RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

JURISDICTION
Sections 27A and 20C of the Landlord and Tenant Act 1985

DECISION

Case Number	CHI/43UM/LIS/2008/0001
Property	St Johns Waterside, Copse Road, Woking, Surrey GU21 8EG
Applicants (Tenants)	Alex Fernando and Others
Respondent (Landlord, for the purposes of section 30 of the Landlord and Tenant Act 1985)	Peverel OM Limited
Applicants' representative	Mr Richard Tutt of Counsel, instructed by MMS Law
Respondent's representative	Mr Richard Sandler
Date of site inspection	27th August 2008
Hearing	Sitting at The HG Wells Conference Centre, Church Street East, Woking, Surrey GU21 6HJ on 27th and 28th August 2008
Date of Decision	7th November 2008
Tribunal Members	Mr C.H.Harrison (Chairman) Mr B.H.R.Simms FRICS MCIArb Mrs J.Playfair

BACKGROUND

1. Mr Alexander Fernando, who is one of the Applicants in this case, is the head tenant of flat 24, St Johns Waterside, Woking in Surrey. The Respondent in the case is Peverel OM Limited which is a party to Mr Fernando's (and the other Applicants') leases as the Manager of the St Johns Waterside Estate.

2. On 17th December 2007, Mr Fernando applied to the leasehold valuation tribunal (of the Southern Rent Assessment Panel) under section 27A of the Landlord and Tenant Act 1985 for a determination of his liability to pay service charges under his lease. The application related to the service charge accounting years ended 2002 to 2007.

3. Subsequently (and after the Directions referred to in paragraph 7 below were made), a number of other tenants of St John's Waterside requested to be, and were, joined as parties to Mr Fernando's application, as applicants. They were:
   Dr. B. Pitamber and Dr. B. Harkinson of flat 19, who applied on 20th February 2008;
   Miss H.Perry of flat 22, who applied on 22nd February 2008;
   Mr G.Spivey of flat 17, who applied on 15th April 2008;
   Dr. and Mrs E.Appiah of flat 20, who applied on 15th May 2008;
   Ms H.Carmichael of flat 6, who applied on 22nd May 2008; and
   Ms P.Lamprae of flat 9, who applied on 26th May 2008.

4. Only Mr Fernando, Ms Harkinson (on behalf of herself and Dr. Pitamber) and Miss Perry appeared and were represented at the Hearing. The other tenants who had been joined as applicants did not appear, and were not represented, at the Hearing.

5. It is important to be clear about the questions which the Tribunal is asked to determine.

6. For each of the service charge accounting years ended 2002 to 2007, Mr Fernando's application form included a section headed *Description of the question(s) you wish the tribunal to decide.* Mr Fernando completed those sections by seeking justification of *"the service charges applied and continual increase every year to now virtually double for a development only 5 years old"*. He also referred to *"Broken door buzzers not fixed – why was this not done when Peverel OM Limited first made [aware]."*

7. Those questions were clarified by paragraphs 3 and 4 of Directions made after a pre-trial review on 15th February 2008. Paragraph 3 recorded that the Tribunal is requested to determine whether a service charge is payable in respect of flat 24 for the years 2002 to 2007 and, if it is, the amount that is payable in respect of the property, whether the charges were reasonably incurred and whether the works were of a reasonable standard. Paragraph 4 recorded that Mr Fernando had yet finally to define the service charges in respect of which the dispute had arisen. Paragraph 9 of the Directions required Mr Fernando to

produce a written statement setting out consecutively and by reference to each of the years for which there is a dispute which of the items of service charge in the year in question is disputed, saying in each case why that is; and that the statement will be Mr Fernando's case.

8. It was confirmed at the beginning of the substantive hearing that the extent of the dispute between the Applicants, in connection with their respective leases, and the Respondent (and, therefore, the extent of the determination requested of the Tribunal) is limited to the service charge expenditure headings for the accounting years listed in a statement of case Mr Fernando had produced in response to the Directions following the pre-trial review. Those expenditure headings and the accounting years to which they relate are, in turn, listed in paragraphs 46 to 121 of this Decision.

