10385

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AS/LAM/2014/0008**
Property	:	**Flats 1-18 and 19-52 The Glen, Northwood, Middlesex HA6 2UP**
Applicants	:	**Ms Janet Clifford Flat 17** **Mr Neil Hargrave Flat 12** **Mr Joseph Roth Flat 25**
Representative	:	**Mr Neil Hargrave**
Respondent	:	**The Glen Residents' Association Limited**
Representative	:	**Mr J Kennedy** **J E Kennedy & Co, Solicitors**
Type of Application	:	**The appointment of a manager – section 24 Landlord and Tenant Act 1987**
Tribunal Members	:	**Judge John Hewitt Chairman** **Mr Stephen Mason BSc FRICS FCIArb** **Mr Clifford Piarroux JP CQSW**
Date and venue of hearing	:	**10 Alfred Place, London WC1E 7LR** **4 September 2014**
Date of Decision	:	**4 November 2014**

DECISION

Decisions of the Tribunal

1. The Tribunal determines that:

   1.1 The application made by the applicants pursuant to section 24 Landlord and Tenant Act 1987 (the Act) seeking an order that Mr Neil Douglas Kurz be appointed manager shall be and is hereby dismissed; and

   1.2 An order shall be made, and is hereby made, pursuant to section 20c Landlord and Tenant Act 1985 to the effect that none of the costs incurred or to be incurred by the respondent in connection with these proceedings shall be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by any of the applicants.

2. The reasons for my decision are set out below.

NB Later reference in this Decision to a number in square brackets ([ ]) is a reference to the page number of the hearing file provided to us for use at the hearing.

Procedural background

3. On or about 8 January 2014 the applicants served on the respondent a preliminary notice pursuant to section 22 of the Act [19].

4. The applicants subsequently made an application pursuant to section 24 of the Act [1]. The applicants sought the appointment of Mr Neil Douglas Kurz (Mr Kurz) as manager.

5. Directions were given on 27 March 2014 [31]. Those directions directed the determination of a preliminary issue, namely: "Is the preliminary notice compliant with section 22 of the Act and/or, if the preliminary notice is wanting, should the tribunal still make an order in exercise of its powers under section 24(7) of the Act?"

6. By a decision dated 20 May 2014 the preliminary notice was found to be a valid notice for the purposes of the Act [35]. Consequential directions for a substantive hearing were then given [46].

7. The application came on for hearing on 4 September 2014. The applicants were present and were accompanied by Mr Kurz. Mr Hargrave took the role of advocate. Several directors of the respondent were present, including Mr Reddyhoff, Ms McKenzie, Ms Montgomery and Mr Sare. The respondent was represented by Mr J Kennedy, assisted and supported by his son Mr C Kennedy both of whom are solicitors in the firm J E Kennedy & Co.

8. We were provided with a hearing file which runs to some 711 pages.

9. Both parties made opening and closing speeches/submissions. Part of the opening submissions dealt with housekeeping matters including the contents of the hearing file and the reasons why mediation did not take place.

10. Oral evidence was given by Mr Hargrave, Mr Reddyhoff, Ms McKenzie and Mr Sare.

Background

11. Some general background is set out in the decision on the preliminary issue – see paragraphs 14 – 19 [39 – 40]. That should be taken as read and is not repeated here.

12. Suffice to say that The Glen is an imposing development maintained to a high standard. Management is relatively straightforward. There are no internal common parts. Most of the focus is on insurance, maintenance of the extensive grounds, roadways and some drainage into the external system beneath the grounds and which in turn feeds into the public system.

13. An unincorporated association was set up known as The Glen Residents' Association. One of its objectives was to acquire the freehold of the development. The respondent company was incorporated on 29 June 1995 as a private company limited by guarantee with no share capital. Its nature of business was stated to be – Residents property management.

    The respondent acquired the freehold interest and on 6 July 1995 it was registered at Land Registry as the proprietor [163]. All or most of the lessees are members of the company and some of whom are appointed as directors. It would appear that until January 2014 the respondent company 'self-managed' the development by means of its directors who evidently gave freely of their time and expertise. Thus the respondent was able to avoid incurring the cost of professional managing agents.

14. The three applicants are all former directors of the respondent. Documents filed at Companies House record that they all resigned as directors on 20 March 2013. We were not told the reasons for those resignations. We infer there was a clash of personalities which led to frustration and irritation. Unfortunately that has led to quite vitriolic and intemperate correspondence passing between some of the personalities involved and there has been generated a huge amount of ill-will and distrust.

15. Unfortunately that ill-will has spilled over into these proceedings and was not abated even when the professionals became involved. Responsibility for that rests with both parties. Whilst not singling anyone out we do at the outset wish to observe that the applicants have been highly critical of the stewardship of the respondent's affairs by the current directors even though some of the practices now complained of were adopted by the applicants when they themselves were directors of the company.

16. In general terms at this stage we wish to observe that the respondent company has not been well run for a number of years. We have little doubt that lay directors giving freely of their time have not always adopted practices that comply with statutory requirements or good professional practice in the highly regulated world of residential management. On some occasions matters were dealt with in an inept manner but we did not see any instances of improper,

inappropriate or dishonest conduct. Of those instances where, in an ideal world, matters would have been handled in a better way we did not consider that either individually or accumulatively they amounted to something so serious as to justify the Draconian step of the appointment of a manager. We were reinforced in this view by the fact that as of January 2014 professional managing agents, David Charles Property Consultants, have been appointed. We took the view that it is in the best interests of all concerned to allow time to see how that firm performed its functions. We would expect that firm to advise the directors on good estate management practice and relevant statutory obligations and we would expect the directors to accept and act properly on that advice. If after a suitable passage of time there are significant deficiencies in the management of the development it will be open to the applicants (or other lessees) to serve a further notice under section 22 of the Act and if the alleged deficiencies are not adequately remedied it will be open to them to make a further application under section 24 of the Act.

