some of the thefts would not have occurred. The Tribunal agrees with the Applicant that it is reasonable to ask why measures were not taken earlier to protect the cabling from theft, and more importantly, to improve overall security to the building. The Tribunal notes that in the Report dated 16<sup>th</sup> May 2010, Ms Davenport says that in order to alleviate the thefts from the trays OM had laid metal trays with anti vandal grease, effectively boxing in the cabling, making it difficult to remove. In the same Report she refers to restricting access to the meter cupboards as a further deterrent, (although this brought further problems of forced entry into the meter cupboards).

50 The Tribunal concludes that the failure by the Respondent to enhance the security at The Atrium to prevent or reduce access to wrongdoers, and the delay in carrying out the modifications to the earthing cable trays, amounts to a prima facie breach by the Respondent of its covenant in paragraph 4 of the Fourth Schedule to the Lease to provide services. However, as the Applicant did not become a leaseholder until September 2010, and in any case did not make written complaint as required by paragraph 4 (e) of the Fifth Schedule to the Lease until 17<sup>th</sup> January 2011, there is no basis for an assessment of damages in respect of such breach which might have been set off against the claim for the service charges concerned, in this case the insurance premium paid on 9<sup>th</sup> February 2011. Accordingly the Tribunal determines that there is no adjustment to the insurance premium for the insurance year commencing 9<sup>th</sup> February 2011.

51 **Landlord remuneration/commission**

The suggestion by Mr Bettinson that the issue has not been positively challenged by the Applicant is clearly incorrect, although the Tribunal fully agrees with the principle that it should not determine issues which have not been raised by the parties. However, the Tribunal directed that the amount of any landlord remuneration be disclosed, so that the Applicant could challenge it if he wished. He clearly did wish to challenge the amount and accordingly the Tribunal intends to make a determination.

52 Tribunal accepts the principles laid down in the cases put forward by Mr Bettinson in his statement. In particular, it accepts that *Williams* is authority for the proposition that services carried out by the landlord or its agent, which the insurer might normally carry out itself, are not necessarily 'commission'. Any commission received by the Respondent as pure profit without the provision of any services in return, would be disallowed because of the operation of section 42 of the Landlord and Tenant Act 1987.

53 However, the Tribunal disapproves of the lack of transparency in respect of the sums the Respondent received. The note on the 2010 accounts does not provide adequate notification that a considerable sum may be being paid to the Landlord or its agents in addition to the management fees.

54 The Tribunal further notes that there is no explanation as to how the payments made in each of the years listed in the Schedule reproduced in paragraph 32 above are calculated. There are clearly different percentages paid to the Brokers and E and M in different years. The Tribunal calculates that the rates (adding Landlord and Broker together) are as follows:

Policy Period	Premium	Landlords remuneration	Broker remuneration	Percentage
10/02/08 – 09/02/09	£13,340.84	£4,315.51	£635.28	37%
10/02/09 – 09/02/10	£14,125.29	£4,569.27	£672.63	37%
10/02/10 – 09/02/11	£14,125.29	£3,867.87	£429.09	30.4%
10/02/11 – 09/02/12	£21,271.70	£2,586.34	£1,503.26	19.22%

10/02/12 23/04/12	–	£4,820.04	£590.36	£341.99	19.33%
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- 55 The Tribunal is, of course bound by the decision in *Williams*. However, as other Tribunals have done, it does not consider that it is prevented from determining what a reasonable rate of remuneration is for the services carried out by E and M and the Locktons. The Tribunal considers that the percentages set out above are, in respect of the first three periods, considerably in excess of the actual cost of the work. For the two later periods, the Tribunal considers that a rate of just over 19% is on the high side, but is nevertheless still within a band of reasonableness, and therefore do not intend to adjust the percentage in respect of the period 10<sup>th</sup> February 2011 to 31<sup>st</sup> December 2011. In respect of the period 1<sup>st</sup> September 2010 to 9<sup>th</sup> February 2011 the Tribunal finds that a proper fee for the work done by the broker and E and M is 19% of the gross premium. Accordingly, the Tribunal determines that for this period there shall be repaid to the Applicant all of the Applicant's share of the broker/landlord remuneration in excess of 19%.

#### Electricity

- 56 Mr Roberts was concerned about the widely fluctuating annual costs (from nearly £15,000 to £4,000. He would prefer to see a more constant figure, and required an explanation. Mr Andresen pointed out that the reason for the discrepancies is solely because some accounts are estimated and there is inevitable catching up when the meters are properly read.
- 57 The Tribunal accepts the Respondent's explanation. There is no challenge as to the level of the charges concerned and the Tribunal therefore finds them to be reasonably incurred.

#### Communal Area Cleaning

- 58 The Scott Schedule figures for 2010 and 2011 are £9,107 and £13,019 respectively. Until June 2010 the cleaning was carried out by Prestige Cleaning Contracts, and after that by Estate Maintenance Services ('EMS'). The monthly account by Prestige was £419.47 for inside and £78.66 for the car park and external areas, making a total of £498.13. EMS charged £851.88 for the monthly clean in 2010, with one additional intensive clean at £653.59. During 2011 EMS charged £933.32 monthly, but on top of this were ten extra visits to deal with instances of human faeces and vomit in the lifts and other communal areas. The total charges for these extra visits amount to £1,819.20.
- 59 Mr Roberts considers that the extra costs incurred by changing to EMS are not justified. There was no appreciable improvement in the quality of the general cleaning following the change. Mr Roberts details the circumstances relating to the ten extra visits during 2011, which are as follows:

01. In February human faeces had to be removed from the communal hallway and the carpet
02. In March human waste had to be removed from the stairwell on the 3<sup>rd</sup> floor and the same in the second floor riser cupboard
03. In May human excrement and vomit had to be removed from State House

04. In June more human excrement had to be removed from the stairs of Centre house
05. In July more human waste and vomit had to be removed from the hallway
06. Also in July stain blocker had to be used to remove graffiti
07. In August two visits to remove general rubbish and furniture and a pile of vomit in the hallway. Also human excrement which had been smeared on the handrails from reception to the first floor had to be cleaned up
08. In September more vomit was removed from the communal hallway and stairs
09. In November vomit and faeces had to be removed from outside the lift on the 4<sup>th</sup> floor.
10. Also in November the carpet inside the lifts smelt of urine and had to be spot cleaned.

