3294

RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

Case number : CAM/26UF/LSC/2006/0044

Property	:	**54 Sollershott Hall, Letchworth Garden City, Hertfordshire SG6 3PW**
Application	:	For determination of liability to pay service charges for the year 2006 [LTA 1985, s.27A]
Applicant	:	Colin Edwards, 54 Sollershott Hall, Letchworth Garden City
rep		in person
Respondent	:	Sollershott Hall Management Ltd, 5 Gernon Walk, Letchworth Garden City, Hertfordshire SG6 3HW
rep		Guy Sims, counsel, instructed by Foreman Laws, solicitors

REASONS FOR THE DECISION OF THE TRIBUNAL
HANDED DOWN ON 14TH MARCH 2007

Tribunal	:	G K Sinclair (chairman), M Krisko BSc (Est Man) FRICS , L Jacobs FRICS
Hearing	:	23rd November 2006, 12th & 13th February 2007

CONTENTS

Introduction

1. This is the second occasion on which the Leasehold Valuation Tribunal has been required to concern itself with the residential flats at Sollershott Hall, an estate both owned and managed by the leaseholders through the Respondent company. On the first occasion (Case ref: CAM/22UF/LVT/2004/0001) the tribunal had to deal with the variation (largely by consent) of all the various leases for flats in the Old and New Blocks and the former Clubhouse. The case for the management company was then presented by Mr Colin Edwards, supported by several of his fellow directors. The documentation produced by the management company – not especially for the tribunal but as a matter of course for each leaseholder at every year end – was extremely comprehensive and helped convey the impression of a thoughtful, well-run operation which sought to keep all concerned informed about key contacts, how their money had been spent that year, of assessments of future expenditure, and how this was to be budgeted for. So good was this annual booklet that the tribunal would, in other cases, cite it to landlords or managing agents as an example of best practice which they should follow.

2. It is therefore with considerable sadness that the tribunal surveys a management in crisis, a board of directors split, and a well-intentioned project diverted from its true course by the deliberate or careless actions of consultant, contractor, and members of the board. The result was that Mr Edwards, who for many years acted as *de facto* administrator for the company, refused to be the main point of contact between the company on the one hand and the consultant and contractor on the other. So dissatisfied did he become that he sought a determination by this tribunal whether he should be obliged to pay, through the annual service charge, his share of the cost of what he had come to regard as this badly mismanaged project. What he did not do was to resign as a director. With a board split between resident leaseholders and those merely with an investment interest, one can perhaps understand the concern of a resident that he should not simply leave to non-resident investors control over works affecting his home. Whether, as a matter of company law, he can or ought to be criticised in the circumstances is not a matter within the jurisdiction of this tribunal. Although raised in the Respondent company's skeleton argument, therefore, it is not an issue on which the tribunal cares to express an opinion.

3. This hearing commenced on 23rd November 2006. The tribunal had before it two lever arch files of documents, comprising 792 pages. These included the statements of case, two documents described as expert reports, skeleton arguments (Mr Edwards' being called a statement of case), two witness statements for the Applicant, and six for the

Respondent (including one from Mr Nugent, who had also provided an "expert report"). With Mr Edwards appearing in person progress was slower than might have been hoped. The hearing was therefore adjourned to the first available date for a further two days. Unfortunately this could not take place until 12th and 13th February 2007. On 5th February the Respondent's solicitors forwarded to the tribunal office an addendum to the trial bundle, extending it to 829 pages. On the following day a further addendum arrived, bringing the total number of pages to 863. In the course of oral evidence/argument each party submitted a small number of further, unnumbered documents. Mr Edwards sought to demonstrate with paper and diluted ink, without prior notice, the nature and extent of chemical migration into concrete. Mr Woodhouse produced two small samples he had made up to compare the physical properties and appearance of the different repair mixes referred to in the specification and evidence.

4. There being insufficient time to hear oral argument at the end of the third day, and with both parties anxious to avoid the cost of another attendance, it was agreed that final submissions would be delivered in writing, sequentially, and the tribunal would meet as soon as possible thereafter to consider its decision. In the interests of speed the tribunal agreed to deliver its decision first, with the reasons to follow in a separate document. The tribunal's decision, ruling in favour of the Applicant, was handed down on 14th March 2007. For convenience, a copy may be found annexed at the end of this document. The tribunal's findings of fact appear at paragraph 4, the financial consequences at paragraph 5, and the decision on costs issues at paragraph 6.

Statutory basis of the Leasehold Valuation Tribunal's jurisdiction

5. Section 18 of the Landlord and Tenant Act 1985 defines the expression "service charge", for the tribunal's purposes, as :

> an amount payable by a tenant of a dwelling as part of or in addition to the rent... (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management...

6. The overall amount payable as a service charge continues to be governed by section 19, which limits relevant costs :
   a. only to the extent that they are reasonably incurred, and
   b. where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard.

7. The tribunal's powers to determine whether an amount by way of service charges is payable and, if so, by whom, to whom, how much, when and the manner of payment are set out in section 27A of the Landlord and Tenant Act 1985.[1] The first step in finding answers to these questions is for the tribunal to consider the exact wording of the relevant provisions in the lease. If the lease does not say that the cost of an item may be recovered then usually the tribunal need go no further.[2] The statutory provisions in the 1985 Act, there to ameliorate the full rigour of the lease, need not then come into play.

1 As introduced by the Commonhold and Leasehold Reform Act 2002, section 155(1). Contrary to counsel's submissions, section 19(2A) of the 1985 Act has been repealed

2 E.g. a landlord will not normally be able to recover the cost of employing managing agents in the absence of express provision to that effect : *Hill & Redman* para A[4627]

8. Please also note sub-sections (5) & (6), which provide that a tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment, and that an agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement)[3] is void in so far as it purports to provide for a determination in a particular manner or on particular evidence of any question which may be the subject of an application to the Tribunal under section 27A.

Relevant lease provisions

9. By clause 3 the tenant covenants with the lessors and with and for the benefit of the flat owners that throughout the term the tenant will ...

(4) Pay the Interim Charge and the Service Charge at the times and in the manner provided in the Fifth Schedule hereto both such Charges to be recoverable in default as rent in arrear.

10. The lessor's covenants appear in clause 5, and at sub-clause (5) the works included within the Interim Charge and the Service Charge are identified. The relevant covenants are :

(a) To maintain and keep in good and substantial repair and condition :

(I) the main structure of the Building including the principal internal timbers and the exterior walls and the foundations and the roof thereof with its main water tanks main drains gutters and rain water pipes (other than those included in this demise or in the demise of any other flat in the Building)

...

(iii) the Common Parts

...

(vi) all other parts of the Building not included in the foregoing sub-paragraphs (I) to (v) and not included in this demise or the demise of any other flat in the Building

(b) As and when the Lessors shall deem necessary

(I) to paint the whole of the outside wood iron and other work of the Building heretofore or usually painted and grain and varnish such external parts as have been heretofore or are usually grained and varnished

...

(g) (I) To employ at the Lessors' discretion a firm of Managing Agents to manage the Building...

(ii) To employ all such surveyors builders architects engineers tradesmen accountants or other professional persons as may be necessary or desirable for the proper maintenance safety and administration of the Building.

11. The demised premises are those referred to at paragraph 3 of the Particulars on the first page of the lease (in this case flat 54 on the first floor and garage no. 37) and more fully described in the First Schedule. That refers to the premises shown marked red on the plan annexed and at (a) to the internal plastered coverings and plaster work of the walls

[3] Eg. provisions in a lease stating that the landlord's accountant's certificate shall be conclusive, or that any dispute shall be referred to arbitration

bounding the flat, etc, but not including (ii) any of the main timbers and joists of the Building or any of the walls or partitions therein (whether internal or external) except such of the plastered surfaces thereof and the doors and door frames fitted therein as are expressly included in this demise. None of the balconies appear on the lease plan; nor is any balcony specifically mentioned as being within the demise (despite the presence of a full-height patio window in each flat above the ground floor). The tribunal therefore takes the view that the balconies do not form part of the demise but are part of the main structure of the building , in clause 5(5)(a)(I), or of the "all other parts" in 5(5)(a)(v).