The issues

17. In the preliminary notice and subsequent statements of case the applicants have identified 17 separate issues of complaint, but some of them overlap. The issues with the respondents' initial responses are set out on [211 – 217]. The applicants' supplemental statement and the respondents' responses thereto are set out on [686 – 691].

18. It will be convenient to take these one by one, save where there is overlap in which case we take them in a group.

Issue 1

19. The alleged failure to provide supporting information on service charges and unfettered access to the documents in respect of certain service charges. In essence the applicants relied upon the RICS: Service Charge Residential Management Code 2nd edition (the Code) which has been approved by the Secretary of State for England under section 87 Leasehold Reform, Housing and Urban Development Act 1993 and which is effective from 6 April 2009.

20. Evidently the applicants sought to inspect supporting invoices, vouchers and directors expense claims for the years ending March 2011, 2012 and 2013 and they claimed to have served formal notices under section 21 of the Landlord and Tenant Act 1985 (LTA 1985). Unfortunately none of the relevant correspondence had been included in the hearing file.

21. It was not in dispute that at an agreed date and time Mr Hargrave and Ms Clifford attended Ms McKenzie's flat and that some documents and files were made available for inspection. Mr Hargrave accepted that they were allowed to go through the materials provided and that he scanned what he could. Mr Hargrave alleged that the response was not met within the 30 day period and he asserted there was some reluctance to let him see everything he had asked for.

22. In contrast Ms McKenzie said that the directors' expense claims were provided. Ms McKenzie offered to go home during the course of the hearing to bring the file to the tribunal so that Mr Hargrave could have another look at it

if he wished to do so. Ms McKenzie did so and towards the end of the hearing the file was offered to Mr Hargrave.

23. Ms McKenzie also told us that at the inspection meeting the formal bank statements were not available but a summary was provided and the actual bank statements were provided a little later. Ms McKenzie was very clear that everything which had been requested was provided even though it might not have been strictly within a 30 day time limit, if there was one.

24. Insofar as there was a conflict of evidence on this issue we prefer that of Ms McKenzie. There is no doubt that Mr Hargrave has now seen all of the documents which he requested, some of which were made available to him even though they did not strictly fall within the classes of documents mentioned within section 21 LTA 1985.

25. We also bear in mind that for two of the years in question the applicants were directors of the company as they were for most of the year ending 31 March 2013.

26. In so far as there may not have been strict compliance with every aspect of section 21 LTA 1985 and the Code we find that such lapses were minor, understandable in the circumstances and in any event have been remedied.

Issue 2

27. Breach of section 42 of the Act – failure to set up a client trust fund bank account.

28. Following questioning from the chairman of those members of the respondent company who were present at the hearing the facts concerning the history of the bank accounts are as follows:

28.1 Prior to the incorporation of the respondent company the unincorporated residents association opened bank accounts. At some point those accounts became accounts at National Westminster Bank, Northwood Branch. There are two accounts:

Reserve Fund	A/c no 67540848
Current Account	A/c no 67540821

Both accounts are in the account name 'The Glen Residents Association' although we note from a copy cheque at [505] the account holder is stated to be 'The Glen Residents Association Limited'.

The current signatories on those accounts are: Mr Reddyhoff, Ms McKenzie and Mr Sare.

28.2 On incorporation the respondent company did not open its own separate bank accounts but for banking purposes continued to operate the bank accounts in the association's name. Throughout the accounts have been used for collecting service charges, disbursing expenditure

and holding the reserve funds. None of these facts were disputed by Mr Hargrave.

28.3 That situation has continued right up to the time of the hearing. We observe that these banking arrangements operated throughout the time when the applicants themselves were directors of the respondent and in control of its affairs.

29. Insofar as a legal analysis is required it appears arguably plain that the balances on the two accounts are held on a bare trust for the respondent and that the signatories on the accounts are required to deal with those balances as the directors of the respondent may properly resolve.

30. The gist of the applicants' complaint is that the bank accounts are not designated as or identified as or are stated to be trust accounts and are not ring fenced. Mr Hargrave submitted that HSBC offer a bank account facility which does make plain that funds are held on trust, are ring fenced and would be protected in the event of an insolvency event. Mr Hargrave further submitted that the original bank accounts were set up prior to a change in legislation and that the respondent should move the two existing accounts to an account or accounts which are designated as a client account or that it is a trust account.

31. The respondent submitted that section 42 of the Act requires sums paid by a contributing tenant to the payee may be held in a single fund or, if preferred in two or more separate funds and that the payee is to hold the sums received on trust for the contributing tenants and to defray service charge costs incurred.

32. The actual provisions of section 42 of the Act are set out in the Schedule to this decision.

33. Part 4 of the Code is entitled 'Accounting for other people's money'. It is clearly aimed at third parties who hold or receive 'client money'. It recommends that client accounts be opened with a recognised bank in the name of the manager and that it be designated a 'Client Account'. Further guidance is given as to the manner in which such accounts should be operated.

34. We observe that section 42 of the Act does not make any reference to bank accounts. The section provides in effect that sums received on account of service charge expenditure to be incurred at some future time are to be held on trust or in a trust fund. Whilst it may be preferable for convenience and transparency to hold such sums which are not immediately required in a bank account it is not obligatory to do so. Cash can be held by a trustee on trust for a beneficiary.

35. Part 4 of the Code is plainly addressed to those who hold funds, whether trust funds or not, for a third party and recommends that they ought hold them in a client account. That is obvious and helpful advice because it separates out the agents' own funds from those he holds on behalf of his client. However the funds held by or on behalf of the respondent are not being held for a client.

Accepted that they are held on trust for the contributing tenants but they are not being held for a client.

36. We are satisfied that the funds held in the bank accounts mentioned in paragraph 28.1 above are being held on trust for the contributing tenants. That said the current arrangements are not wholly satisfactory from a practical point of view. The funds ought to be under the direct control of the directors. The directors may wish to consider whether the funds should be held in accounts in the name of the respondent company or, as an alternative, they may prefer the funds to be held in a designated client account by its managing agents, David Charles.