9. The application to the tribunal includes one made under section 20C of the Landlord and Tenant Act 1985.

RELEVANT LAW

10. Section 18(1) of the 1985 Act defines "service charge" as meaning an amount payable by a tenant of a dwelling, as part of or in addition to the rent, which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's cost of management... and the whole or part of which varies or may vary according to the relevant costs.

11. Section 18(2) of the 1985 Act defines relevant costs as being the costs or estimated costs incurred or to be incurred by or on behalf of the landlord ... in connection with the matters for which the service charge is payable.

12. Section 19(1) of the 1985 Act provides that relevant costs shall be taken into account in determining the amount of a service charge payable for a period – (a) only to the extent they are reasonably incurred; and (b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard and the amount payable shall be limited accordingly.

13. Section 27A(1) of the 1985 Act provides, so far as material to this case, that an application may be made to a leasehold valuation tribunal to determine whether a service charge is payable and, if it is, as to ... (c) the amount which is payable. Section 27A(2) applies section 27A(1) whether or not any payment has been made.

14. Section 20C(1) and (2) of the 1985 Act provide, so far as material to this case, that a tenant may apply to a leasehold valuation tribunal for an order that all or any of the costs incurred, or to be incurred, by a landlord in connection with proceedings before the tribunal are not to be regarded as relevant costs for the purpose of determining the amount of any service charge payable by the tenant. Section 20C(3) provides that the tribunal may make such order on the application as it considers just and equitable in the circumstances.

THE SITE AND THE TRIBUNAL'S SITE INSPECTION

15. St John's Waterside comprises a block of 19 flats built with brick elevations under pitched, tile covered roofs. The style is that of a terrace of houses fronting on to Copse Road. a cul-de-sac situated in St Johns on the outskirts of Woking town. The flats are arranged on ground and two upper floors. There is a central communal entrance and hallway with staircases to upper floors and a rear exit to the parking areas. The entrances have security door entry systems.

16. At the rear is a paved parking area, a building housing refuse bins, another for cycles and a separate building housing the water tanks and pumps.

17. Adjoining the block and as part of the overall estate, but not the subject of this hearing, is a terrace of 5 houses of similar construction.

18. The tribunal inspected the property, both externally and, as to the common parts, internally in the presence of the Applicants who attended the hearing, their legal representatives and Mr Sandler and Miss Mumford of the Respondent. The inspection took place during the morning of Wednesday 27th August 2008.

19. The Tribunal noted that the landscaping of the site was of a reasonable order, with numerous evergreen and deciduous trees adjacent to the site's boundaries. The grassed areas adjacent to the building elevations were, in part, very 'mossy' or otherwise devoid of grass apparently due to lack of sunlight or presence of damp soil. Some shrubs were more established than others. It appeared a few shrubs were not planted in ideal locations.

20. The tribunal further noted that the external surfaces of the buildings on the site were in reasonable condition. There was some evidence of isolated and minor surface cracking in external elevation rendering; but it did not appear of an unusual or material nature.

21. The tribunal found the internal common parts to have been recently re-decorated and in a clean and reasonable state of repair and condition. It was noted that one of the communal corridor wall light switch panels was not securely fixed. The tribunal observed the low voltage wiring associated with the security door entry systems was exposed near the latches.

THE LEASES

22. At the commencement of the hearing, copies of two leases had been produced to the tribunal. One was a copy of an undated and unexecuted lease with an uncoloured plan of one floor level of the building. It purported to be a proposed lease of 'Plot Number 24 St Johns Waterside' to Mr Alexander Fernando as lessee. The other was a copy of Miss Perry's lease of flat 22 St Johns Waterside. It is dated 30th November 2001 and made between (1) Barratt Homes Limited, as landlord (defined as Lessor) (2) Peverel OM

Limited, the Respondent, (defined as Manager) and (3) Matthew John Groome and another, Miss Perry's predecessors in title, (defined as Lessee). The 'Lessee' is defined, as one would expect, to include the person for the time being entitled to the legal estate constituted by the lease. The copy lease annexed extracts of uncoloured plans apparently annexed to the original lease.