- 60 The Respondent does not in any way deny that the incidents referred to above did not occur. However, it was also necessary that, when they did occur the cleaners were sent in. With regard to the change to EMS, Mr Andresen said that, because of the high level of arrears at The Atrium and the resultant delay in paying contractors, the Respondent sometimes had difficulty obtaining reliable contractors willing to perform the work. EMS were well known to OM and able and willing to do the work. Ms Davenport said at the Hearing that she recalled that Premier resigned their contract, as they were not big enough to cope with the conditions at The Atrium. Mr Andresen said that it is denied that EMS' charges are exorbitant. They are reasonably incurred.
- 61 On the question of the security at The Atrium, which the Applicant alleges is the cause of the extra cleaning, as well as other charges, Ms Davenport provided some background in her Statement. She was in fact the Property Manager until May 2011, when she handed over to Mr Mughal. Mr Mughal had in fact been involved with The Atrium before, when he worked for Butlins, who managed The Atrium before OM took over. Mr Mughal subsequently left OM and Ms Davenport took over the position of Property Manager once more.
- 62 Ms Davenport points out that there has always been a problem with arrears at The Atrium, so that during the period 2009 to 2011 there was a constant overdraft of between £15,000 and £20,000. Because some of the investing owners lived abroad, debt recovery was at times difficult. It is not true to say that OM were not concerned about security. This can be seen from the Reports and the other correspondence exhibited in the bundles. However, the lack of funding meant that planning major expenditure was difficult. OM had to use the funding they had to ensure that key services were maintained. It was always intended to carry out major improvement works but the funding position did not allow this.
- 63 Ms Davenport in her Statement disputes that outsiders breaking in caused all of the problems, although she admits that there was a problem with rough sleepers at times. However, damage to the doors was sometimes occasioned by sub-tenants not having had the security codes passed to them by letting agents. She very fairly says, however, that access to The Atrium was compromised. This is why, in 2010, she planned various improvements outlined in her newsletter of August 2010. A number of contractors were approached and firm quotations obtained from Fortress Security Systems Limited for CCTV

and door strengthening on 6<sup>th</sup> December 2010. The quotation in respect of the doors involved strengthening 7 doors by fitting zinc coated metal coverings to both sides of each door and a 'London Bar'. This would have the effect of preventing kicking or crowbar type forced entry. The amount of the quotation was for £2246.78 plus VAT. A further option was the fitting of Maglocks to all doors for a further cost of £2415.45 plus VAT.

### **The Tribunal's determination with regard to the Communal Cleaning**

64 The Tribunal accepts that OM through its two Property Managers during the period of the Application were aware of the grave security issues at The Atrium and had positive plans to make improvements when funds allowed. OM were clearly in a difficult position because of this. However, the Tribunal accepts in principal Mr Robert's assertions that at least part of the problems at The Atrium arose from inadequate security. The Tribunal agrees that the catalogue of events during 2011 listed above represents an intolerable situation for the residents at The Atrium. As Mr Roberts pointed out in his opening remarks, the Respondent is in breach of a number of its covenants in respect of The Atrium, and it is not sufficient for the management agents to say that the reason that essential security improvements were not carried out is because of leaseholder arrears. The Respondent's covenants with the Applicant are not made conditionally upon the payment by other leaseholders of their service charges. The Respondent had the obligation to carry the necessary works out expeditiously, and was entitled to a re-imbusement of the costs of so doing through the service charge. Any major works relating to security requiring consultation under section 20 of the Act could have and, in the opinion of the Tribunal, should have been the subject of an application for dispensation under section 20ZA of the Act, as there was clearly an emergency. However, if the options within the door security quotation from Fortress had both been acted upon, the cost per leaseholder would only have been £75 and were thus well under the consultation threshold of £250 per leaseholder. It is true, however, that the proposals eventually put forward by Mr Mughal involved a levy of £300 per leaseholder, and involved the replacement of the wooden doors with steel door, as opposed to cladding.

65 It was, of course, entirely necessary that the mess resulting from the instances recorded in paragraph 59 above were dealt with. There is no challenge by the Applicant as to their amount and accordingly the Tribunal finds that the charges are all reasonably incurred. However, the Tribunal agrees with Mr Roberts that, had the security been improved earlier, or at the latest immediately upon receipt of the Fortress quotation, on the balance of probabilities, much of the damage would not have occurred. The Tribunal concludes that the failure by the Respondent to implement the works the subject of the Fortress quotation in a timely manner amounts to a breach by the Respondent of its covenants to provide services. The Tribunal determines that the letter written by the Applicant on 17<sup>th</sup> January 2011 is sufficient notice of such breach for the purposes of paragraph 4 (e) of the Lease. Accordingly, following the decision of the Lands Tribunal in *Continental Property Ventures v White* [2007] L.&T.R., as the Tribunal's jurisdiction under section 27A of the Act has been invoked, the Tribunal also has the jurisdiction to determine damages in respect of the breach of covenant, which may be set off against the claim for the service charges concerned. Because this particular outcome had not been discussed at the Hearing the Tribunal notified the parties in writing of its intention to find, on the

basis of *Continental Property Ventures*, that damages as a sum equal to one half of the additional cleaning be allowed as a set off against the total charge in respect of the additional cleaning visits of £1819.20. The parties were given the period of 14 days within which to make written submissions on this point.

- 65.1 Both parties made written submissions. The Applicant's additional submissions in respect of the additional cleaning regrettably went further than that permitted by the Tribunal's invitation of submissions. The Applicant stated that he wished 'to extend my argument to show that (the Respondent's breaches) are historic' and wished to 'mount a defence of set-off with damages to my S27A application....supported by new and substantive evidence'. He also wished to make further submissions relating to his costs application and to the sums handed over to the RTM Company. The Tribunal is not prepared to consider any submissions other than those which it had authorised, because to do otherwise, after the formal closing of the Hearing, would amount to an abuse of process. The letter inviting submissions was couched in the following terms:

'The Tribunal considers that the ten additional visits by EMS in 2011 (page 186 Accounts Bundle) amounting to a total of £1819.20, whilst reasonably incurred in themselves, arise as a result of the Respondent's breach of covenant to provide services, in particular to those provisions of the Sixth Schedule to the Lease relating to security. *Continental Property Ventures* is authority for the proposition that the LVT has the jurisdiction to determine damages in respect of such breach as a set off against the Applicant's liability to pay the service charges.