37. In the light of the above we find that whilst the banking arrangements may not have been perfect in every respect there has been no or no material breach of section 42 of the Act or Part 4 of the Code that would warrant either alone or in combination with other matters the appointment of a manager at this time.

Issue 3

38. The complaint is that the respondent failed to provide the applicants with full copies of bank statements for each month of 2013. It was said this failure amounted to a breach of section 42A(1) and (2) of the Act.

39. Initially Mr Hargrave submitted that he had made a formal request for the bank statements pursuant to section 21 LTA 1985 but he was unable to provide a copy. As regards the letter at [67] Mr Hargrave accepted that it was not itself a section 21 notice because in the opening paragraph it states that if matters are not resolved to full satisfaction *"... we shall be advising our client as to their available remedies which may include the service of a notice ... under section 21 ..."* Mr Hargrave also accepted that the letter did not expressly refer to bank statements but Mr Hargrave invited us to imply that the letter taken overall was an informal request for copy bank statements which the respondent has failed to provide.

40. In answer Mr Kennedy submitted that 42A(1) and (2) of the Act did not impose an obligation on landlords to provide copies of bank statements. Further and in any event section 21 LTA 1985 did not impose an obligation to provide copy bank statements. The ambit of the section is limited to a request by a tenant of a summary of relevant costs.

41. We find as a fact that the applicants did not make a request, whether formal or informal to see copies of the bank statements in question. Even if such a request had been made there would not be any legal or statutory obligation on the respondent to provide them. On this issue we prefer and adopt the submissions made on behalf of the respondent.

Issue 4

42. The gist of the complaint is that the respondent failed to respond promptly and suitably to reasonable requests from the applicants for information or observations relevant to the management of the development contrary to paragraph 3.4 of the Code.

43. Mr Hargrave said that this complaint was different to and separate from that relating to the accounting issues raised and the requests to see vouchers and bank statements. He said that on occasions replies to letters sent to directors were sent not by the directors but were sent by the wife of a director. He cited as an example an email sent by Ms Clifford at [364] and the reply from Mrs Sare at [363] which, in any event, he said was not a reasonable response.

44. Mr Hargrave was also aggrieved about the directors sharing certain survey reports and about comments made in certain newsletters circulated to lessees.

45. On the evidence before us we were not satisfied that there had been any or any material breach of paragraph 3.4 of the Code. In a development such as The Glen managed on a daily basis by a group of directors, who no doubt have full time day jobs or outside interests, it is hardly material if a reply is sent by the wife of a director rather than the director himself. It seems to us that what is more important is the quality of the reply rather than the identity of the sender. We were told that at the material time Mrs Sare was in any event 'minutes secretary' and was well placed to respond to the enquiry made.

46. Further, the context of the request for information and the reply must be read in context. In the exchange in question it is evident that Ms Clifford made her feelings very clear in a rather aggressive manner. We cannot see any sound basis on which Mrs Sare's reply can be criticised.

Issue 5

47. This is a further complaint that the respondent has, from time to time, responded in an aggressive, discourteous, threatening and inaccurate manner, contrary to paragraph 3.10 of the Code, which requires: *"When communicating with tenants you should be accurate, clear, concise and courteous."*

    There was a further complaint that some letters sent to the applicants' solicitors from the respondents' solicitors were dismissive, inaccurate and rude.

48. Mr Hargrave cited as an example the letters at [295] and the reply at [298]. Mr Hargrave also made a complaint about the manner in which an EGM of the respondent had been conducted and the way he had been treated. Mrs Sare gave evidence to the effect that at the meeting Mr Hargrave continually interrupted proceedings and was asked to sit down. At the end of the meeting the chairman invited Mr Hargrave to make his point but by that time he had forgotten what it was.

49. This tribunal is not directly concerned with the manner in which the respondent conducts its AGMs and EGMs and doubtless if a member considers that matters have not been dealt with correctly he or she may pursue whatever corporate remedies that may be open to them. This tribunal does not have any jurisdiction over the corporate management of a landlord.

50. It is clear that the relationship between the applicants and the current management of the respondent sunk to a very low level. Both parties have

engaged in a robust exchange of correspondence. Sometimes not all of the points made by both sides were concise, accurate and courteous.

51. Our attention was not directly drawn to the correspondence passing between the parties' respective solicitors. We consider that such correspondence to be outside the scope of paragraph 3.10 of the Code.

52. Taken overall and in context we were not persuaded that there was any or any material breach of paragraph 3.10 of the Code on the part of the respondent such that would justify the appointment of a manager.

Issue 6

53. The gist of this issue is that despite repeated requests the respondent has failed to meet with the applicants to reasonably discuss issues, observations and concerns contrary to paragraph 3.12 of the Code. We observe that paragraph 3.12 does not expressly impose an obligation to meet with lessees. It does state that *" Out of hours meetings and inspections requested by tenants may be the subject of additional charge..."*

54. The limited oral evidence presented to us was conflicting. It was plain to us that some meetings and discussions have taken place but the outcomes have not always been to mutual benefit or long lasting.

55. As is clear from this decision the degree of antipathy between the parties concerned, or at least some of them, was not conducive to productive and cordial meetings.

56. Taken overall and in context we were not persuaded that there was any or any material breach of paragraph 3.12 of the Code on the part of the respondent such that would justify the appointment of a manager.

Issues 7 and 8

57. The parties agreed that these were fully covered in there exchanges on Issues 5 and 6 and there was nothing they wished to add.

Issue 9

58. This issue related to the manner in which water ingress into Ms Clifford's maisonette was dealt with by the respondent. The complaint is that the respondent did not deal with the matter fairly, it produced prejudiced letters and produced a survey report purporting to be on her property and falsely declaring that she was at fault, contrary to the requirements of the lease, companies house, the landlord's responsibilities and paragraph 3.26 of the Code. There was a further complaint that a survey report obtained was not copied to Ms Clifford.