23. Mr Sandler confirmed that the copy document purporting to be the form and content (absent plans, execution and dating) of the lease of flat 24 was a true representation of the original of Mr Fernando's lease of flat 24 which in all material respects is the same as the form and content of Miss Perry's lease.

24. Following the hearing, the tribunal requested the parties to produce certified copies of the leases of flats 22 and 24 and a copy of the filed plan of HM Land Registry's title number SY616281. That plan serves to define the expression *'Estate'* used in the leases. The tribunal was mindful that it would, in part, base its determination on the evidence of those documents (even though on seeing them, in the tribunal's opinion, they do no more than confirm the evidence available at the hearing about the contents of the leases and the extent of the Estate). The tribunal therefore recorded those facts with the parties by letter dated 1st October 2008 (so far as the filed plan and the Estate definition are concerned, in the terms of paragraph 26 below) and afforded the parties an opportunity, over 21 day's subject to requests for further time, of making such representations to the tribunal as they chose concerning the additional evidence. Neither the Applicants nor the Respondent made any representations.

25. The definition of the *'Estate'* is one of a number of definitions in the leases which the tribunal needs to construe in order to make the determination under section 27A. Two others are the definitions of *'Service Installations'* and *'Maintained Property'*.

26. The definition of the Estate is *ALL THAT piece of land situate at Copse Road, St Johns, Woking now or formerly comprised in Title Number SY616281 together with any adjoining land which may be added thereto within the Perpetuity Period and together with any buildings or structures erected or to be erected thereon or on some part thereof.* That drafting does not make clear whether the timing reference is 'now' or 'formerly' and, if formerly, when. The land comprised in the five freehold houses has been removed from title number SY616281. Nevertheless, the tribunal considers that the true construction of the Estate definition, having regard to the wording of the leases as a whole, is that the Estate is the land originally comprised in that title namely, in all material respects, the land shown outlined in blue on the plans at pages 192 and 193 of the Respondent's hearing bundle.

27. The definition of *'Service Installations'* is *'sewers drains channels pipes watercourses gutters mains wires cables conduits aerials tanks apparatus for the supply of water electricity gas (if any) or telephone or television signals or for the disposal of foul or surface water'*.

28. The definition of *'Maintained Property'* is *'those parts of the Estate which are more particularly described in the Second Schedule and the maintenance of which is the responsibility of the Manager'*. Not all of the Second Schedule is relevant to this case but it is appropriate to set it out in full: *The Maintained Property shall comprise (but not exclusively):*

1.1 The Accessways the Parking Spaces the gardens and grounds shown on Plan 1 the drying area (if any) bin and gardeners management stores (if any)

1.2 The entrance halls passages landings staircases and other internal parts of the Building(s) which are used in common by the owners or occupiers of any two or more of the Dwellings therein and the glass in the windows and doors of all such common parts together with all decorative parts ancillary thereto

1.3 The structural parts of the Building(s) including the roofs gutters rainwater pipes foundations floors and walls bounding individual Dwellings therein and all external parts of the Building(s) including all decorative parts

1.4 All doors and window frames not forming part of the demise of any of the Dwellings

1.5 All Service Installations not used exclusively by any individual Dwelling

EXCEPTING AND RESERVING from the Maintained Property:

2.1 The glass and window frames and the external doors of the Dwellings SAVE FOR the external decorative parts of the said window frames and doors which (for the avoidance of all doubt) shall form part of the Maintained Property

2.2 All interior joinery plaster work tiling and other surfaces of walls the floors down to the upper side of the joists slabs or beams supporting the same and the ceilings up to the underside of the joists slabs or beams to which the same are affixed to the Dwellings

2.3 All Service Installations utilised exclusively by individual Dwellings

The location of the gardens and grounds, referred to in paragraph 1.1 as depicted on the lease Plan 1, coincide with the landscaped areas seen by the tribunal on its site inspection.