12. The Fifth Schedule provides for the calculation and payment of the service charge. At paragraph 1(1) "Total Expenditure" is defined as :

> ...the total expenditure incurred by the Lessors in any Accounting Period in carrying out their obligations under Clause 5(5) of this Lease and any other costs and expenses reasonably and properly incurred in connection with the Building including without prejudice to the generality of the foregoing (a) the cost of employing Managing Agents (b) the cost of any Accountant or Surveyor employed to determine the Total Expenditure and the amount payable by the Tenant hereunder and (c) ...

The inspection

13. The tribunal inspected the estate on the first morning of the hearing. At the time the weather was overcast but dry. The Applicant, Mr Edwards, was in attendance with his expert Mr Woodhouse. The Respondent was represented by counsel, solicitor, Mr Nugent, and various directors. Some other leaseholders were also present. The tribunal first viewed the exterior of the four modern three storey blocks of flats from ground level. Concrete parts of each block still looked freshly painted. Elsewhere some hung tiles appeared loose and/or broken. The parties showed the tribunal various matters including patch repairs and what appeared to be shuttering marks. On the first floor balconies it was possible to see the small drain holes – with small protruding tubes of no greater diameter than that of a ballpoint pen – formed in the new raised, bevelled edge plinths (to prevent water simply dripping down all around the balcony edges, as had previously been the case).

14. Having been granted access to flats 54 (Mr Edwards') and 36 (in the block opposite) the tribunal was able to inspect two balconies at close range. The surface of each balcony was tiled and painted, with a raised, chamfered concrete edge on three sides (so that dirt could be brushed up and over; not caught against a right-angled lip). With balconies close to trees, such as Mr Edwards', it was observed how easily the 3 or 4 drain holes could be blocked by leaves and other detritus, thus creating a likelihood of ponding. Should cracks appear in the joints between the quarry tiles then the paint would provide no protection and water could penetrate the concrete structure. No flashing could be observed under the door frames.

15. The tribunal was also able to note the poor quality of the timber handrails surmounting the painted wrought iron balustrades. Due to their inaccurate mitring and lack of mastic sealant the corner joints were seen to be susceptible to ingress of water. The timber was rough-cut, with the ends closest to the wall left exposed and untreated with any

weatherproofing. In each case the surface of the handrails was rough to the touch, requiring sanding and revarnishing. The overall impression conveyed by these balcony handrails (and the tribunal shall assume that the two inspected are typical of the others) was of very poor workmanship.

The hearing

16. The vast bulk of the evidence was documentary in nature, although many questions were asked by the parties and by the tribunal. It is not the intention of these reasons to regurgitate the evidence taken in any detail. Instead, this document shall record the history of the project, points of note, and the tribunal's observations. Matters of law, and the parties' understanding of it, shall be noted.

The problem

17. During the period when the four new blocks of flats at Sollershott Hall were built a technique was employed to speed up the setting of concrete. This involved the addition of calcium chloride to the mix. It was later discovered that, in conditions where the concrete was exposed to moisture, this "high alumina cement" was prone to failure; often sudden and dramatic. These flats were built using just such a process. All of the flats above the ground floor have a concrete balcony cantilevered from the main external wall.

18. According to Mr Edwards' account of the recent history the balconies were exhibiting obvious signs of distress, including spalling of the concrete and rust staining from the steel reinforcement. This can be seen in the photographs appearing in the hearing bundle at tab 26, pages 402–410 [26/402–410]. A survey undertaken in 2003 determined that the chloride content of the concrete in some balconies was high enough to grade them as at very high risk. A number of companies became involved, suggested different remedies, but for various reasons were dispensed with. These companies included :
    a. Martech, which conducted the 2003 survey and proposed cathodic protection
    b. Its sister company, Makers, which suggested galvanic protection as being more cost-effective
    c. Concrete Consultancy 2000 Ltd, of which Mr Woodhouse – later to play a role in this saga – is a director
    d. Philips Welding & Fabrication Ltd, which was going to replace the balconies with galvanised steel ones
    e. A E Butler & Partners, structural engineers who recommended using a product by Degussa (later taken over by BASF), viz Protectosil CIT.

    What Sollershott Hall Management Ltd's directors wanted was a solution for the balcony problem, backed by an effective warranty for the mid to long term – say 20 years.

19. In each case Mr Edwards, as the *de facto* manager of the site, was heavily involved in the decision not to proceed. While the tribunal did not wish to waste any time over solutions which ultimately were not adopted, it was clear from the parties' various statements that the wisdom of these past decisions remained a bone of contention. This may explain why, when Mr Edwards started expressing legitimate concern about the way the repairs eventually agreed upon were being carried out, his fellow directors seem to have largely

ignored him – in effect treating him as the boy who cries "Wolf" just once too often.

20. Finally, in the autumn of 2005, Mrs Willey, one of the Sollershott directors, proposed that Mr Michael Nugent, of The Concrete & Corrosion Consultancy Practice Ltd (CCCPL), be invited to survey the premises and prepare a report.

Mr Nugent's initial approach/advice

21. At [15/124] in the hearing bundle appears CCCPL's document dated 23rd November 2005 and headed "Proposals for full project management package". The quotation type is expressed to be fixed and the amount to be £5,750 plus VAT, which strongly suggests that this covered only the cost of the initial investigation and written report. It is signed by Mr Nugent but not by Sollershott Hall Management Ltd. However, it is the only document indicating the nature of the contractual relationship between CCCPL and the Sollershott management and so is worth some study. The document comprises two pages. On the first page the project, client, date and CCCPL reference are quoted. There are then nine numbered points. Some can be summarised, while others require quotation in full. Point numbered 1 requires CCCPL "to produce specifications, project documentation, tender documents." The company is then required to select up to 6 specialist contractors and consult with the client prior to issue of the invitations to tender, carry out tender evaluations and report to the client with recommendations.

22. At point 5 CCCPL is to :

> Appoint contractor on clients behalf and administer the entire project on behalf of the client to include : –
>
> - Inspections of the work at all stages to assure quality assurance at all stages
> - Ensure the contract runs smoothly, to time and looking after the client's best interests
> - Carry out valuation agreement at 4 weekly stages
> - Ensure all guarantees and maintenance manuals are in place
> - Confirm all health and safety issues are met.

23. The final point, point 9, is important because it is relied upon by Mr Nugent to justify his company's later actions. It reads as follows :

> Please note we offer a single point contact scheme where we administer everything including paying the contractor and submitting 1 no. invoice to the client for contractor and consultant fees.

24. On the second page, in smaller print, are a number of standard terms and conditions of engagement – from 1.0 to 5.4 – with the headings : Obligations of the client, Obligations of the consultant, Financial obligations, Grievance/dissatisfaction, and Protection of information.

25. In December 2005 CCCPL produced a detailed written report on its inspection and testing survey. It appears to be 126 pages long, but not all of it is in the hearing bundle. Apart from the front page and contents it starts at page 20. At page 97 of the report [20/255] appear some conclusions. They begin :

From the inspection and testing carried out to the external facade of Sollershott Hall Balconies, we can comfortably conclude that the balconies are in a sound condition structurally, but are suffering extensive distress due to cracking and spalling of concrete. There are a number of reasons that have combined to cause the levels of distress currently present.

- Low concrete cover to the steel reinforcement
- High levels of chloride within the concrete
- **Poor protection from the top decks** *[emphasis added]*
- Inadequate protection from inferior coatings.

With the above aside the balconies are repairable economically.