59. We can take the facts fairly shortly. Ms Clifford's property is in a block containing numbers 17, 18, 19 and 20 The Glen. Ms Clifford's property is number 17. In July 2010 the respondent's then surveyor, Mr A R Collison issued a report on remedial repairs required [522]. Later it became apparent that defects to the balcony on number 20 were also part of the cause of water ingress and damp penetration into number 17. Some level of discussions took

place between Ms Clifford and the owner of number 20 in 2011 – see [525] but evidently they fell out before all of the remedial works were carried out.

60. Ms Clifford requested the respondent to appoint a surveyor to determine the dispute with the owner of number 20 pursuant to clause 6(2) of the lease [61].In consequence a report was prepared by Mr Daniel Stephens BSc (Hons) MRICS of Woodward Chartered Surveyors. It is dated 27 September 2013. A copy is at [526]. Curiously the report did not set out what the surveyor had been instructed to do and it did not expressly deal with the water ingress into number 17.

61. It would have been helpful if the letter of instruction to Woodward Chartered Surveyors had been provided to us. It is not clear from the report what role Mr Stephens was undertaking. The gist of clause 6(2) of the lease is that any dispute between the lessee and any owner of adjacent property as to any easement, right or privilege in connection with the use of the demised premises or any party walls or structures shall be determined by 'the Landlord's Surveyor whose decision shall be final and binding on the Tenant'. Our reading of the report is that it did not address or determine the dispute between Ms Clifford and the owner of number 20.

62. On the evidence before us we find that the directors did discuss Mr Stephen's report but concluded that it did not really affect them directly, it being of more concern to the lessees of the four properties in issue. They also concluded, wrongly in our view, that the report addressed all that was required.

63. We also find as a fact that the report was sent to the four lessees concerned and that a further copy was sent by email to Ms Clifford later.

64. The directors' handling of Ms Clifford's request pursuant to clause 6(2) of the lease was poorly and ineptly managed by the respondent. We infer this was due to inexperience and lack of professional advice as to how a clause 6(2) request should be dealt with.

65. Having made this finding we are firmly of the view that this failure taken by itself alone, or in conjunction with other matters, does not justify the Draconian step of the appointment of a manager. It appears to be a one off issue. The directors have learned from it. They now have the benefit of professional managing agents. We have confidence that any future clause 6(2) request will be managed in much more appropriate manner. In the real world landlords do from time to time manage things badly or ineptly but that of itself does not always justify the appointment of a manager.

Issue 10

66. The gist of this issue is that the directors failed to properly account for monies received, contrary to paragraph 4.11 of the Code, that the directors were paying for various pest control services for selected lessees and that there were issues with personal expenses being recovered from the service charge account.

67. Evidently the first issue concerned a cash sum of £60 paid by a contractor. Mr Hargrave accepted that it was eventually paid into the respondent's bank account although he complained it should have been paid in earlier.

68. As to the pest control expenditure we accept the evidence from the respondent that the respondent paid for the cost of the removal of wasps nests in two trees as requested by the gardener.

69. Evidently there was a drainage blockage incident which resulted in a back-up into several flats, one of which is owned by Ms McKenzie. Investigations were carried out with the water company and the local authority to ascertain exactly where the problem lay and who was responsible to clear the blockage but no clear resolution was found, in consequence the directors have arranged for the drains within The Glen to be cleaned once per year. Ms McKenzie said, and we accept, that she made a claim for the cost of clearing the blockage to the sink of her flat, the directors considered it and rejected it. Accordingly Ms McKenzie bore the cost herself.

70. Mr Hargrave did not present any evidence to support his allegation that director's personal expenditure was being borne by the service charge account.

71. We were not persuaded that there was any or any material breach of paragraph 4.11 of the Code on the part of the respondent or that any other breach or improper conduct had taken place such that would justify the appointment of a manager.

Issue 11

72. The gist of the issue is that Mr Sare and Mr Reddyhoff have shown themselves not to practice or behave in an impartial and professional manner by failing to 'deal fairly with all parties' contrary to paragraph 19.2 of the Code. It was also alleged that the respondent responded to questions from some lessees about the letting of the managing agent contract to David Charles but failed to respond to questions raised by the applicants. In oral submissions Mr Hargrave widened the issue to assert that the current directors do not understand the effect of the leases and the law.

73. In support of the issue Mr Hargrave said that one of the directors, Mr Reddyhoff, had (improperly) enclosed his garden and permitted an external post box to be erected on the development. Mr Hargrave accepted that the 'enclosing of the garden' had now been corrected but he asserted that the fact he had done it showed Mr Reddyhoff's partiality.

74. In response Mr Reddyhoff told us that some bushes were planted in order to prevent persons passing by his windows. When it was drawn to his attention that the effect was to enclose his garden and that this was not permitted, he had the subject bushes taken up.

75. We reject the submission that the 'bushes' incident demonstrates partiality on the part of the Mr Reddyhoff. We find this to have been a minor misunderstanding which was remedied promptly.

76. The appointment of managing agents is a matter for the directors. They were not obliged, by the terms of the leases or the general law, to consult lessees about whom to appoint, but they chose voluntarily to consult. The basis on which they did so and to extent to which they were prepared to answer questions, as opposed to consider observations, was a matter for the directors to determine, and we cannot see that any criticism is fairly made.

77. We accept that the directors are not legally trained and that they may not be conversant with all of the terms of the leases and the body of residential landlord and tenant law. That is not an unusual situation. Many directors of property companies are in the same position. The same might have been the case when the applicants had stewardship of the affairs of the respondent. We find that situation is not of itself or in combination with other matters a sufficient or compelling reason to cause us to appoint a manager. We are reinforced in this conclusion by the fact that the respondent now has now appointed professional managing agents.

Issue 12

78. The gist of this issue is that the respondent had failed to keep up to date records of tenancies and accurate up to date details of lessees' contact addresses; such that a list of lessees provided to the applicants in January 2014 was out of date by several months.

79. The allegations were denied by the respondent. The directors asserted that all records are updated as changes are notified by lessees. It was also asserted that the list provided to Ms Clifford in January 2014 was provided openly and in good faith but on a confidential basis without Ms Clifford supplying a genuine reason for wanting to see the list.