The provision of services and incurring of relevant costs by the Respondent as Manager

29. Recital (3) to the leases states *The Manager is to undertake responsibility for the supply of services to the Estate (but by the Lessor initially) for which the Lessee will pay the Lessee's Proportion of the Maintenance Expenses.* Neither party explained to the tribunal what is meant by *initially*. It appears from other recitals that the word refers to the period pending the intended grant to the Respondent of a headlease of the external and internal common parts of the Estate. At all events, it is common ground between the parties that the Respondent has, at all material times, been the party to the leases having responsibility for the provision of services.

30. That recital, so to speak, comes to life in clause 6 in which the Respondent Manager covenants both with the Lessor and the Lessee to observe and perform the obligations set out in the Tenth Schedule. For completeness, it should be noted that this covenant is qualified by a proviso enabling the Respondent to discontinue any of the Tenth Schedule obligations which it believes have become impracticable or obsolete, if it reasonably decides it would be in the general interests of the leasehold and freehold owners of the Estate dwellings to do so and if the decision accords with the views and wishes of the

majority of such owners. No submission was made to the tribunal during the hearing that the proviso has ever been invoked.

31. Paragraph 1 of the Tenth Schedule is the Respondent's obligation *to carry out the works and do the acts and things set out in the Sixth Schedule.* The fact that the obligation is qualified by references to it being conditional on prior receipt of payment of the Lessees Proportion (see paragraphs 33 and 39 below), to the obligation applying as appropriate to each type of separate dwelling and to other matters of liability neither affects the substance of the Respondent's obligation to perform the Sixth Schedule matters, nor was referred to by either of the parties in the case.

32. The Sixth Schedule extends to various services, repairs, maintenance and insurance matters and other costs.

33. Finally, by clause 4.2 and paragraph 2 of Part One of the Eighth Schedule to the lease, the Applicant Lessees are obliged to the Respondent to pay it the 'Lessee's Proportion'. That, fundamentally under the leases, is an amount payable by the Lessee as a proportion of the money actually expended, or reserved for payment, by or on behalf of the Respondent in connection with the Sixth Schedule obligations. The lease defines that expenditure as the Maintenance Expenses. The detail of the Lessee's Proportion is considered in more detail in paragraphs 39-41 below.

34. Section 30 of the Landlord and Tenant Act 1985 provides that the statutory expression 'landlord' used in the service charge provisions of the Act includes any person who has the right to enforce payment of a service charge. That definition, in this case, includes the Respondent because the Respondent has the benefit of the Lessee's payment obligation referred to in paragraph 33 above.

The component parts of the Sixth Schedule

35. The Sixth Schedule, being a list of obligations, is broken down into three separate parts, A,B and C, each being headed, rather confusingly, by a category of costs.

36. Part A is headed *'Development Costs'*. That expression is not defined in the leases. The Part A obligations are drafted by reference to various expressions, most of which are further defined as relating, in some way or another, to the Estate. They appear to be obligations relating to the Estate as a whole.

37. Part B is headed *'Block Costs'*. That expression is not defined in the leases either. However, with one exception, all the Part B obligations expressly relate to the 'Block'. 'Block' is defined as the Building (itself defined) which, in fact and substance, comprises the block of 19 flats forming part of the Estate. The one exception, paragraph 4 of Part B, refers to 'Dwellings' which, itself, is confusingly defined. No purpose is served by attempting to unravel the confusion of words. 'Dwellings' could be interpreted under the lease to mean the flats in the 'Block', because of the words *[flats or houses] ... forming the Building(s) or the Block* (which does not include houses) *or the Estate (as the context*

permits). The context of the reference Dwellings in paragraph 4 is that it is part of a schedule sub-division which is headed 'Block Costs' and which is otherwise limited to 'Block' obligations. Therefore, the tribunal interprets Part B as relating exclusively to the 'Block' as defined.