26. On 18th January 2006 Mr Nugent attended a meeting of the Sollershott directors so as to discuss his company's proposed remedy. This would involve application of Protectosil CIT, a migratory corrosion inhibitor. Having discussed the earlier Martech report Mr Nugent explained that it was unnecessary to test every balcony (which he said would cost £15,000 and be a waste of money). He said that an incipient corrosion problem had to be managed, to slow it down to a negligible rate – but that it could never be stopped. According to the typed minutes starting at [24/372] he was then asked to explain how the balconies would be treated. His recorded reply is important. It reads :

GL : How will they be treated?

MN : **All the balconies will have the tiles and membrane removed. They will be grit blasted above and below to bare concrete.** The steel work will be blast cleaned. We will do patch repairs which can be done by hand or, if the area is large, shuttering will be used and the repair is filled in.

All the materials from the manufacturers are identical : Sika, Fosroc, Sbd and contain Revacryl or similar which is a powdered latex resin and all the products are the same with only their own little tweaking to differentiate. However it is important to use all the materials from the same manufacturer in case there are any problems. The guarantee can be applied because they are all from one company. No company can then blame another. *[emphasis added]*

27. Mr Edwards then interjected with a question whether CCCPL issues a guarantee, to which Mr Nugent responded "Yes definitely the contractor would issue a guarantee, we would oversee all works. If there are any problems you contact us and we arrange for the contractor to carry out the guaranteed works again under our supervision."

28. Returning to the subject of the procedure to be followed, Mr Nugent said that :

After the coatings have come off it will be obvious where to patch. All spalls will be treated. Hammer testing is carried out to identify required patch repairs.

Then a Migratory Corrosion Inhibitor will be applied on top. The concrete is sprayed and absorbs the product.

29. Asked why he proposed using a Degussa product, Mr Nugent explained that it was because in independent Swiss testing Protectosil, the Degussa product, "is the only one

that has been shown to work".

30. Finally, the subject of cost was raised. Mr Nugent is recorded at [24/75] as stating that his company's project management fees are between 12 and 13% of a contract, which is in addition to the job cost. As his company had already done the survey "your charge is at a preferential rate."

31. The tribunal finds no fault with the work done by CCCPL, its report, and the oral advice given by Mr Nugent up to then.

The tender process

32. The draft tender documentation appears at [16/127–175] and is dated 7th March 2006. It was not suggested to the tribunal that the actual tender documentation differed in any material respect. The parties to the contract appear at [16/131]. The client is correctly identified as Sollershott Hall Management Ltd. CCCPL is identified both as consulting engineers and as project managers. The name of the main contractor is marked "to be announced". Amongst the instructions to tenderers at [16/134–135] are :
    a. Point 3 – no unauthorised alteration or additions
    b. Point 5 – "This contract does not include a Contract Price Fluctuation Clause"
    c. Point 11 – "The Form of Agreement shall be that published in standard as given in the ICE Conditions of Contract, 7th Edition, September 1999"
    d. Point 12 – providing for a 5% retention from the first payment to the contractor in lieu of a bond
    e. Point 15 – a list of the information required to be produced by the contractor, failure to supply which at the time of tender may invalidate the tender.

33. Some Special Conditions of Contract appear at [16/156], including a statement (repeating point 4 above) that the Institution of Civil Engineers Contract Price Fluctuation Clause shall not apply.

34. At [16/144] is a form of agreement to be used by employer and contractor. It includes a covenant by the employer to pay the contractor in consideration of the construction and completion of the works.

35. The specification of works appears at [16/163–172]. It identifies the products to be used, states that Protectosil CIT is to be applied to the entire surface to be protected, including any repaired areas, at a total application rate of 600ml/m^2 – applied in two or three coats, but makes no mention whatever of removing the tiles from each balcony.

36. The budget rated bill of quantities at [16/174] specifies the area to be treated with migratory corrosion inhibitor as being 175m^2. The timber handrail to be removed and replaced is quantified as 130 linear metres.

37. Appearing at [21/304–322] is what is described as a schedule of works for nominated contractor as recommended by Degussa. All pages except the first two are on Degussa headed paper, although that refers specifically to the project as being Sollershott Hall and quotes a project number : JW/60495. At [21/309] it is stated that "all areas are to be

treated with Protectosil CIT..." On the first page (not on headed paper) at [21/305] appears the instruction :

> Remove and dispose of all existing quarry tiles. This will leave the balcony ready for concrete repairs to take place. This will follow Degussa specification JW/60495.

38. The tribunal is surprised that the need to remove the quarry tiles from each balcony, identified as part of the procedure by Mr Nugent at the meeting in January 2006, did not feature anywhere in the tender specification. The fact that the tiles had not been lifted only 1½ –2 weeks before the contract was due to finish[4] is a strong indication that the contractor either did not know or had no intention of removing them, for this is one of the first tasks that would have been required before grit blasting the concrete surface. In the tribunal's view this was a failing on the part of CCCPL.

39. The tribunal was also puzzled why, in works to an existing structure, CCCPL would have sought to contract on the basis of the ICE 7th edition form of agreement. A JCT contract would have been more suitable. When questioned by the tribunal it became apparent, however, that Mr Nugent was not at all familiar with the terms of an ICE (or JCT) contract, and had no understanding of its requirements for insurance of the works[5] or the meaning of the term "Contract Price Fluctuation Clause".[6]

Appointing the contractor – things start to go wrong

40. Tenders were then invited from four companies and CCCPL then prepared a tender analysis document dated 5th May 2006, to be found at [17/176–184]. Before looking at that it is worth recording that at perhaps the first meeting between Mr Nugent and the Sollershott directors on 22nd November 2005 he was asked by Mike Button (at [24/369]) whether CCCPL would recommend the contractors. His answer is recorded as :

> We will not recommend a company. We have a project management. We have a database of contractors that is divided into categories. This is based on value, Construction Line approved, 10 years of accounts, all staff trained and have tickets to show they are trained, insurances, experience, we ask past customers. We vet them after they have worked for us.

41. At [17/179] the tender analysis document begins by giving information about each of the tenders in turn. The first is described thus :

> **1. Bondcote Construction**
>
> Bondcote Construction has carried out projects of this nature in the past and is known to our practice having won tenders in the past in particular on housing association projects.
>
> Their score on our database passed all the required criteria.
>
> Bondcote Ltd during our tender analysis were found to be extremely helpful and

4 See Minutes of project meeting dated 7th August 2006, at [24/376]

5 See *Keating on Construction Contracts* (8th ed), pg 994, paras 20–105 & 106

6 See *Keating*, pg 1105, paras 20–350 & 351

supplied us without question any and all information required to analysis (sic) their company and their tender.

The Schedule of Price Comparison, at [17/182], shows Bondcote Ltd as the lowest tenderer overall. In its conclusions/recommendations at [17/184] CCCPL quotes the tender prices and then states :

> With the above in mind it is our recommendation that the contract be awarded to Bondcote Ltd.
>
> We feel that to have this contract including provisional item carried out for the above total sum represents the best value and the contractor is of a size with the experience to carry out this work successfully.
>
> We have also contacted Bondcote Ltd relating to the question of the number of points they needed to clarify before entering into a formal agreement. This has been resolved and there are no remaining points requiring clarification and therefore the price is fixed and we have written confirmation of this.

42. As Mr Edwards was able to discover from an online search of Companies House records, the company registered under the name Bondcote Ltd is described as a manufacturer of fabricated metal products. It is not a builder. If CCCPL was so familiar with this builder and had been so helpfully supplied with all the documentation sought, why should it repeatedly refer to it by this name. As Mr Edwards discovered, there is a limited company with the name Bondcote (Medway) Ltd, with a registered office at Gillingham in Kent, but it was only incorporated on 9th February 2001 and is dormant.[7] In fact the entity tendering successfully for the contract was a sole trader, Mr Peter Box. He is also the director of the dormant Bondcote (Medway) Ltd and shares its address. This became clear when the vital parts of the tender documentation were eventually produced, on the third day of the hearing. Mr Box trades as Bondcote Building Contractors.[8] Mr Edwards had raised this query with CCCPL at the time, but did not receive a satisfactory answer.