80. We were not persuaded on the limited evidence presented to us that contact details of lessees were not kept up to date. Although for practical purposes it is helpful for landlord's (and any managing agents) to keep contact details up dated we are not aware of any legal obligation on them to do so. Furthermore a landlord is not obliged to provide a contact list (whether up to date or not) to a lessee who may request it. Often a lessee may wish to keep his or her contact details private. We were rather surprised that the list was in fact provided to Ms Clifford.

81. The complaint made by the applicants does not justify the appointment of a manager, whether taken alone or in combination with other matters.

Issue 13

82. The gist of the complaint was that the directors of the respondent had failed to keep lessees and themselves informed on changes in legal requirements, including any statutory notices and other requirements of public authorities and to check compliance with lease terms.

83. In oral submissions Mr Hargrave said that he did not wish to say any more and that the issue had already been discussed.

84. For the sake of good order we make clear that on the limited evidence presented to us the applicants have failed to make out the complaint. Furthermore Mr Hargrave was not able to draw to our attention any statutory or other authority to support his submissions that the directors of the respondent were under a duty to keep themselves and lessees informed about the matters complained of.

Issues 14 and 15

85. The gist of these complaints is that the respondent has entered into an active campaign to misinform lessees about the nature of the application and the proceedings before this tribunal, and that the respondents procured the managing agents to solicit support for the directors' positions.

86. The complaints are ill-made. They are not issues raised by the applicants in their section 22 notice. They relate to matters alleged to have occurred after the commencement of these proceedings.

87. We find that these are not issues on which we have jurisdiction to make determinations and we decline to do so.

Issue 16

88. The gist of this issue is that the respondent has refused to acknowledge alleged voting rights of members of the respondent at AGMs or EGMs.

89. This is an issue as between the applicants and the respondent company governed by company law. It is not an issue as regards the relationship of the applicants and the respondent arising under the leases and/or the management of The Glen as a development.

90. We find that this is not an issue we should take into account in arriving at our determination of the subject application.

Issue 17

91. This issue is related to the appointment of David Charles as managing agents. Mr Hargrave complained that the process was questionable and poorly managed. He also submitted that the respondents did not provide a detailed written specification of the contractual terms of the proposed appointment and that some prospective managing agents were not given due time to prepare submissions.

92. This issue is closely related to matters discussed under Issue 11 above.

93. Mr Sare gave evidence as to the manner in which the appointment was dealt with. The directors made a decision on the appointment which was later ratified by members of the respondent at an EGM.

94. For the reasons set out under Issue 11 above we find that even if the applicants were able to prove the facts and matters alleged that would not of itself justify this tribunal in appointing a manager.

The section 20C LTA 1985 application

95. The applicants made an application under section 20C LTA 1985 as regards the costs incurred or to be incurred by the respondent in connection with these proceedings.

96. Mr Kennedy accepted that the terms of the leases do not permit the respondent to put such costs through the service charge account and he confirmed that the respondent did not oppose the making of an order under section 20C LTA 1985.

97. In the circumstances and for the sake of good order we have made an order under section 20C LTA 1985.

Material statutory provisions

98. Material statutory provisions we have taken into account in arriving at our decisions are set out in the Schedule to this decision. For the convenience and interest of the parties we have included section 42A of the Act but as appears from the notes we have included the material provisions of this section are not yet in force.

Judge John Hewitt
4 November 2014

The Schedule

Landlord and Tenant Act 1985

20C.— Limitation of service charges: costs of proceedings.

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court , residential property tribunal or leasehold valuation tribunal or the First-tier Tribunal, or the Upper Tribunal, or in connection with arbitration proceedings, 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.

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to the county court;

(aa) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;

(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;

(ba) in the case of proceedings before the First-tier Tribunal, to the tribunal;

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;
(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to the county court].

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Landlord and Tenant Act 1987

21.— Tenant's right to apply to court for appointment of manager.
(1) The tenant of a flat contained in any premises to which this Part applies may, subject to the following provisions of this Part, apply to [the appropriate tribunal for an order under section 24 appointing a manager to act in relation to those premises.

(2) Subject to subsection (3), this Part applies to premises consisting of the whole or part of a building if the building or part contains two or more flats.

(3) This Part does not apply to any such premises at a time when—

(a) the interest of the landlord in the premises is held by–
(i) an exempt landlord or a resident landlord, or
(ii) the Welsh Ministers in their new towns residuary capacity,

(b) the premises are included within the functional land of any charity.

[
(3A) But this Part is not prevented from applying to any premises because the interest of the landlord in the premises is held by a resident landlord if at least one-half of the flats contained in the premises are held on long leases which are not tenancies to which Part 2 of the Landlord and Tenant Act 1954 (c. 56) applies.

(4) An application for an order under section 24 may be made—
(a) jointly by tenants of two or more flats if they are each entitled to make such an application by virtue of this section, and
(b) in respect of two or more premises to which this Part applies;
and, in relation to any such joint application as is mentioned in paragraph (a), references in this Part to a single tenant shall be construed accordingly.

(5) Where the tenancy of a flat contained in any such premises is held by joint tenants, an application for an order under section 24 in respect of those premises may be made by any one or more of those tenants.

(6) An application to the court for it to exercise in relation to any premises any jurisdiction to appoint a receiver or manager shall not be made by a tenant (in his capacity as such) in any circumstances in which an application could be made by him for an order under section 24 appointing a manager to act in relation to those premises.

(7) References in this Part to a tenant do not include references to a tenant under a tenancy to which Part II of the Landlord and Tenant Act 1954 applies.

(8) For the purposes of this Part, *"appropriate tribunal"* means—

(a) in relation to premises in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and
(b) in relation to premises in Wales, a leasehold valuation tribunal.