The preliminary decision of the Tribunal is that a sum amounting to one half of the costs of the visits (£909.60) is set off against the total charge. The Tribunal considers that there is not sufficient evidence (as to the extent of any damages) in respect of any of the other cost headings for it to make a similar determination with regard to any other cost heading'.

The Tribunal is therefore only prepared to consider the parties' submissions to the extent that they relate to the following:

- a. Has there been a breach of covenant which would give rise to a finding of damages which can be set off against the service charge in respect of the additional cleaning visits?
  - b. Does the case of *Continental Property Ventures v White* provide authority for the Tribunal to make such a finding?
  - c. Is the Tribunal right in finding that there is insufficient evidence (as to the extent of any damages) to make a similar determination with regard to any other cost heading?
- 65.2 It is clear that the Applicant accepts (a) and (b) above. As to (c) the Tribunal assumes that the Applicant would prefer the Tribunal to have found otherwise. However, there is nothing in the additional submissions which relates to the question or assists the Tribunal in coming to a different view, and accordingly its initial findings are not modified as a result of the Applicant's further submissions.

- 65.3 The Respondent made the following submissions:
- a. The covenants in the lease relating to security are confined to systems and installations, are qualified, and subject to the landlord's discretion. In the Respondent's view the only covenants which could apply are



those in paragraphs 1.10, 2.9 and 2.10 of the Sixth Schedule. The Respondent was not in breach in any case because of lack of funds. Further or alternatively the Respondent was entitled to exercise a discretion that maintenance of any or all of the systems was not sufficiently necessary in the light of other considerations, including day to day funding. Further or alternatively, the actual covenant in Paragraph 4 of the Fifth Schedule also entitles the Lessor to discretion when considering which of the services to provide and in what circumstances. For these reasons the Tribunal should not be making a finding of a breach.

- b. There was insufficient evidence before the Tribunal to provide a direct causative link between the matters which resulted in the EMS attendances in question and a failure by the Respondent to comply with covenants relating to security. In particular some items include costs for the removal of graffiti and bulk items and that these were related to residents rather than intruders. The Respondent respectfully submits, on the quality of the evidence provided by the Applicant that it is impossible to conclude that damages should be set off, due to this lack of causal link and the other evidence.
- c. It is not appropriate to exercise the extended jurisdiction under *Continental Property Ventures* in this case. The Tribunal is reminded of the Land's Tribunal view as expressed in *Canary Riverside Pte v Schilling [LRX/65/2005]* that the Tribunal should exercise caution in dealing with its extended jurisdiction. Finally, the damages in *Continental Property Ventures* were in respect of the cost of repairs following a breach of the repairing covenant. Here, the damages proposed are in respect of cleaning costs and not directly linked to the alleged breach.

65.4 The Tribunal considered carefully the arguments put forward by the Respondent. Dealing with (a), the Tribunal does not agree that the Respondent is in any way excused from performance of its covenant due to a lack of service charge funds. The covenant in paragraph 4 of the Fifth Schedule is not qualified in this manner. It is true that the covenant is qualified by the words 'as shall be deemed necessary by the lessor from time to time'. However, the Tribunal does not consider that this qualification permits the Respondent to so neglect its basic repair covenants in paragraphs 1.1 and 2.1 of the Sixth Schedule (in which there is no discretion allowed to the Lessor), or the specific covenants highlighted by the Respondent so as to enable persons to gain entry on a regular basis to The Atrium and cause the appalling catalogue of events as evidenced by the majority of the invoices listed in paragraph 59. It would be a wholly unreasonable irrational and perverse exercise of any such discretion which allowed such a result. Accordingly the Tribunal dismisses the arguments put forward by the Respondent and finds that there is a breach of the covenants.

65.5 As to (b), the Tribunal acknowledges that it may be that not all of the ten invoices listed in paragraph 59 directly resulted from behaviour of persons who were unlawfully present. It agrees that the graffiti, for instance, may have been caused by someone lawfully present. However, on the balance of probabilities the Tribunal finds that at least 50% of the additional visits arose directly as a result of the Respondent's breach, and therefore finds that a sum equal to the value of 50% of the invoices are damages that may be set off against the service charge for those visits. As to the quality of the evidence, the Tribunal

considers it needs to look no further than the narrative on the invoices themselves to establish the causal link between the breach of covenant and the damages.

- 65.6 The Tribunal is mindful that it should approach the question of its extended jurisdiction derived from *Continental Property Ventures* with caution. In the particular case of the additional cleaning invoices the Tribunal is satisfied that there are specific costs which the Applicant and the other leaseholders have had to bear which are a direct consequence of a breach of covenant. However, although it might be said (and the Applicant, in terms, has said so) that the same breach of covenant has led to other avoidable costs under other cost headings, the Tribunal has not, upon an examination of those costs found a direct causal link between those costs and the breach, which would have enabled it to assess damages as a set off against the costs. An example of this is the door entry system (see paragraphs 77 – 80 following). One of the costs involved was for the repair of the intercom system. The Applicant explained how inconvenient it was that this was not repaired before October 2011. This would appear to be a failure to comply with the covenant in paragraph 2.12 in a timely manner, but no evidence was put forward as to the extent of any financial loss occasioned as a result of this, and the Tribunal is not prepared to infer any pecuniary figure in the absence of evidence.
- 65.7 The Tribunal has ruled that the Applicant's additional submissions relating to a claim based on 'historic neglect' (to include a claim in respect of periods before the Applicant became a leaseholder) will not be considered as they were not made within the appropriate period prior to the Hearing. However, even if they had been made at an appropriate stage of the proceedings, in view of the complexities of such a claim, including the difficult areas of land law which would be involved, the wording of the covenants, the evidential questions and the assessment of any damages, the Tribunal (applying the advice in *Canary Riverside Pte v Schilling*) would in any case have been mindful to adjourn the LVT proceedings to enable these matters to be addressed in the more appropriate formal environment of the Court.
- 66 With regard to the monthly charges, the Tribunal notes that there was a considerable increase after Prestige was replaced by EMS. However, given the size of The Atrium, the Tribunal does not find, in the absence of any evidence to the contrary that the sums charged are unreasonable, and accordingly finds that all of the regular cleaning charges for September 1<sup>st</sup> 2010 to 31<sup>st</sup> December 2011 are reasonably incurred (including for the avoidance of doubt) the one-off intensive clean by EMS on 1<sup>st</sup> June 2010.
- 67 In summary, the Tribunal's determination is that the communal cleaning for the period of the Application is reasonably incurred with the exception of the £909.60 set off in respect of the 2011 additional cleans.