43. Another question raised by Mr Edwards, but fobbed off by CCCPL (and ignored by his fellow directors when he had resigned as principal point of contact for the purposes of this project), was "Where is the contract mentioned in the tender documents?" It is not acceptable to say that ICE contracts are copyright, and it would cost £75 to buy one. Every contract administrator has a supply of blank copies (or digital versions) of each of the contracts it is likely to require. One is then completed and signed by all concerned. This is one of the overheads of being a contract administrator. In fact, as was discovered only in response to some questions from the tribunal on day two, there never was a signed ICE contract, or even a signed version of the form of agreement referred to in the tender documentation.[9] The "contract" took the form of a letter of engagement from Mr Nugent to Bondcote Contractors, finally produced on day three of the hearing.

44. Dated 23rd May 2006, the relevant parts of this letter (which is short) read as follows :

7 See records at [90/746]

8 According to Mr Box's public liability insurance, at [41/461], in which the business description reads merely "Builder, carpenter, flat roofer and tiler"

9 See [16/144], referred to in paragraph 34 above

Re : Balcony repair and protection tender – Sollershott Hall, Letchworth

With reference to the above and further to your submission of tender, having examined the document and reported to our client we have pleasure in confirming your appointment to carry out the contract for the **fixed tendered sum** £55,950.00 + VAT. *[emphasis added, here and below]*

We confirm that we act as single point contact and that this letter of appointment overrides any previous contract or documentation.

45. When asked by the tribunal to explain this last sentence Mr Nugent said that it was intended to override any tender document incorporating the tenderer's qualifications. When asked to what contract Mr Nugent thought he was working he answered "The tender is the contract". Questioned by the tribunal once again, towards the end of his evidence, there was the following exchange :

A (Re the above sentence) I would not read that as saying all previous contracts are inapplicable
Q What do you mean by previous contract? The only contract referred to in the documentation is the ICE form.
A I am saying that the ICE form is not overridden. This is a standard letter.
Q What are the terms of the contract with Bondcote? There is no reference to any terms.
A I agree. It is on the basis of the tender.
Q Do you have a legal department?
A No
Q Have you ever run this letter past a lawyer?
A No.

46. The tribunal regards the complete absence of a signed contract identifying the parties' respective rights and liabilities as utterly inexcusable where a consultant is involved in managing the tender process and offering to project manage the work. This is all the more so where that professional claims to have upwards of 20 years experience. Instead, Mr Nugent demonstrated a complete lack of understanding of basic contract terms in the ICE form. Having started reasonably well by ensuring that the correct documents were identified in the tender, he then ruined it by placing reliance upon a short, badly worded letter signed by him which on its face overrides all previous documentation.

47. To cap it all, Mr Nugent then went on to demonstrate in evidence a complete confusion – and lack of understanding – of his true role in this project.

Mr Nugent – his true role

48. CCCPL's document at [15/124] dated 23rd November 2005 is headed "Proposals for full project management package". Point 5 on page one makes clear that its role is to appoint the contractor on the client's behalf and administer the entire project, again on its behalf.

49. In the tender documentation at [16/131] the client is correctly identified as Sollershott Hall Management Ltd and CCCPL is shown both as consulting engineers and as project managers.

50. In his written statement, at [14/120], Mr Nugent confirms that CCCPL were "the Consultants/Project Managers for the... project". In his oral evidence to the tribunal, however, he became very confused. In answer to questioning first from the tribunal he stated :

> I understood that our job was to take the project away from SHML, and hand it back to them when the job was done. We engaged Bondcote, who were working for us, and in respect to Bondcote we were fulfilling the role of the client.

Later, to the tribunal and then to Mr Edwards, he said :

A I saw my role as being the client, so far as the contractor was concerned. We would be responsible for the complete contract.
Q Where were you tasked with that?
A Our terms are at [16/124], paragraph 9.
Put : Note 9 refers to administration.
A Agreed.

Later still, he said :

> In the tender documents I believe our name should have been in the box as Employer. That was the mistake.

Shortly thereafter, he adopted a different role :

> We oversaw the works, as your prime contractor.[10] We have insurance to cover that work.

51. A copy of CCCPL's professional indemnity insurance policy is at [41/461–464]. It makes no provision for the insured acting as a contractor.

52. Case law has confirmed the contract administrator's dual role in acting as an agent for the client, and as an impartial middleman when making decisions concerning payment and time.[11] From the recent case of *McGlinn v Waltham Contractors Ltd*[12] the following other propositions can be noted :

a. Under a modern construction contract, there are certain documents and procedures which are generally regarded as critical to a satisfactory outcome
b. On the vast majority of sizable building projects, there will also be a specification. This will usually be based on the design brief, and will be an expanded version of what the employer requires, rendered into technical language for a contractor to understand and to follow. The specification will usually be prepared by the

[10] A stance maintained in paragraph 18 of the Respondent's closing submissions. The tribunal does not accept that the Respondent believed, contrary to all the tender documentation, that CCCPL was main contractor

[11] *Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd* [2006] EWHC 89; [2006] BLR 113 (TCC); followed in *McGlinn* below

[12] [2007] EWHC 149 (TCC)

architect, and will become one of the most important component parts of the building contract

c. The lead consultant will usually agree, on behalf of the employer, the particular terms of the building contract appropriate to the project. This is important because it will usually be the lead consultant who will be responsible for administering that contract

d. Most of the standard forms of contract identify a wide range of tasks which the contract administrator must perform. It is therefore critical for the lead consultant to ensure that the contract as between the employer and himself incorporates all the obligations which, in its terms, the standard form of building contract assumes have been imposed upon the lead consultant as contract administrator.

53. In the instant case CCCPL simply had no understanding of its role, failed to ensure that a contract was executed between contractor and employer, and as a result left its client wholly unprotected. It undertook no checking of invoices for the purposes of proving what was supplied, or of time sheets to show what was done, or kept or checked a site diary which would record weather conditions and what treatment was undertaken on which part of the site that day. Due to his lack of understanding of the insurance position Mr Nugent failed to check that his client had any form of insurance for contractors working on site, with the result that there was none. When authorising payment of an invoice [34/468][13] he also "overlooked completely" the 5% retention clause at [15/124], thus requiring the client to pay too much against the first invoice. For these reasons the tribunal determines that the fees paid or payable by the Respondent to CCCPL in respect of its administration of the works were not reasonably incurred.

The work commences, and initial concerns

54. A contractor appeared on site on 12th June 2006. Rather to Mr Edwards' surprise, the two vans bore signs for Bondcote (Medway) Ltd and two telephone numbers. He checked and found that the company was described as dormant, while the two telephone numbers were not connected. He raised this with Mr Nugent but was assured all was well. When his concerns about this lack of clarity, and the complete absence of the expected contract documentation, were still not answered, Mr Edwards wrote to Mr Nugent on 2nd August 2006. The letter appearing at [92/762] is heavily annotated by one of the directors, to the effect that this (and in particular the statement that independent advice had been taken) was an "abuse of position and contrary to board's decisions". In the margin next to the request that Mr Nugent immediately supply paper copies of the contractor's name, address, etc and of the ICE contract documents, is the comment "In escrow with the Chair". At the bottom, initialled AP, is the remark "I confirmed I had these documents". It is not clear to the tribunal whether Mr Parker knew the meaning of the concept of "escrow"; nor does it understand why he considered that he could keep this information concealed from his fellow directors. What is certain is that he had never been shown any ICE contract documentation because, as admitted by Mr Nugent, there never was any.