22.— Preliminary notice by tenant.
(1) Before an application for an order under section 24 is made in respect of any premises to which this Part applies by a tenant of a flat contained in those premises, a notice under this section must (subject to subsection (3)) be served [by the tenant on—

(i) the landlord, and
(ii) any person (other than the landlord) by whom obligations relating to the management of the premises or any part of them are owed to the tenant under his tenancy.

(2) A notice under this section must—

(a) specify the tenant's name, the address of his flat and an address in England and Wales (which may be the address of his flat) at which [any person on whom the notice is served may serve notices, including notices in proceedings, on him in connection with this Part;
(b) state that the tenant intends to make an application for an order under section 24 to be made by [the appropriate tribunal] [2] in respect of such premises to which this Part applies as are specified in the notice, but (if paragraph (d) is applicable) that he will not do so if the [requirement specified in pursuance of that paragraph is complied with] [1] ;
(c) specify the grounds on which the court would be asked to make such an order and the matters that would be relied on by the tenant for the purpose of establishing those grounds;
(d) where those matters are capable of being remedied by [any person on whom the notice is served, require him] [1] , within such reasonable period as is specified in the notice, to take such steps for the purpose of remedying them as are so specified; and
(e) contain such information (if any) as the Secretary of State may by regulations prescribe.

(3) The appropriate tribunal] [3] may (whether on the hearing of an application for an order under section 24 or not) by order dispense with the requirement to serve a notice under this section on a person in a case where it is satisfied that it would not be reasonably practicable to serve such a notice on the person, but the tribunal may, when doing so, direct that such other notices are served, or such other steps are taken, as it thinks fit.

(4) In a case where—

(a) a notice under this section has been served on the landlord, and
(b) his interest in the premises specified in pursuance of subsection (2)(b) is subject to a mortgage, the landlord shall, as soon as is reasonably practicable after receiving the notice, serve on the mortgagee a copy of the notice.

23.— Application to court for appointment of manager.
(1) No application for an order under section 24 shall be made to [the appropriate tribunal] [1] unless—
(a) in a case where a notice has been served under section 22, either—

(i) the period specified in pursuance of paragraph (d) of subsection (2) of that section has expired without the [person required to take steps in pursuance of that paragraph having taken them, or

(ii) that paragraph was not applicable in the circumstances of the case; or

(b) in a case where the requirement to serve such a notice has been dispensed with by an order under subsection (3) of that section, either—

(i) any notices required to be served, and any other steps required to be taken, by virtue of the order have been served or (as the case may be) taken, or

(ii) no direction was given by the tribunal when making the order.

24.— Appointment of manager by a tribunal].

(1) The appropriate tribunal may, on an application for an order under this section, by order (whether interlocutory or final) appoint a manager to carry out in relation to any premises to which this Part applies—

(a) such functions in connection with the management of the premises, or

(b) such functions of a receiver,

or both, as the tribunal thinks fit.

(2) The appropriate tribunal may only make an order under this section in the following circumstances, namely—

(a) where the tribunal is satisfied—

(i) that [any relevant person] [4] either is in breach of any obligation owed by him to the tenant under his tenancy and relating to the management of the premises in question or any part of them or (in the case of an obligation dependent on notice) would be in breach of any such obligation but for the fact that it has not been reasonably practicable for the tenant to give him the appropriate notice, and

[...]

(iii) that it is just and convenient to make the order in all the circumstances of the case; [...]

(ab) where the tribunal is satisfied—

(i) that unreasonable service charges have been made, or are proposed or likely to be made, and

(ii) that it is just and convenient to make the order in all the circumstances of the case;

(aba) where the tribunal is satisfied—

(i) that unreasonable variable administration charges have been made, or are proposed or likely to be made, and

(ii) that it is just and convenient to make the order in all the circumstances of the case;

(ac) where [the tribunal] [1] is satisfied—

(i) that any relevant person has failed to comply with any relevant provision of a code of practice approved by the Secretary of State under section 87 of the Leasehold Reform, Housing and Urban Development Act 1993 (codes of management practice), and

(ii) that it is just and convenient to make the order in all the circumstances of the case; or

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

(2ZA) In this section *"relevant person"* means a person—

(a) on whom a notice has been served under section 22, or

(b) in the case of whom the requirement to serve a notice under that section has been dispensed with by an order under subsection (3) of that section.

(2A) For the purposes of subsection (2)(ab) a service charge shall be taken to be unreasonable—

(a) if the amount is unreasonable having regard to the items for which it is payable,

(b) if the items for which it is payable are of an unnecessarily high standard, or

(c) if the items for which it is payable are of an insufficient standard with the result that additional service charges are or may be incurred.

In that provision and this subsection *"service charge"* means a service charge within the meaning of section 18(1) of the Landlord and Tenant Act 1985, other than one excluded from that section by section 27 of that Act (rent of dwelling registered and not entered as variable).

(2B) In subsection (2)(aba) *"variable administration charge"* has the meaning given by paragraph 1 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

(3) The premises in respect of which an order is made under this section may, if the tribunal thinks fit, be either more or less extensive than the premises specified in the application on which the order is made.

(4) An order under this section may make provision with respect to—

(a) such matters relating to the exercise by the manager of his functions under the order, and

(b) such incidental or ancillary matters,

as the tribunal thinks fit; and, on any subsequent application made for the purpose by the manager, the tribunal may give him directions with respect to any such matters.

(5) Without prejudice to the generality of subsection (4), an order under this section may provide—

(a) for rights and liabilities arising under contracts to which the manager is not a party to become rights and liabilities of the manager;

(b) for the manager to be entitled to prosecute claims in respect of causes of action (whether contractual or tortious) accruing before or after the date of his appointment;

(c) for remuneration to be paid to the manager by [any relevant person] [4] , or by the tenants of the premises in respect of which the order is made or by all or any of those persons;

(d) for the manager's functions to be exercisable by him (subject to subsection (9)) either during a specified period or without limit of time.

(6) Any such order may be granted subject to such conditions as the tribunal thinks fit, and in particular its operation may be suspended on terms fixed by the tribunal.