#### Refuse Bins

- 68 As with the Communal Area Cleaning, Prestige used to carry out the cleaning of the refuse bin as part of their normal contract. Following the appointment of EMS, charges were made per visit. In 2010, from August to December there were five visits, totalling £881.25, for the removal of rubbish and furniture etc. In 2011 there were 15 visits, also mostly concerned with the removal of large items, but also including minor repairs. The total for 2011 was £3,192.

- 69 Mr Roberts considers that the charges are excessive, but also point to the continued abuse of the building exacerbated by the poor security. One of the visits, in September 2011 included the removal of two double mattresses from a meter cupboard where a tramp had been sleeping.
- 70 Ms Davenport was of the opinion that most of the dumping of large items of furniture etc emanated from within the building, occasioned when there was a change of occupant in a sub-let flat. There is no evidence that outsiders were bringing in items to dump. The charges levied by EMS were reasonable for the work they did.

#### **The Tribunal's determination in respect of the refuse bins**

- 71 The Tribunal agree with the Respondent that, on the balance of probabilities, the dumping of large items was predominately caused by residents from within The Atrium, rather than outsiders. There is no evidence (in the form of alternative quotations or otherwise) that the charges by EMS are not reasonable for the work involved, other than the perception that Prestige may have been cheaper. However, the evidence is that Prestige resigned their contract. Accordingly the Tribunal finds that all of the invoices in respect of both years under the Refuse Bin cost headings are reasonably incurred.

#### **The Fire Equipment Maintenance**

- 72 In 2010 there were two invoices from Coopers Lighting and Safety for a callout to the fire panel, and other miscellaneous faults. The total was £1,192.34. In 2011 the total was £4,820.81 consisting of the annual maintenance charge by Coopers (£936.24) one other invoice from Coopers, an invoice from Cirrus Communications, one from Hunnington Builders for investigating faults on the panel and four further invoices from EMS for varying amounts.
- 73 The Applicant is clearly concerned about whether the fire alarm is fully effective, and providing the safety and security required at the building. He said initially (in his written submissions) that he had no quibble with the Coopers invoices, but has now changed his mind, as the invoices relate to reports about the fire alarm system which were never acted upon and were thus wasted.
- 74 On 25<sup>th</sup> August 2011 a Fire Safety Order was made by the Leicestershire Fire and Rescue Service. This required work to be carried out which the Respondent says were complied with as fully as possible up to the RTM handover. The charges in respect of this work do not appear in the 2011 accounts, but appear in the RTM handover closing statement. Ms Davenport says that full co-operation is being given to the new managing agents with regard to this issue.
- 75 Ms Davenport says that the fire alarm system at The Atrium was difficult and complex, but was what was inherited. The principal issue with the system was that it showed up faults which caused the system not to work properly or in false alarms. The work to rectify the problem has involved individual access to each flat in order to fully service the system, correct the faults that were showing and also to investigate de-linking the flats from the system to reduce the number of false alarms.

### **The Tribunal's determination with regard to the Fire Equipment Maintenance**

- 76 It is clear to the Tribunal that there have been issues with the fire alarm system, and the Applicant has every reason to be concerned about this. However, the Tribunal does not accept that the work done by Coopers was wasted, as suggested by the Applicant, and there are no sustainable challenges to the other invoices within the period concerned. The Respondent has carried out reactive maintenance as required, and whilst it might be criticised for not doing more sooner, the Tribunal does not find that any of the invoices for the work that was done during the period in question were not reasonably incurred.

### **The Door Entry System**

- 77 In 2010 the total under this heading was £1,593.60 consisting of four invoices from Fortress Security Systems Ltd and one from EMS. The work included the installation of a new Keypad on the Wimbledon Street access and a new transom. In 2011 the total shown was £2,881.40 and consisted of three invoices from EMS and one from Fortress. The first three invoices all related to the main entrance door and the final invoice (for £2,266.20) was for a repair of the intercom system on 31<sup>st</sup> October 2011.
- 78 Mr Roberts said that the true costs are higher than shown, because some items have been placed under other headings, such as general repairs. Mr Roberts' challenge is not to the individual invoices but the policy of repairing a system that was not fit for purpose, rather than replacement, particularly with regard to the main entrance doors, which should have had steel maglocks fitted. A particular problem highlighted by Mr Roberts was the intercom system, which simply did not work until the repairs in October 2011. This made it very difficult for leaseholders being able to let visitors in and for deliveries. The front window used to be papered with delivery instructions because of this.
- 79 Ms Davenport said that OM did what it could to make the system serviceable. The question of the security upgrade quotations is dealt with elsewhere. In the mean time it had been necessary to install the keypad because people had lost the fobs, or did not hand them to sub-tenants. Reactive repairs to doors that had been kicked in had to be carried out.

### **The Tribunal's determination with regard to the Door Entry System**

- 80 Following an examination of the relevant invoices, and in the absence of any direct challenge by the Applicant in respect of any particular invoice, the Tribunal finds all of the costs under this Heading reasonably incurred for the period covered by the Application. The Tribunal notes Mr Roberts' contention that not all of the work would have been necessary if replacement of the door entry system had been considered as an alternative to repair. However, although it is clear that there has been a breach of the covenant contained in paragraph 1.12 of the Sixth Schedule to the Lease (relating to the intercom system), it does not consider there is sufficient evidence of direct pecuniary loss to establish a claim for damages in respect of this breach.