55. Mr Edwards had other concerns. On 10th July 2006 he e-mailed his fellow directors to

[13] See also [87/658], produced by Mr Nugent and his colleague, John Smith

express his puzzlement

> ...why they have not removed all the tiles before building the sills. They seem to be patching at the same time and where there are lateral cracks in the balconies they will need to patch these on the upper surface so they will visiting the balcony twice. (sic)

56. In a document headed "Review of New Block Balconies Repairs", on which has been endorsed the handwritten date 12th July 2006, [35/441] Mr Edwards comments on the lack of detailed instruction in the draft specification of work (the only one seen) and notes that
    a. The paint was not being removed by needle gun or grit blaster, in the correct manner, but ineffectively by use of a wire brush
    b. Patch and crack repairs were not being carried out properly, with use of a power saw
    c. He could find no trace of any Degussa products being stored or used on site
    d. The sills to the balconies were not being constructed as previously agreed. CCCPL had now adopted a new arrangement, with 3 spigots – which might soon become blocked by debris and require regular rodding
    e. The paint removal from concrete and railings has not been sufficient. For the treatment by Protectosil to be effective all the surface area has to be coated.

    He then went on to suggest that the Sollershott management retain its own consultant to monitor progress, as he had doubts about Bondcote's experience and knowledge to undertake the work as a prime contractor.

57. The presence of other suppliers' products on site, the method of mixing the material for patch repairs (whether by hand or by power tools), Bondcote's method of working, and the degree of supervision by CCCPL were the subject of regular e-mails, discussion and argument.

58. As Mr Edwards was resident on site, and initially held the principal management role on behalf of the Sollershott board, he carried out his own regular inspections of the work. This caused resentment amongst the workforce, particularly as he was looking into the garages allotted to them for storage of materials and criticising their method of working. They also resented the fact that a representative of the Health & Safety Executive visited one day in response to a complaint that they were working on site without hard hats, proper boots, or complying with other standard health and safety procedures on building sites. The complaint was well-founded, and instructions were duly issued by the HSE. Ensuring compliance with health and safety should have been a responsibility of CCCPL under point 5 of its "Proposals for full project management package" at [15/125].

Mr Woodhouse – independent expert or rival?

59. As already mentioned above, Mr Edwards was so concerned about the way Bondcote was operating (seemingly with the approval of CCCPL) that he wanted the directors to appoint their own independent consultant to monitor what was going on. This proposal was rejected by the board. The impression formed by the tribunal, having listened to the evidence of some of these other directors and seen the flurry of e-mails, minutes of

meetings, and annotations to other documents,[14] is that they feared that yet again Mr Edwards was raising obstacles to progress. Now that the job was under way after many years arguing about what to do, and with the end finally in sight, they wanted nothing to undermine their faith in Mr Nugent or cause either CCCPL or Bondcote to stop work. As a result, on or about 19th July 2006, he withdrew as point of contact either with CCCPL or Bondcote. Mr Parker and Mrs Willey took over that role.

60. Despite that, and wrongfully using Sollershott Hall Management Ltd headed paper, Mr Edwards invited Mr Justin Woodhouse to attend, quietly inspect, and report to the board on his findings. On 2nd August Mr Woodhouse wrote a quick letter confirming his initial observations. This is appended to his report for the tribunal and can be found at [5/69]. He notes :

> The finished balcony walls and in some cases soffits have an uneven texture with obvious foreign inclusions or areas of poorly mixed fairing coating. The raw edges of concrete repairs beneath the fairing coating are at the majority of locations plainly visible. The anti carbonation coating is at a number of locations dragged as a result of application during too greater temperature. (sic)
>
> The primary reasons for the above appear to be the fact that the levels of preparation of the substrate or grit blasting appear to have not removed all of the existing surface coatings. This is essential to all the following applications. If existing coatings remain in place they will form a physical barrier to the corrosion inhibitor, which is surface applied, preventing its passage into the concrete...

61. The following day, 3rd August 2006, he again wrote to Mr Edwards [5/70]. This letter was significant, because he had forwarded some of the photographs he had taken to the local representative of Degussa (now part of BASF), Mr Darren Priddle. He went on :

> We must advise you that in Mr Priddle's opinion the fairing coat applied has not been mixed correctly and the general preparation of the substrate is not sufficient to comply with the specification they put forward. With this in mind BASF would be unable to offer a warranty for the materials applied at Sollershott Hall. Should you wish any further confirmation of this Mr Priddle will be on site to view the works and confirm in writing his observations and his company's position on Monday 7th August.
>
> In addition there appears to be some confusion as to the materials used in the completion of the works. Mr Priddle is trying to locate any records of the MCI, repair material or anti carbonation coating which were specified having been purchased through their organisation or distributors by the contractor. As you are aware, we photographed a number of empty MCI containers on site from Weber SBD: an alternative manufacturer, but no empty Protectosil CIT containers were evident...

62. At page 4 of his report for the tribunal, at [5/57], Mr Woodhouse explains what materials he found on inspecting the storage and mixing area :

> An inspection of the material storage and mixing area located within a garage on the site provided evidence of a number of different materials, although only one

[14] Such as the letter of 2nd August 2006 at [92/762]

of these was found to be of the specified BASF range; that being the Masterseal 525; the deck waterproofing material which was being used as a fairing coating. The remaining materials on site were found to comprise, Weber SBD repair mortar, sharp sand, cement, various FEB mortar additives and Weber SBD Mulsiguard MCI. No mechanical mixing tools were evident during inspection although mixing by hand with a stick and bucket had obviously taken place.

63. The possibility that no supplier's warranty would be forthcoming from Degussa (BASF) and the evidence that materials form other manufacturers was being used on site (despite the importance placed by Mr Nugent on using material from only one manufacturer at his meeting with the directors in January 2006) was potentially very serious. Mr Edwards was anxious that the other directors read Mr Woodhouse's report, and quietly meet with him on site.

64. Instead, with the exception of Valerie Button – who resigned in protest at the other directors' response, they reacted with horror, regarded the secret instruction of another expert as an outrage and something underhand, and (with the other exception of George Land[15]) refused even to read the letters of 2nd and 3rd August from Mr Woodhouse. Instead, Mr Nugent was told what had been going on. He too, was upset, warning the directors that Mr Woodhouse was a competitor (and therefore likely to be biassed against him) and withdrew the contractors, Bondcote, from the site.[16] They eventually returned and finished the job.

65. Just to complete the events of that summer, on 18th August 2006 Mr Woodhouse wrote a detailed report – this time addressed to Mr Edwards personally – making observations on the contract, the tender, the appointment of the contractor, supervision of the works and the unusual arrangement for payment, and on the works themselves.[17] By then the works had been inspected not only by Mr Woodhouse but also by Darren Priddle of BASF. While the former might be regarded as a competitor, the latter was supposed to be the supplier of the products to be used in the course of this contract and the party due to issue a warranty for the performance of the corrosion inhibitor. This latter issue shall be discussed further on in this document.

66. Both Mr Woodhouse and Mr Nugent gave oral evidence at the hearing. Neither written report was compliant with the Civil Procedure Rules 1998. The CPR do not of course apply to this tribunal, but a knowledge of and compliance with Part 35 at least indicates that the expert is aware of his or her duties to be impartial, to consider all the evidence, and to be prepared to reconsider his or her opinion if fresh evidence were to emerge or scientific or technical knowledge or standards change. Mr Woodhouse openly admitted to an ignorance of the CPR, and confirmed that he had never appeared as an expert in court – although he had done so in arbitrations. However, he confirmed that he understood the need to remain independent and objective in the giving of his evidence.