(7) In a case where an application for an order under this section was preceded by the service of a notice under section 22, the tribunal may, if it thinks fit, make such an order notwithstanding—

(a) that any period specified in the notice in pursuance of subsection (2)(d) of that section was not a reasonable period, or

(b) that the notice failed in any other respect to comply with any requirement contained in subsection (2) of that section or in any regulations applying to the notice under section 54(3).

(8) The Land Charges Act 1972 and the Land Registration Act 2002shall apply in relation to an order made under this section as they apply in relation to an order appointing a receiver or sequestrator of land.

(9) The appropriate tribunal may, on the application of any person interested, vary or discharge (whether conditionally or unconditionally) an order made under this section; and if the order has been protected by an entry registered under the Land Charges Act 1972 or the [Land Registration Act 2002] [9] , [the tribunal] [1] may by order direct that the entry shall be cancelled.

(9A) The tribunal shall not vary or discharge an order under subsection (9) on [the application of any relevant person] [4] unless it is satisfied—

(a) that the variation or discharge of the order will not result in a recurrence of the circumstances which led to the order being made, and

(b) that it is just and convenient in all the circumstances of the case to vary or discharge the order.

(10) An order made under this section shall not be discharged by the appropriate tribunal by reason only that, by virtue of section 21(3), the premises in respect of which the order was made have ceased to be premises to which this Part applies.

(11) References in this Part to the management of any premises include references to the repair, maintenance, improvement or insurance of those premises.

42.— Service charge contributions to be held in trust.

(1) This section applies where the tenants of two or more dwellings may be required under the terms of their leases to contribute to the same costs, or the tenant of a dwelling may be required under the terms of his lease to contribute to costs to which no other tenant of a dwelling may be required to contribute, by the payment of service charges; and in this section—

"the contributing tenants" means those tenants and *"the sole contributing tenant"* means that tenant;

"the payee" means the landlord or other person to whom any such charges are payable by those tenants, or that tenant, under the terms of their leases, or his lease;

"relevant service charges" means any such charges;

"service charge" has the meaning given by section 18(1) of the 1985 Act, except that it does not include a service charge payable by the tenant of a dwelling the rent of which is registered under Part IV of the Rent Act 1977, unless the amount registered is, in pursuance of section 71(4) of that Act, entered as a variable amount;

"tenant" does not include a tenant of an exempt landlord; and

"trust fund" means the fund, or (as the case may be) any of the funds, mentioned in subsection (2) below.

(2) Any sums paid to the payee by the contributing tenants, or the sole contributing tenant, by way of relevant service charges, and any investments representing those sums, shall (together with any income accruing thereon) be held by the payee either as a single fund or, if he thinks fit, in two or more separate funds.

(3) The payee shall hold any trust fund—

> (a) on trust to defray costs incurred in connection with the matters for which the relevant service charges were payable (whether incurred by himself or by any other person), and
>
> (b) subject to that, on trust for the persons who are the contributing tenants for the time being, or the person who is the sole contributing tenant for the time being.

(4) Subject to subsections (6) to (8), the contributing tenants shall be treated as entitled by virtue of subsection (3)(b) to such shares in the residue of any such fund as are proportionate to their respective liabilities to pay relevant service charges or the sole contributing tenant shall be treated as so entitled to the residue of any such fund.

(5) If the Secretary of State by order so provides, any sums standing to the credit of any trust fund may, instead of being invested in any other manner authorised by law, be invested in such manner as may be specified in the order; and any such order may contain such incidental, supplemental or transitional provisions as the Secretary of State considers appropriate in connection with the order.

(6) On the termination of the lease of any of the contributing tenants the tenant shall not be entitled to any part of any trust fund, and (except where subsection (7) applies) any part of any such fund which is attributable to relevant service charges paid under the lease shall accordingly continue to be held on the trusts referred to in subsection (3).

(7) On the termination of the lease of the last of the contributing tenants, or of the lease of the sole contributing tenant, any trust fund shall be dissolved as at the date of the termination of the lease, and any assets comprised in the fund immediately before its dissolution shall—

(a) if the payee is the landlord, be retained by him for his own use and benefit, and
(b) in any other case, be transferred to the landlord by the payee.

(8) Subsections (4), (6) and (7) shall have effect in relation to any of the contributing tenants, or the sole contributing tenant, subject to any express terms of his lease (whenever it was granted) which relate to the distribution, either before or (as the case may be) at the termination of the lease, of amounts attributable to relevant service charges paid under its terms (whether the lease was granted before or after the commencement of this section).

(9) Subject to subsection (8), the provisions of this section shall prevail over the terms of any express or implied trust created by a lease so far as inconsistent with those provisions, other than an express trust so created, in the case of a lease of any of the contributing tenants, before the commencement of this section or, in the case of the lease of the sole contributing tenant, before the commencement of paragraph 15 of Schedule 10 to the Commonhold and Leasehold Reform Act 2002.

42A Service charge contributions to be held in designated account

(1) The payee must hold any sums standing to the credit of any trust fund in a designated account at a relevant financial institution.

(2) An account is a designated account in relation to sums standing to the credit of a trust fund if—

(a) the relevant financial institution has been notified in writing that sums standing to the credit of the trust fund are to be (or are) held in it, and

(b) any other sums held in the account are sums standing to the credit of one or more other trust funds,] [2]

and the account is an account of a description specified in regulations made by the [appropriate national authority] [3].

(2A) The appropriate national authority may by regulations ensure that a payee who holds more than one trust fund in the same designated account cannot move any of those funds to another designated account unless conditions specified in the regulations are met.] [4]

(3) Any of the contributing tenants, or the sole contributing tenant, may by notice in writing require the payee—

(a) to afford him reasonable facilities for inspecting documents evidencing that subsection (1) is [, or regulations under subsection (2A) are,] [5] complied with and for taking copies of or extracts from [such documents] [6], or

(b) to take copies of or extracts from any such documents and either send them to him or afford him reasonable facilities for collecting them (as he specifies).