### **Gates/Barrier Maintenance**

- 81 For 2010 the total under this heading was £1,669.98, consisting of repairs to the vehicle gates and this issue of fobs (partially offset by payments by

leaseholders for replacement fobs). In 2011 the total was £3,569.46. In the main the total was made up of invoices from Fortress for repairs to the vehicle gates.

- 82 Mr Roberts again made no direct challenges in respect of any particular invoice. He repeated that the policy of repairs uses up funds when replacement would have been better.

### **The Tribunal's determination with regard to Gates/Barrier Maintenance**

- 83 Following an examination of the relevant invoices, and in the absence of any direct challenge by the Applicant in respect of any particular invoice, the Tribunal finds all of the costs under this Heading reasonably incurred for the period covered by the Application. The Tribunal does not consider there is sufficient evidence to establish Mr Roberts' contention that some or all of the work would not have been necessary if replacement of the vehicle gates had been considered earlier as an alternative to repair.

### **General Repairs and CCTV**

- 84 For 2010 the total was £27,477.42 and for 2011 £24,628.36. As would be expected, the repairs under this heading are in respect of a wide variety of matters. Mr Roberts made the point forcefully in his written submissions that many of the invoices under the heading General Repairs have been misallocated, and should properly be placed under one of the other headings. Once again Mr Roberts made no specific challenges to any individual invoices but commented that a lot of the work done arose from vandalism and the poor condition of the lighting system. Over £12,500 has been spent in 2010 and 2011 on the lighting system including £5,000 on bulb replacement alone. The removal of the fluorescent tubes pointed out at the Inspection has meant the lighting system has been downgraded. Much of the expenditure could and should have been avoided, if there had been sensible investment to establish the security of the building. Mr Roberts also questions the extensive use of EMS and suggests that there may have been a lack of competitive rigour in the limited choice of contractors employed by the Respondent.
- 84 On the question of CCTV, Mr Roberts points out that there is no CCTV that is working and never has been whilst he was resident. In April 2010 there was an invoice from Hunnington for £188 relating to a visit to meet police to view CCTV footage. The invoice states that there was no footage to view. There is a further invoice (listed under General Repairs) on 31<sup>st</sup> October 2010. This invoice reveals that Hunnington were called on site to review the CCTV footage only to find the hard drive was corrupted. This was repaired but the system still did not work as the cameras are in a state of disrepair and not focussed on anything. Mr Roberts says that CCTV could have helped to deal with the security issues at The Atrium, but the Respondent did nothing.
- 86 For the Respondent, Mr Andresen said that the repairs were what they are, general reactive repairs arising from the daily use of The Atrium. It is true that some items were in the nature of vandalism, but on the balance of probabilities the vast majority of incidents arose as a result of the actions of residents and their guests. In any case the carrying out of repairs is necessary for the normal life of people living in the building. The choice of contractors arises from OM's

experience in dealing with many sites in the general area. The contractors used have a track record of reliability and value.

- 87 With regard to CCTV, Mr Andresen said that both invoices are perfectly proper given the police request, and are therefore reasonably incurred. It is accepted that only reactive repairs have been undertaken. This is because of the lack of funding.

#### **The Tribunal's determination with regard to General Repairs and CCTV**

- 88 The Tribunal agrees with Mr Roberts that it was regrettable that some of the invoices included in the general repairs section should have been shown under different cost headings, and that this made Mr Roberts' task harder. However, whilst noting the general observations concerning the appointment of EMS and other regular contractors, the Tribunal does not find, in the absence of any evidence, that any of the invoices under the heading general repairs for 2010 and 2011 are not reasonably incurred.
- 89 With regard to the CCTV invoices, the Tribunal determine, on balance, that these were reasonably incurred, given that they arose as a result of Police requests.

#### **Management Charges**

- 90 In 2010 the total management fees for The Atrium were £18,654.30, and for 2011 they were £19,619.04, averaging £233.18 and £245.24 per unit respectively. However, the charges are differential depending on the size of the units, and in the Applicant's case the respective amounts are £287.20 and £302.13.
- 91.1 The Applicant suggests that it is OM who is responsible for the poor security at The Atrium, and that in performing its management functions there have been failures which have increased the service charge costs. Accordingly the management costs should be reduced. Most of the submissions and the evidence put forward by the Applicant are contained under the Scott Schedule headings above, and are not reproduced here.
- 91.2 The Applicant also considers that the Respondent has failed to disclose the contents of the Fire Brigade Notice to the residents and has not warned or advised the residents of the implications to their safety arising from it.
- 92.1 Mr Andresen says that OM has done a good job of management in difficult circumstances. The chronic lack of funding has meant that reactive repairs have had to be carried out rather than expensive modifications as suggested by Mr Roberts. However, the evidence shows, in the form of the Reports and the other communications with the Leaseholders that the property managers were aware of the problems at The Atrium and put in hand positive plans to solve them. Many of the leaseholders were happy with the service provided.
- 92.2 On the question of the Fire Brigade Notice, the Respondent states that full co-operation was given to the Fire Brigade in reducing the risks and exhibited a letter from OM's Health and Safety manager to the Fire Brigade and

confirmation that the Order was withdrawn against the Respondent on 27<sup>th</sup> April 2012.