67. He explained how he had initially been given a bundle of documents bearing no names.

15 See statement of George Land, para 11, at [12/108]

16 See the statement of Anthony Parker, paras 8–10, at [9/96]

17 See [5/71–73]

He had briefly reviewed the contract documents, noted the references to JCT or ICE agreements, but could find neither. He took photos, looked at the spoils heap, was surprised not to see any waste packaging from the specified concrete repair material or the corrosion inhibitor. He had subsequently asked about delivery notes, but had not been shown any.[18]

68. Having referred to the intended uses for Emaco 232 as a fairing coat and Masterseal 525 as a cementitious waterproofing agent in the original specification[19] he went on to explain the importance of removing the quarry tiles. They are impervious and the inhibitor will not penetrate them. If they are not removed the contractor will achieve a considerable saving in time, effort and cost. Referring to the Degussa technical sheet for Protectosil CIT, which it was confirmed Mr Nugent would have had available at the time, he said that a small dab of paint will prevent Protectosil penetrating beneath that paint. Protectosil will penetrate to the rebars from the bottom if there is a suitably prepared surface. The product chemically alters the concrete itself, and works by capillary action. From his examination of the site, and the photographs[20] to which he drew the tribunal's attention, he said that the corrosion inhibitor was being applied over a poorly prepared surface, with considerably in excess of "match heads" of paint being present. One had to assume that the inhibitor goes into the concrete vertically, which is why the whole surface had to be treated.

69. On the subject of concrete patch repairs, Mr Woodhouse was of the definite opinion that the repairs had been carried out using Weber SBR and not the Emaco product. For the benefit of the tribunal he had made up two samples using SBR and Emaco R340. Each had a different consistency and colour. One includes fibre. The colour of SBR depends on the amount of cement and colour of the sand, but the matrix is different. Using the analogy of chocolate bars the Emaco R340 is solid, like Bournville, whereas SBR is full of bubbles, like Aero[21]. The difference between the two repair products was striking.

70. Mr Nugent gave evidence, being the principal witness for the Respondent. It ranged over many subjects, as would be expected, but the tribunal noted with some surprise just how vehemently he attacked the evidence – and impartiality – of Mr Woodhouse. Mr Nugent informed the tribunal that he had 25 years experience of concrete repair and corrosion of steelwork. He had sat on various boards, including to do with the repair of nuclear structures. He stated that he was a Member of the Institute of Corrosion, and the British Institute of Non-Destructive Testing. Membership was obtained as a result of interview, professional qualifications and experience. He had also been a Fellow of the Faculty of Building, but dropped that due to other commitments.

71. He stated that CCCPL had specified these products on a number of occasions. He had also personally attended training on all these products, and been at the launch in the UK of Protectosil. He had spent three days in Germany at the manufacturer's labs, where he had been taken to see the products being formulated, tested and made.

18 This is hardly surprising, as none have ever been disclosed and produced to the tribunal.

19 See [16/168 & 170]

20 See [5/74, 75 & 76] and the loose photo produced by the respondent and numbered 796

21 Except that in this case the bubbles could also be seen on each surface

72. He was satisfied that, although their removal was in the original specification, the quarry tiles were in such good condition that they did not need to be removed. The slabs were so thin that the Protectosil spray would reach the reinforcement from below. There was no need to apply it from above.

73. Where doubts were raised, Mr Nugent's response was always to stand by the contractor. At a meeting with the board on 7th August, when a request was made for proof that Protectosil had been applied, his minuted response, at [24/376], was :

> There has to be an element of trust that it has been applied.

74. He disagreed with Mr Woodhouse's assessment of how the work had been undertaken, of the quality of the surface preparation, and asserted that in his opinion Mr Woodhouse had interfered in his getting a warranty for this site. Further (and potentially libellously), he said not only that Mr Woodhouse and Mr Edwards were stopping the warranty but that a Mr Gilbert of BASF was involved in an underhand scheme with Mr Woodhouse; the implication being that they wished harm to CCCPL.

75. Again, at the meeting on 7th August he is minuted as stating that the involvement of Mr Woodhouse ("a competitor") on site :

> ...had caused much embarrassment to his company in their tendering process. Although (he mentioned Colin) the intentions may have been good, it had caused a major problem and that more detail may have inadvertently leaked than we have stated.. This information had nullified a major tender with a local authority, which is now void.

76. The tribunal finds such an allegation staggering. No substantiation was offered. How any of the information in the draft tender documents could possibly have such an effect was not explained. It is inconceivable that a local authority would dream of entering into a contractual relationship with a contract administrator for a major tender on the basis of the two page project management package at [15/124–125], or that any other firm of consulting engineers or quantity surveyors would use such a document.

77. Having made accusations about Mr Woodhouse's professionalism, the tribunal was astonished by the cavalier manner in which Mr Nugent should proceed to utter such wholly unsubstantiated allegations in public. The tribunal considers that despite the many years in which he has been engaged in this business, these wild allegations, taken together with Mr Nugent's other responses which demonstrate a basic lack of knowledge about JCT or ICE contractual matters, the true role of a contract supervisor, etc, adversely affect his credibility as a witness.

78. Despite his limited ability to investigate the works, which he had to undertake in a non-destructive way, the tribunal therefore prefers the evidence of the much more measured Mr Woodhouse to that of the excitable and conspiratorial Mr Nugent.

Protectosil CIT – was it used as required?

79. The presence on site of products from a rival manufacturer (Weber) and the absence of any waste packaging from Degussa/BASF, or indeed of any invoices or relevant delivery

notes, has already been noted. At the meeting on 7th August Mr Nugent stated :

> John Smith, Colin and I have all seen the Protectosil being applied.[22]

He went on to describe the amounts required for application, stating accurately that the application rate is 600mls per square metre but inaccurately that the total amount required is two 25 litre drums. He then offered to take a sample and have it analysed.

80. The tribunal heard evidence of the sampling exercise. In order to establish whether the product had been applied, correctly or otherwise, one might expect the taking of a couple of core samples. One might even expect to see this written into the specification for the contract. Instead, Mr Nugent arranged to take a sample before it was applied. This was the process :

> ...it was not a spur of the moment thing. The only thing I could find on site was to take a milk bottle. I stopped someone and took a sample from the sprayer's tank. I then took the sample back to Canterbury. I spoke to the [BASF] technical people in Manchester, who told me it was made in Germany, and I would need to speak to them. I e-mailed their lab (Sabine Griesler) and she said they could do the CG test. She said send some out. I tried to find a container – a small square plastic screw-top container. I sent it off to Germany by post. Sabine informed me that the red colouring in the plastic had tainted the colour. She said it looked like Protectosil but was the wrong colour. She then spoke to me and said if you send me some more, in a clear plastic bottle from a pharmacy. She was satisfied that it was Protectosil. That was the remainder of the same original sample in the milk bottle.

81. The presence of packaging from other manufacturers was explained as a means of keeping the Bondcote vans tidy. Why Bondcote could not tidy its vans before coming on site, and leading to this suspicion, was not explained. Completely out of the blue, however, Mrs Willey, chairman of the board, volunteered as additional evidence in chief that :

> ...at the meeting on 7th August which Mr Edwards refused to attend Mr Nugent said that the reason for not seeing any drum with Protectosil on it was because it had to be mixed in a large drum, and Protectosil was not supplied in a large drum.

82. The inference which the tribunal was being invited to draw was that this explained the presence of the empty drum of Weber SBD Mulsiguard seen in the photograph in Mr Woodhouse's report, at [5/57]. No such explanation appears in the minutes of that meeting, at [24/376–379]. Despite knowing that this was a major issue concerning Mr Edwards, and affecting the provision by BASF of a warranty, no such allegation appeared in Mrs Willey's fairly brief witness statement; nor in anyone else's.

83. As not even Mr Nugent adopted this comment in his live evidence, which followed, the tribunal is disinclined to believe Mrs Willey on this.