38. Part C is headed *'(Costs applicable to any or all of the previous parts of this Schedule).* The precise meaning of that heading is not, in its own context, wholly clear; but, unlike Parts A and B, Part C is more (but not exclusively) a list of costs.

The components of the Lessee's Proportion

39. The Lessee's Proportion is, for the purposes of section 18 of the 1985 Act, the service charge. It is defined at paragraph 1 of the Seventh Schedule as:

The Part A Proportion of the amount attributable to the Development Costs in connection with the matters mentioned in Part A of the Sixth Schedule and of whatever of the matters referred to in Part C of the said schedule are expenses properly incurred by the Manager which are relative to the matters mentioned in Part A of the said Schedule

The Part B Proportion of the amount attributable to the Block Costs in connection with the matters mentioned in Part B of the Sixth Schedule and of whatever of the matters referred to in Part C of the said Schedule are expenses properly incurred by the Manager which are relative to the matters mentioned in Part B of the said Schedule.

40. The definition of the Lessee's Proportion clarifies the Sixth Schedule Part C heading. Any service charge demand which is levied against the Applicants based on the Part A Proportion must be limited to the Part A Proportion of the costs attributable to any Sixth Schedule Part A matter and of those, if any, of the Part C costs which are properly incurred by the Manager relative to the matters mentioned in Part A. Equally, any service charge demand levied against the Applicants based on the Part B Proportion must be correspondingly limited to the Part B Proportion of the Block Costs under Part B and of those, if any, of the Part C costs which are properly incurred by the Manager relative to the matters mentioned in Part B.

41. Each copy lease seen by the tribunal provides for a Part A Proportion of 4.17%. The product of 4.17 and 24, being the total number of dwellings comprised in the Estate including the freehold houses, is 100.08. Thus, it is clear that the relevant costs to be recovered by levying the Part A Proportion are intended to be spread across not only the leasehold flats but also five freehold houses. The Part B Proportion varies from lease to lease. In the context that the Part B matters are limited to the Block comprising the 19 flats, it would appear to follow that relevant costs recoverable via the Part B Proportion are to be spread across only the 19 leasehold flats. These deductions are confirmed by notes to the service charge accounts and were also confirmed at the hearing by Mr Sandler.

THE FORMAT OF THE SERVICE CHARGE ACCOUNTS

42. The service charge accounts:

a) unhelpfully, do not cross-refer to the Sixth Schedule Parts sub-divisions or to Development Costs or Block Costs. Instead, the accounts are broken down into numbered schedules. Each of schedules 1 and 2 are sub-divided into separate headings. Some headings occur in both schedules. A closer study of the headings indicates that schedule 1 is designed to cover relevant costs recoverable via the Part A Proportion and that schedule 2 is designed to cover relevant costs recoverable via the Part B Proportion. Consequently, schedule 1 relates to matters across the Estate. Schedule 2 relates exclusively to the Block, as defined; and

b) are presented, as required by paragraph 5 of the Seventh Schedule to the leases, in respect of accounting years ending on 31st August.

THE EVIDENCE AND THE SECTION 27A DETERMINATIONS

43. It is about some of the headings in the service charge accounts on which the Applicants seek the tribunal's determination under section 27A(1)(c), that is whether a service charge is payable in respect of them and, if it is, as to the amount which is payable.

44. Mr Fernando, Dr. Harkison and Miss Perry were called as witnesses of fact on behalf of the Applicants. No expert evidence was called on their behalf.

45. Mr Sandler, for the Respondent, called Miss Mumford who is described in the correspondence as the Respondent's Estate Manager. She, also, was a witness of fact. Consequently, the tribunal received no expert evidence.