### **The Tribunal's Determination with regard to the Management Charges**

- 93 The first consideration is whether, assuming the management had been carried out to a good standard, the amounts charged per unit are reasonable. The Tribunal finds that, using its knowledge and experience as an expert tribunal, the amounts are on the high side, but are nevertheless within a band of reasonableness given the complexities of managing a building of this size with the problems associated with high occupier turnover and city centre location. Accordingly the Tribunal does not consider that the 'headline' figures quoted above are in themselves unreasonable. In this regard the Tribunal notes that Walton and Allen are charging £21,600, an average of £270 per leaseholder.
- 94 However, the Tribunal finds that there have been deficiencies in the management of The Atrium which have impacted upon the Applicant and the other leaseholders and residents. It is not entirely the fault of OM that there were problems with unlawful entry into the property over a long period, and it is also true that many of the problems were identified and plans put in place to carry out the necessary works. However, the Tribunal do not consider that it is a legitimate reason not to provide services simply because of leaseholder default in paying service charges. One of the tasks of the management company is to collect outstanding service charges, and whilst there may have been particular problems at The Atrium because of the large number of buy to let landlords, some of whom may live abroad, the Tribunal does not consider that this issue is sufficient excuse for the delays in making the building reasonably secure. There is no explanation, for instance, other than a presumed lack of funds, as to why the Fortress estimates received in December 2010 were not acted upon immediately. The amounts involved were relatively modest, and this should have been a priority.
- 95 It was at this point that Ms Davenport handed over responsibility to Mr Mughal. Some progress was eventually made, but not until October 2011, after the residents had had to endure the appalling occurrences resulting in the ten extra cleaning visits. His Report dated 19<sup>th</sup> September 2011 identified a programme of work, including the replacement of the wooden doors with steel doors, and proposed a levy of an average of £300 to fund the work. The Applicant states that had such a programme, including the levy, been proposed much earlier, the leaseholders would have been happy to pay it to secure the building and protect their investment. The Tribunal finds, on the balance of probabilities, that this could well have been the case.
- 96 It is also clear that, despite the Reports and the other evidence of active involvement with the residents as a whole, there have been failures of communication between the Applicant and the Respondent, and the Tribunal accepts the Applicant's evidence in respect of this, and with regard to the dispute regarding the parking fine he incurred.
- 97 Although the Tribunal have not found that any of the actual invoices have not been reasonably incurred, the Tribunal agrees with the Applicant that there

appears to have been a lack of competitive rigour in the awarding of contracts. Certainly costs have increased significantly, and the evidence is abundant that the condition of the building declined rather than improved.

- 98 The Tribunal also notes that, whilst there does appear to have been active compliance with regard to the Fire Brigade Notice, there is no evidence that its contents or any advice was given to the Residents. The Tribunal therefore agrees with the Applicant that this amounts to a management failure.
- 99 Taking all of the above into consideration the Tribunal finds that the management fees are only reasonably incurred as to 75% of the total and determines therefore, that the fees charged to the Applicant in respect of 2010 are reduced to £215.40 and in respect of 2011 to £226.50. In making this determination the Tribunal took into account (so as to avoid double counting) the damages it has determined in respect of the breaches of covenant to be set off against the additional cleaning visits in 2011.

### **The Schedule 12 Costs Applications**

- 100 Mr Roberts has asked for a costs award of such amount as the Tribunal considers reasonable up to the maximum of £500, and has also indicated that he makes application under Regulation 9 Of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003 ('the Fees Regulations') for a return of the fees he has paid for the Application and the Hearing.
- 101 The circumstances in respect of which the Tribunal may make an order under paragraph 10 of Schedule 12 to the 2002 Act are (in the circumstances of this case) where the party concerned has, in the opinion of the Tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.
- 102 Under Regulation 9 of the Fees Regulations, the Tribunal 'may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings'.
- 103 The complaints of Mr Roberts fall into two categories. Firstly, he states that the Respondent has failed to comply with the Tribunal's Directions in accordance with the time limits provided, and that this has set back the resolution of the dispute, and that the information that was initially provided by the Respondent was incomplete and that he had to do a lot of checking of cost headings etc, which should have been the Respondent's responsibility. He also feels very strongly that the late submission of the Respondent's bundles, giving him only the weekend and the Monday before the Hearing to go through the two large bundles put him at a disadvantage and necessitated working throughout that weekend to try and prepare for the Hearing.
- 104 Secondly, Mr Roberts believes that Mr Andresen treated him in a bullying and abusive manner at the meeting which was held after the PTR to try and settle the dispute.
- 105 Mr Andresen says that the Applicant's case is wholly disproportionate to the overall service charge liability for the period in question. He refused to narrow the issues, complete the Scott Schedule or address how much of the costs he actually disputed. The Applicant is not entitled to treat costly litigation as a



fishing expedition, or as an academic exercise. Such an approach is both frivolous and unreasonable.

- 106 The Respondent made an offer of 26% of the amount of service charges paid in an attempt to settle the matter. The settlement process was abused in the correspondence following the settlement meeting. This is frivolous, vexatious and unreasonable, as well as abusive.

### **The Tribunal's Determination of the Costs Applications**

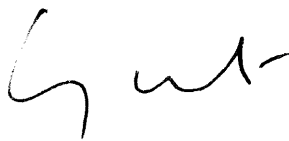
- 107 It is clear to the Tribunal that a great deal of personal animosity has arisen between Mr Roberts senior and junior and Mr Andresen and that each side believes that the other has acted in an improper manner with regard to the necessary contact between the parties to a dispute of this nature. It is a matter of regret that the personal animosity led to intemperate language, either at the meeting or in the email correspondence that followed. However, the Tribunal does not find that the conduct of either party amounts to conduct in respect of which it would award costs under paragraph 10 and accordingly dismisses the applications of both parties with regard to these personal allegations.
- 108 However, with regard to the compliance with the Tribunal's Directions, the Tribunal finds that the Respondent has not acted reasonably, particularly with regard to the delivery of the final bundles. The Applicant was put to unnecessary trouble as a result of the late delivery of the bundles. The Tribunal only received the bundles on the day of the Hearing itself. The Tribunal regards these failures of the Respondent as sufficiently serious to warrant an award of costs under paragraph 10, and considers that there should also be a partial reimbursement of the Tribunal fees.
- 109 The Tribunal orders that the Respondent pays the Applicants £250 by way of costs, and the Applicant is reimbursed one half of the Application and Hearing fees.

### **The Section 20C Application**

- 110 There are no circumstances in which the Respondent is likely to be in a position to recover its costs in connection with the Tribunal. However, in view of the fact that the Applicant has been successful in part, the Tribunal considers it just and equitable that the order be made and does so.
- 111 In making its determinations the Tribunal had regard to its inspection, the submissions of the parties, the relevant law and its knowledge and experience as an expert tribunal, but not any secret or special knowledge.