84. If, as appears from the e-mails from the BASF lab in Germany, the sample taken by Mr Nugent from a Bondcote workman's applicator was indeed Protectosil then the tribunal

22 This was denied by Colin Edwards

is prepared to accept that some was used. The tribunal is not, however, satisfied about the explanation for the presence on site of an empty drum for a rival product. Rather late in the day a letter was produced from Mr Peter Box of Bondcote Contractors. Dated 19th December 2006, the letter forms part of the additional material submitted days before the resumed hearing, at [824]. Given the importance of such evidence, the tribunal would clearly have preferred to hear this given orally at the hearing, so that the witness could be questioned. Why the Respondent chose not at any stage to call Mr Box as a witness shall remain a mystery. The letter explained that Degussa were very keen to develop a relationship with him as the were actively trying to get contractors to use their products :

> We were supplied with a selection of materials whilst in Manchester including 4 bags of Repair mortar, 2 drums of Protectocil, 2 drums of Elastic Coating, some flashband and flexible roof coating that they make. The total value was in the region of £1,500.

85. Apart from the implicit suggestion that such experienced concrete repairers as Bondcote had not found the opportunity before the Sollershott contract to use any of this material, the greatest difficulty with Mr Nugent's argument is that his figures simply do not add up. The Degussa technical specification for the product, repeated in the tender specification at [16/169] and in the bill of quantities at [16/192], shows that the required application rate is 600ml/m^2. The area to be covered is stated to be 175m^2, therefore the quantity required is 4.2 x 25 litre drums; not the 2 (free sample) drums mentioned by Mr Nugent on [24/377]. One cannot buy 4.2 drums, therefore the quantity required for this contract was 5 drums. No evidence has been produced that any were ever purchased. The conclusion must be either :

a. That a mixture of corrosion inhibitors was used, depending on what Mr Box had in stock; or

b. That only Protectosil CIT was used, but in insufficient quantities.

Without taking a number of core samples from around the site the answer to this conundrum will never be known. If the parties were expecting the tribunal to provide a conclusive answer, one way or the other, they shall be disappointed.

Non-removal of the tiles – a late change in spec?

86. Another part of Mrs Willey's additional evidence volunteered on the day was that at the meeting on 7th August 2006 :

> Colin Edwards was not there when we discussed the tiles. Michael Nugent was prepared to dig up the tiles. I said No; in my experience it could cause more problems. I am not sure whether there was discussion on whether there would be any effect on the Degussa contract.

87. By this stage, however, the work was allegedly within 1½–2 weeks away from finishing. Grit blasting had taken place. Patch repairs had been undertaken, and finishing coats, waterproofing and paint applied. Metal balusters had been painted. The timber handrails had been applied, and Mr Mehew (another director) thought they looked fantastic. If there had been a genuine intention to remove the tiles one would not have waited until this stage before chipping off tiles, grit blasting the surface beneath, and then applying Protectosil. This would only damage the other work.

88. An examination of the tender specification shows that – whether by accident or design – there never was any mention of lifting the tiles. No tenderer included a price for that. Mr Edwards had queried the failure to tackle the tiles at the outset of the job, and by mid-July Mr Nugent was stating that they did not need to be lifted. This he repeated on 7th August.

89. The tribunal does not believe that Bondcote was ever aware that the original intention, confirmed by Mr Nugent at the meeting in January 2006, was that the tiles were to be lifted. Unless Mr Nugent told Mr Box, how could he possibly know from the limited documentation provided to him?

90. The tribunal is therefore more inclined to believe that Mrs Willey merely went along with Mr Nugent's proposal not to lift the tiles than that she took the decision herself. Had she done so then that would have been extremely foolish. She would have been departing from the technical specification and the original plan, and perhaps overruling the expert consultant, without the benefit of any relevant expertise of her own. She also would have been doing so without any knowledge of the time and cost savings which such a decision might entail – savings which it was her duty as a director to ensure would accrue to Sollershott Hall, not to the contractor.

The role of the directors

91. The directors of a company owe a fiduciary duty to act *bona fide* in what they consider to be the interests of the company (and not for any collateral purpose). In the exercise of their powers they are fiduciary agents for the company and they owe a duty to the company to exercise an independent judgment accordingly. Directors must not fetter their powers by contracts with or promises to other persons.[23]

92. In this case most of the directors of Sollershott Hall Management Ltd, perhaps out of a sense of frustration, allowed themselves to ally themselves with the consultant they had engaged instead of focussing on the interests of the company, even when evidence was being presented to them by Mr Edwards that matters were not following their intended course. Despite the presence on the board of several business people, amongst them senior managers in listed companies, they failed to express any concern when it became apparent that the contractor engaged was a sole trader rather than the limited company about whose accounts and reputation Mr Nugent led them to believe he had ample past knowledge. They also expressed no concern about the absence of any signed contract with Bondcote, as contractor, or even with CCCPL.

93. When evidence from a knowledgeable outside source, Mr Woodhouse, was presented to them, most held their noses at the thought that dishonourable tactics had been employed *vis à vis* their relationship with Mr Nugent and his company. Rather than put the interests of the Sollershott leaseholders and members first, they appear to have treated their loyalty as due to Mr Nugent. Mrs Button was so concerned by this failure that she resigned on 7th August 2006. Mr Land believed that his fellow directors should consider the two letters from Mr Woodhouse, but he was not at the crucial meeting. The other directors refused Mr Edwards' request that they read the letters and/or listen

[23] *Halsbury's Laws of England*, Vol 7(1), paras 1083 & 1084

to Mr Woodhouse. As one of the points made by Mr Woodhouse was that BASF would not issue a warranty for the work undertaken they should have taken his concerns rather more seriously. Instead, most were blinded by a strange morality. To quote from the evidence of Mr Anthony Parker :

> I did not want you to bring Darren Priddle and Justin Woodhouse in to a meeting secretly to surprise Michael Nugent. To my mind it was disreputable. It was all underhand.

94. The directors did partially redeem themselves when they took Mr Nugent up on his offer to take a sample of the corrosion inhibitor and have it analysed. However, they too failed to appreciate that the quantity which Mr Nugent told them on 7th August was necessary was much less than that actually required. Mr Edwards was much nearer the mark with his calculations than the majority of the directors.

95. The tribunal has already commented on Mrs Willey's evidence that it was she who, with no expertise in this area, determined that the quarry tiles on the balconies were not to be lifted. Had this been true, and she had diverted the contract from its intended path, then this would have been a grave breach of her fiduciary duty. As it is, the tribunal is satisfied that it had never been the contractor's intention to do any such work, and that the board were gently steered in the direction of accepting this.

96. Nevertheless, the board has so clung to Mr Nugent and his poor decision-making that the leaseholders now find themselves in the position whereby work has been done expensively, invoices have been paid, the 5% contract retention specified under the ICE terms was overlooked by CCCPL when invoicing Sollershott for both its work and that of Bondcote, but the required BASF warranty has not been forthcoming.

97. Instead of seeking legal advice about the shortcomings of CCCPL the directors have placed their reliance upon Mr Nugent as their star witness. It was noticeable that for most of the time the Respondent's counsel was attended upon not by his instructing solicitor, or by a director of the company, but rather had Mr Nugent seated next to him. What do they do now?

The lack of any manufacturer's warranty

98. Upon being contacted by Mr Woodhouse and shown photographs of work undertaken by the end of July 2006 Mr Priddle of BASF was so concerned about the quality of the work that he felt unable to say that a warranty would be forthcoming. On 7th August 2006 he attended the site and confirmed that stance. Although the Respondent, through Mr Nugent, has sought to argue that a warranty will be obtained, the latest information before the tribunal is in a letter from BASF dated 15th November 2006.[24] Its position has not changed :

> I can confirm that BASF Construction Chemicals have procedures that are to be carried out before, and during the works. These procedures were not put in place and therefore we can not offer any warranty on the material element of the works on the above site.

[24] Annexed to a written response by Mr Woodhouse to Mr Nugent's comments, filed by the Applicant by letter dated 15th November 2006

99. Since the first day of the hearing no attempt was made by either the Respondent or by CCCPL to write to BASF urging it to change its stance . Despite Mr Nugent's assertion that this can be sorted out by negotiation the tribunal does not, on the evidence before it, share his confidence. The leaseholders have therefore had to pay for work which on the balance of probabilities will never be covered by an effective warranty.