(4) If the tenant is represented by a recognised tenants' association and he consents, the notice may be served by the secretary of the association instead of by the tenant (and in that case any requirement imposed by it is to afford reasonable facilities, or to send copies or extracts, to the secretary).

(5) A notice under [subsection (3)] [7] is duly served on the payee if it is served on—

(a) an agent of the payee named as such in the rent book or similar document, or
(b) the person who receives the rent on behalf of the payee;

and a person on whom such a notice is so served must forward it as soon as may be to the payee.

(6) The payee must comply with a requirement imposed by a notice under [subsection (3)] [7] within the period of twenty-one days beginning with the day on which he receives the notice.

(7) To the extent that a notice under [subsection (3)] [7] requires the payee to afford facilities for inspecting documents—

(a) he must do so free of charge, but

(b) he may treat as part of his costs of management any costs incurred by him in doing so.

(8) The payee may make a reasonable charge for doing anything else in compliance with a requirement imposed by a notice under [subsection (3)] [7].

(9) Any of the contributing tenants, or the sole contributing tenant, may withhold payment of a service charge if he has reasonable grounds for believing that the payee has failed to comply with the duty imposed on him by subsection (1); and any provisions of his tenancy relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it.

[

(9A) Regulations under subsection (2A) may include provision about–

(a) the circumstances in which a contributing tenant who has reasonable grounds for believing that the payee has not complied with a duty imposed on him by the regulations may withhold payment of a service charge,

(b) the period for which payment may be so withheld,

(c) the amount of service charge that may be so withheld;

and the regulations may provide that any provisions of the contributing tenant's tenancy relating to non-payment or late payment of service charge do not have effect in relation to the period for which the payment is so withheld.] [8]

(10) Nothing in this section [or in regulations under subsection (2A)] [9] applies to the payee if the circumstances are such as are specified in regulations made by the [appropriate national authority] [10].

(10A) Regulations under this section may–

(a) make different provision for different cases, including different provision for different areas,

(b) contain such supplementary, incidental, consequential, transitional, transitory or saving provision as the appropriate national authority considers appropriate.

(10B) Regulations under this section are to be made by statutory instrument which–

(a) in the case of regulations made by the Secretary of State, is to be subject to annulment in pursuance of a resolution of either House of Parliament, and

(b) in the case of regulations made by the Welsh Ministers, is to be subject to annulment in pursuance of a resolution of the National Assembly for Wales.] [11]

(11) In this section–

[*"the appropriate national authority"*–

(a) in relation to England, means the Secretary of State, and

(b) in relation to Wales, means the Welsh Ministers,] [12]

"recognised tenants' association" has the same meaning as in the 1985 Act, and

"relevant financial institution" has the meaning given by regulations made by the [appropriate national authority] [13];

and expressions used both in section 42 and this section have the same meaning as in that section.] [1]

Notes

1.
Added by Commonhold and Leasehold Reform Act 2002 c. 15 Pt 2 c.5 s.156(1) (July 26, 2002 in relation to England for the purpose of making regulations as specified in SI 2002/1912 art.2(c); January 1, 2003 in relation to Wales for the purpose of making regulations as specified in SI 2002/3012 art.2(c); not yet in force otherwise)

2.
Substituted by Housing and Regeneration Act 2008 c. 17 Sch.12 para.12(2)(a) (December 1, 2008 for the purpose of enabling the Secretary of State to make regulations under 1987 c.31 s.42A; not yet in force otherwise)

3.
Words substituted by Housing and Regeneration Act 2008 c. 17 Sch.12 para.12(2)(b) (December 1, 2008 for the purpose of enabling the Secretary of State to make regulations under 1987 c.31 s.42A; not yet in force otherwise)

4.
Added by Housing and Regeneration Act 2008 c. 17 Sch.12 para.12(3) (December 1, 2008 for the purpose of enabling the Secretary of State to make regulations under 1987 c.31 s.42A; not yet in force otherwise)

5.
Words inserted by Housing and Regeneration Act 2008 c. 17 Sch.12 para.12(4)(a) (December 1, 2008 for the purpose of enabling the Secretary of State to make regulations under 1987 c.31 s.42A; not yet in force otherwise)

6.

Word substituted by Housing and Regeneration Act 2008 c. 17 Sch.12 para.12(4)(b) (December 1, 2008 for the purpose of enabling the Secretary of State to make regulations under 1987 c.31 s.42A; not yet in force otherwise)
7.
Words substituted by Housing and Regeneration Act 2008 c. 17 Sch.12 para.12(5) (December 1, 2008 for the purpose of enabling the Secretary of State to make regulations under 1987 c.31 s.42A; not yet in force otherwise)
8.
Added by Housing and Regeneration Act 2008 c. 17 Sch.12 para.12(6) (December 1, 2008 for the purpose of enabling the Secretary of State to make regulations under 1987 c.31 s.42A; not yet in force otherwise)
9.
Words inserted by Housing and Regeneration Act 2008 c. 17 Sch.12 para.12(7)(a) (December 1, 2008 for the purpose of enabling the Secretary of State to make regulations under 1987 c.31 s.42A; not yet in force otherwise)
10.
Words substituted by Housing and Regeneration Act 2008 c. 17 Sch.12 para.12(7)(b) (December 1, 2008 for the purpose of enabling the Secretary of State to make regulations under 1987 c.31 s.42A; not yet in force otherwise)
11.
Added by Housing and Regeneration Act 2008 c. 17 Sch.12 para.12(8) (December 1, 2008 for the purpose of enabling the Secretary of State to make regulations under 1987 c.31 s.42A; not yet in force otherwise)
12.
Definition inserted by Housing and Regeneration Act 2008 c. 17 Sch.12 para.12(9)(a) (December 1, 2008 for the purpose of enabling the Secretary of State to make regulations under 1987 c.31 s.42A; not yet in force otherwise)
13.
Words substituted by Housing and Regeneration Act 2008 c. 17 Sch.12 para.12(9)(b) (December 1, 2008 for the purpose of enabling the Secretary of State to make regulations under 1987 c.31 s.42A; not yet in force otherwise)