Dated **30 JAN 2013**

W.J Martin – Chairman



## Appendix 1

### THE SIXTH SCHEDULE

#### The Services

1

- 1.1** Repairing maintaining replacing renewing improving cleaning decorating (or otherwise treating) lighting draining and otherwise keeping in good and substantial repair
- a) the exterior and structure of the Building and in particular the roof foundations and structural and/or load-bearing walls thereof (including the service ducts)
  - b) the Internal Common Parts (including the windows)
  - c) such of the Service Media as may be enjoyed or used by the Building (excluding those within and exclusively serving any of the Flats and also excluding any serving the Building in common with any other building on the Development)
- 1.2 Valuing the Building from time to time for insurance purposes
- 1.3 Paying all rates taxes charges assessments and outgoings whatsoever (whether Parliamentary parochial local or of any other description) assessed charged imposed upon or payable in respect of the Building or any part thereof except in so far as the same are the responsibility of the Lessee or of any other lessee or exclusively payable in respect of any Flat
- 1.4** Paying the costs charges and expenses of abating a nuisance at or in respect of the Building and of executing all such works as may be necessary for ensuring that the Building complies with all legal requirements and complying with any notice served by a local authority or other competent body in connection with the Building or any part thereof or the Service Media exclusively serving the same insofar as the same is not the liability of or attributable to the fault of any individual lessee of any part of the Development or the responsibility of the Lessee or the lessee of any other flat or exclusively payable in respect of any Flat
- 1.5** Maintaining repairing renewing improving replacing and keeping in good and serviceable order and condition all appurtenances appointments fixtures and fittings bins receptacles tool appliances materials fire fighting equipment and other things and equipment which the Lessor may in its absolute discretion consider desirable or necessary for the security maintenance lighting upkeep or cleanliness of the Building
- 1.6** Heating and lighting the Internal Common Parts as deemed desirable or necessary by the Lessor in its absolute discretion

- 1.7 Maintaining repairing renewing improving replacing and keeping in good and serviceable order and condition and insuring such equipment as the Lessor in its absolute discretion considers desirable or necessary for carrying out or providing the services referred to in this paragraph 1 and any other services or amenities which the Lessor may in its absolute discretion consider desirable or necessary for the Building and providing such accommodation as the Lessor may in its absolute discretion consider desirable or necessary to house vehicles and equipment employed in providing the Services referred to in this paragraph 1
- 1.8 Procuring the supply of and paying for all electricity gas water telephone and other services required for providing any of the Services referred to in this paragraph 1
- 1.9 Employing such staff (including without prejudice to the generality of the foregoing security officials and supervisory staff) as the Lessor may in its absolute discretion consider desirable or necessary to enable it to carry out or maintain the Services referred to in this paragraph 1 or any of them and for the general conduct management and security of the Building
- 1.10 Maintaining repairing renewing improving and replacing and keeping in good and serviceable order and condition such surveillance and security systems apparatus and equipment as the Lessor may in its absolute discretion consider desirable or necessary for the security of the Building**
- 1.11 Maintaining repairing renewing improving replacing and keeping in good and serviceable order and condition all apparatus equipment plant and machinery serving the heating system and the electric lighting and appliances in the Internal Common Parts**
- 1.12 Procuring the maintenance repair renewal improvement replacement and the keeping in good and serviceable order and condition of an entry phone or entry video or other similar system or systems (if any) for the exclusive use of the owners and occupiers of the Building**
- 1.13 Erecting maintaining repairing renewing improving replacing and keeping in good and serviceable order and condition communal television and domestic radio aerials (if any) for the use of owners and occupiers of the Building
- 1.14 Charging and recovering from the Lessee the cost of enforcing or attempting to enforce against any lessee or occupier of any of the other Flats in the Building the observance of any covenant or agreement regulating that person's occupation the non-observance of which is or may be detrimental to the Lessor or the Lessor or to any other lessee or occupier of any other Flats insofar as the same is not recovered from that lessee or occupier
- 1.15 Calculating and setting aside annually such sum as the Lessor (whose decision shall be final) shall in its absolute discretion consider desirable to set aside (which setting aside shall be deemed to be an item of expenditure actually incurred) to provide a reserve fund for periodically recurring items of expenditure whether or not of a capital nature and whether recurring at regular or irregular intervals and to provide for anticipated expenditure in respect of any of the Services referred to in this paragraph 1

- 1.16 Keeping the said reserve fund in a separate account any interest on or income of the said fund (after deduction of any tax) being added to the fund which shall be held by the Lessor in trust for the Lessee and the lessees of the other Flats and shall only be applied in accordance with the terms of this Schedule
- 1.17 Preparing and supplying to the individual lessees copies of regulations made by the Lessor or its agents governing the use of the Building or any part or parts thereof
- 2
- 2.1 Repairing maintaining replacing renewing improving cleaning decorating (or otherwise treating) lighting draining and otherwise keeping in good and substantial repair**
- a) the Accessway
- b) **the External Common Parts**
- 2.2 Valuing the External Common Parts the Accessway from time to time for insurance purposes
- 2.3 Paying all rates taxes charges assessments and outgoings whatsoever (whether Parliamentary parochial local or of any other description) assessed charged imposed upon or payable in respect of the External Common Parts the Accessway**
- 2.4 Maintaining repairing renewing improving replacing and keeping in good and serviceable order and condition all appurtenances appointments fixtures and fittings bins receptacles tool appliances materials and fire fighting equipment and other things and equipment which the Lessor may in its absolute discretion consider desirable or necessary for the security maintenance lighting upkeep or cleanliness of the Development as a whole**
- 2.5 Providing lighting for such of the External Common Parts and the Accessway in its absolute discretion deems desirable or necessary**
- 2.6 Any other services or amenities which the Lessor may in its absolute discretion consider desirable or necessary for the Accessway and the External Common Parts
- 2.7 Procuring the supply of and paying for all electricity gas water telephone and other services required for providing any of the Services referred to in this paragraph 2
- 2.8 Employing such staff (including without prejudice to the generality of the foregoing security officials and supervisory staff) as the Lessor may in its absolute discretion consider desirable or necessary to enable it to carry out or maintain the Services referred to in this paragraph 2 or any of them and for