Mr Nugent's proposed multi-party warranty

100. Amongst the additional documentation served just before the second day of the hearing, at [800–807], was a draft multi-party "warranty for repair/protection works" which, although each page was stamped "sample", was already signed by or on behalf of Bondcote Contractors ("the Applicator") and by The Contract & Corrosion Consultancy Practice Ltd ("The Project Managers/Consultants"). The document also named as parties BASF Construction Chemicals (UK) Ltd ("the Supplier") and Sollershott Hall Management Ltd ("The Building Owner"). The respective liabilities of the various parties are set out in this document. The Applicator warrants to the building owner and the supplier that he will comply with all requirements of the contract relevant to the product and that he has complied with the supplier's current data sheets and printed recommendations regarding the handling, storage, mixing, preparation of backgrounds/substrates and the applying/laying/installing of the product.

101. Quite apart from the fact that the supplier is unwilling to issue a warranty precisely because it is unhappy with the applicator's compliance with its procedures, and the tribunal does not believe that Bondcote can have complied with the requirements for installing the product, Bondcote's own insurance policy, at [41/461], does not provide cover for either defective design/workmanship or products guarantee cover. Any such warranty is of extremely limited value.

102. The proposed warranty also includes a warranty by the consultant. This only requires the consultant to attend site, inspect the defect, ascertain whether it is covered by the warranty, and then liaise with other parties to have the works carried out. In the absence of a solid products warranty by a large multi-national chemical company what possible good is that?

Ancillary costs issues

103. For the reasons set out above the tribunal is satisfied that once the tendering process had concluded the Sollershott board succumbed too readily to a blind faith in CCCPL as its consultant. Despite the presence on the board of various senior managers, the directors failed to ensure that a proper contract was signed. When the contractor appeared on site and Mr Edwards quickly discovered some matters of concern, most of the rest of the board ignored him. While he may have been no more technically knowledgeable than the rest of them,[25] Mr Edwards did obtain (eventually at his own expense) expert support from Mr Woodhouse. His two letters, identifying problems which might result in the refusal by BASF to provide any warranty, should have put the directors on enquiry. Instead, they preferred to close their eyes to what might be going on. They allied themselves with Mr Nugent and Bondcote instead of maintaining a healthy distance in

[25] Although he swiftly acquired some hefty manuals on concrete, seen in his flat during the inspection

order better to protect the interests of the leaseholders. They maintained this attitude throughout the tribunal process.

104. The tribunal having found in favour of the Applicant, it does not in these circumstances consider it reasonable that he should be liable, as part of his annual service charge, for any share of the Respondent's legal costs of defending the application.

105. The Respondent shall also reimburse the Applicant's application and hearing fees.

Dated 26th June 2007

Graham K Sinclair – Chairman
for the Leasehold Valuation Tribunal

ANNEXE

DECISION (WITH REASONS TO FOLLOW)

Handed down 14th March 2007

Tribunal : G K Sinclair (chairman), M Krisko BSc (Est Man) FRICS , L Jacobs FRICS

Hearing : 23rd November 2006, 12th & 13th February 2007

1. The Applicant is the resident leaseholder of flat 54 Sollershott Hall, Letchworth. At the material time he was also a director of, and *de facto* administrator for, the Respondent company. The latter is a limited company acquired or established by the leaseholders as a body both to own and manage the freehold estate. Its assets therefore comprise the freehold of the common parts, the freehold reversion in the flats, and any small surplus it may generate to cover management expenses through the regular service charge.

2. This application was brought because the Applicant grew concerned by the way in which a large concrete repair and refurbishment contract was being handled by the building contractor, by the attitude of the consultant[26] supposed to be administering the work, and by the lack of concern demonstrated by his fellow directors. He ceased to act as point of contact with the consultant employed. He says that the work is unsatisfactory, does not comply with the specification originally agreed and upon which basis the work was put out to tender; as a result of which the product manufacturer has not and will not issue the warranty which the Respondent was expecting. Relying upon his own expert

[26] Mr Michael Nugent, managing director of the Concrete & Corrosion Consultancy Practice Ltd

witness[27] he says that the work was valueless, the majority of his fellow directors were wilfully blind to the truth and their responsibility to safeguard the freehold assets of the company, and therefore that the service charge levied in respect of such work has not been reasonably incurred and is not payable.

3. The application was firmly resisted by the Respondent company, which instructed solicitors and counsel but placed considerable reliance upon the advice and evidence of Mr Nugent.

4. For the reasons which will follow in a separate document,[28] and after careful consideration of the evidence and the parties' submissions on law and fact, the tribunal finds :
   a. That Mr Nugent, upon whom the company relied, failed :
      i. To understand the true nature of his company's contractual role
      ii. To ensure that a contract complying with the ICE Form of Contract (7th edition) – upon which basis tenders were sought – was entered into by the Respondent as employer, by itself as contract administrator, and by the contractor
      iii. To prepare a specification clearly defining the scope of the works and in accordance with the manufacturer's specification and his initial discussions with the client
      iv. To ensure that the specification was complied with
      v. To ensure that the manufacturer would provide a warranty for the work
   b. That it is not satisfied with the quality of the repair/replacement work performed on site by the contractor, Mr Peter Box; in particular the concrete patch repairs and hardwood handrails
   c. That the directors collectively, as a body, failed to ensure that a proper contract was in place, and shut their eyes to evidence that matters might be going wrong
   d. That it is not possible, on the evidence produced, to say one way or the other whether the Degussa/BASF product Protectosil CIT was used exclusively on site
   e. That, even if that product had been used, the quantity declared to have been used is less than half that required for the area of 175m^2 stated in the Bill of Quantities if applied strictly in accordance with the manufacturer's specified application rate of 600ml/m^2
   f. That, months after the work on site has finished, no manufacturer's warranty has yet been obtained nor, in the tribunal's view, is one likely to be obtained
   g. That, in such circumstances, the work should best be considered as a contract for external decoration only, the result of which has provided a modest benefit for the buildings lasting perhaps 5 years.

5. The tribunal therefore :
   a. Disallows that part of the service charge which reflects the fees charged by Mr Nugent's company for administering the works
   b. Disallows that part which reflects the contractor's invoices
   c. Allows instead a sum which the tribunal assesses as appropriate for an external decorating contract, viz £400 per flat plus VAT, together with a further 10% for

27 Mr Justin Woodhouse of The Concrete Consultancy 2000 Ltd

28 See Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, reg 18(3), (4) & (5)

management under clause 5(5)(g)(ii) of the lease; viz a total of £517 per flat.

6. The application having substantially succeeded, Mr Edwards asks the tribunal to grant further relief. Again, for reasons which shall follow, the tribunal determines :
   a. That the Respondent's costs incurred in defending this application shall not be regarded as relevant costs when assessing the amount of the service charge for this or any other year which is payable by the Applicant
   b. That the Respondent shall reimburse the Applicant's application and hearing fees[29]
   c. That the Respondent has not acted frivolously, vexatiously, disruptively or otherwise unreasonably in connection with the proceedings and therefore the circumstances do not apply where the tribunal would be justified in ordering it to pay to the Applicant costs incurred of an amount not exceeding £500[30]
   d. That, apart from the above provision, the tribunal has no power to consider the Applicant's request that the Respondent pay the fees charged by his expert, Mr Woodhouse, either for his initial report or for his attending as a witness.

Dated 14th March 2007

Graham K Sinclair, Chairman
for the Leasehold Valuation Tribunal

29 Leasehold Valuation Tribunal (England)(Fees) Regulations 2003, reg 9

30 Commonhold and Leasehold Reform Act 2002, Sch 12, para 10