the general conduct management and security of the Development as a whole

- 2.9 Maintaining repairing renewing improving replacing and keeping in good and serviceable order and condition such measures as the Lessor may in its absolute discretion consider necessary or desirable for the control of vehicles entering and leaving the Development
- 2.10 Maintaining repairing renewing improving replacing and keeping in good and serviceable order and condition such surveillance and security systems apparatus and equipment as the Lessor may in its absolute discretion consider desirable or necessary for the security of the Development as a whole**
- 2.11 Maintaining repairing renewing improving replacing and keeping in good and serviceable order and condition all apparatus equipment plant and machinery serving the electric lighting and appliances in the External Common Parts the Accessway**
- 2.12 Procuring the maintenance repair renewal improvement replacement and the keeping in good and serviceable order and condition of an entry phone video or other similar system or systems (if any) for the use of the owners and occupiers of the Development as a whole**
- 2.13 Landscaping tending and keeping tidy and planting the External Common Parts as the Lessor may in its absolute discretion consider appropriate
- 2.14 Paying any special costs (other than original construction costs) which may be made or imposed by the local authority or any other competent body on the Development as a whole and which relate to or arise from the administration thereof and/or the provision of the Services
- 2.15 Collecting and disposing of refuse from the Bin Stores as often as the Lessor deems necessary
- 2.16 Calculating and setting aside annually such sum as the Lessor (whose decision shall be final) shall in its absolute discretion consider desirable to set aside (which setting aside shall be deemed to be an item of expenditure actually incurred) to provide a reserve fund for periodically recurring items of expenditure whether or not of a capital nature and whether recurring at regular or irregular intervals and to provide for anticipated expenditure in respect of any of the Services referred to in paragraph 2
- 2.17 Keeping the said reserve fund in a separate account any interest on or income of the said fund (after deduction of any tax) being added to the fund which shall be held by the Lessor in trust for the Lessee and the other lessees of the Development and shall only be applied in accordance with the terms of this Schedule
- 2.18 Preparing and supplying to the individual lessees copies of regulations made by the Lessor or the Lessor or its agents governing the use of the Development or any part or parts thereof

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3.1 Keeping the Parking Bays generally in good repair and maintaining and insuring the Parking Bays and any electronic entry or monitoring systems and such other equipment relating to the Parking Bays by way of contract or otherwise as the Lessor may at its sole discretion from time to time consider necessary or desirable

3.2 Paying all rates taxes charges assessments and outgoings whatsoever (whether Parliamentary parochial local or of any other description) assessed charged imposed upon or payable in respect of the Parking Bays or any part thereof

**3.3 Paying the costs charges expenses of abating a nuisance at or in respect of the Parking Bays and of executing all such works as may be necessary for complying with any notice service by a local authority or other competent body in connection with the Parking Bays or any part thereof insofar as the same is not the liability of or attributable to the fault of any individual lessee of any part of the Development**

3.4 Providing any other service relating to the Parking Bays which the Lessor (in its sole discretion) thinks necessary

4 The Lessor shall in its absolute discretion be at liberty at any time to review the heads of expenditure or charges set out in this Schedule and to vary the same or add thereto where reasonably necessary any items of expenditure charge depreciation or other allowance PROVIDED ALWAYS that any omission by the Lessor its managing agents or accountants to include in the Service Costs and/or Service Charges in any Financial Year a sum expended or a liability incurred in that Financial Year pursuant to the provisions of this Schedule shall not preclude the Lessor from including such sum or the amount of such liability in the Service Costs and/or Service Charge in any subsequent Financial Year

**5. Keeping proper records of all costs charges and expenses incurred in respect of the Service and of any accountant or firm of accountants employed to audit the Service Costs**

**6. Carrying out the following obligations in relation to the Service Charge**

a) At or prior to the commencement of each Financial Year the Lessor or its managing agents or accountants shall (with good faith to the Lessee) estimate the amount of the Service Costs and the Service Charge for that Financial Year (which estimate may be reviewed by the Lessor at any time during such period and the payment on account varied accordingly but which shall otherwise be final and binding) and a sum equal to the Service Charge so estimated (as varied if appropriate) shall be recovered from the Lessee by the Lessor in one yearly instalment in advance on the 1<sup>st</sup> January in each year on account thereof

- b) As soon as practicable after the end of each Financial Year the Lessor or its managing agents or accountants shall prepare an account of the Service Costs which shall contain a summary of the expenditure on and incidental to the matters set out in the Sixth Schedule and shall show how such monies have been applied and shall show how such monies have been allocated between the Building Service Costs the Development Service Costs and the Parking Bay Services Costs and shall certify the amount of the Service Charge which account and certificate shall be final and binding save in the case of manifest error
- c) If following the issue of the said account and certificate for any Financial Year the Service Charge for that Financial Year shall exceed the said estimated sum for that Financial Year then the difference between the certified sum and the estimated sum shall be demanded from the Lessee by the Lessor to be paid within fourteen days of demand
- d) If following the issue of the said account and certificate for any Financial Year the Service Charge for that Financial Year shall be less than the said estimated sum for that Financial Year then the difference between the certified sum and the estimated sum shall be credited by the Lessor against the next instalment of the Service Charge due from the Lessee
- e) **At the end of the Term (howsoever determined) if the said certified sum shall exceed that said estimated sum the amount of the excess shall be recovered from the Lessee within fourteen days after the issue of the said account and certificate and if the said estimated sum shall exceed the said certified sum the amount of the excess shall be paid by the Lessor to the Lessee without demand within the same period**

7. If it should at any time become necessary or equitable to do so the Lessor may recalculate on an equitable and reasonable basis the Service Charge percentages appropriate to all properties comprising the Building and the Development and will notify the lessees accordingly and in such case as from the date specified in the notice the new proportions notified to the Lessee in respect of the Property shall be substituted for those set out in clause 5 of the Particulars and the new percentages notified to the other lessees shall be substituted for those set out in the Particulars of their lease

8. The apportionment of Service Costs between the Building Service Costs the Parking Bay Service Costs and the Development Service Costs shall be determined by the Lessor whose decision shall be final and binding in making the apportionment and the Lessor shall insofar as it is readily ascertainable from the accounts maintained by the Lessor allocate the Service Costs between the Building Service Costs the Parking Bay Service Costs and the Development Service Costs in the proportion in which they are incurred

9. The Lessee shall be entitled within 30 days after the date of the said account and certificate for any Financial Year to inspect at a place specified by the Lessor the receipts and vouchers relating to the Service Costs