Insurance for the years ended 2003-2007

46. The first head of relevant costs which concern the Applicants is insurance for the years 2003-2007.

47. The insurance related relevant costs for these years were:

Year ended 31/8/2003	
Schedule 1 (Part A Proportion)	Nil
Schedule 2 (Part B Proportion)	£2,506.12
Total	**£2,506.12**
Year ended 31/8/2004	
Schedule 1 (Part A Proportion)	£115.89
Schedule 2 (Part B Proportion)	£2,913.20
Total	**£3,029.09**
Year ended 31/8/2005	
Schedule 1 (Part A Proportion)	£385.14
Schedule 2 (Part B Proportion)	£3,101.16
Total	£3,486.30
Year ended 31/8/2006	
Schedule 1 (Part A Proportion)	£385.14
Schedule 2 (Part B Proportion)	£3,028.68
Total	**£3,413.82**

Year ended 31/8/2007	
Schedule 1 (Part A Proportion)	£385.19
Schedule 2 (Part B Proportion)	£3,288.22
Total	**£3,673.41**

48. Insurance costs are covered by the Sixth Schedule as follows:
    a) Paragraph 6 of Part B states *Insuring and keeping insured the Block and other structures at all times against the Insured Risks in the full reinstatement value.* The obligation is qualified by a number of provisos, none of which is material to the Applicants' concerns.
    b) Paragraph 1 of Part C states *Insuring any risks (including material and third party liability risks) for which the Manager may be liable as an employer of persons working or engaged in business on the Maintained Property or any part thereof in such amount as the Manager shall reasonably think fit.*

49. The Applicants do not seek to question the apportionment of relevant costs between the service charge proportions A and B.

50. Mr Fernando has three concerns about insurance:
    a) The relevant costs of insurance for each of the years appears to be expensive for a development of 19 flats and 5 houses. He gave evidence that, in May 2004, he and a number of other tenants had obtained an insurance quotation from Norwich Union Insurance Limited for a total premium of £1,519.02. The quotation was stated to be subject to a survey, confirmation of a satisfactory claims record and to receipt of a satisfactory insurance proposal.
    b) He states he has frequently requested the Respondent to provide comparable insurance quotations but has never received a satisfactory response.
    c) The Respondent is, according to its printed notepaper, an appointed representative of Kingsborough Insurance Services Limited, through which the insurance of the Block is apparently handled. Mr Fernando considers this evidences an unsatisfactory, cosy relationship between the Manager and the brokerage of insurance.

51. Dr. Harkison and Miss Perry gave evidence that they share Mr Fernando's concerns.

52. Mr Sandler called Miss Mumford to give evidence about the Respondent's procurement of insurance at the Estate:
    a) Miss Mumford has been employed by the Respondent for approximately 7 years and is an associate of the Institute of Residential Property Managers.
    b) Miss Mumford disagreed with Mr Fernando's evidence that he had frequently requested comparable insurance cost information.
    c) She referred to correspondence which indicated that the Applicants' insurance quotation referred to in paragraph 50(a) was not on a like for like basis because it did not take the claims record into account.
    d) Miss Mumford stated that Kingsborough was engaged to obtain competitive insurance quotations on the insurance market. She could not point to any evidence in the papers

before the tribunal that Kingsborough did, in fact, do so. Neither was Miss Mumford sure about the actual relationship between the Respondent and Kingsborough. Indeed, she finally admitted to the tribunal that she had no personal knowledge of what Kingsborough does in relation to the procurement of insurance.

e) Nor did Miss Mumford know about the relationship between Kingsborough and a company which may act as insurance brokers; or how the overall premium on the Respondent's block insurance policy is apportioned between individual properties.

f) Miss Mumford was asked if she could explain the increase in insurance costs between 2003 and 2005. She was unable to do so.

g) The tribunal asked Miss Mumford how often the amount of insurance cover is considered. She stated that, so far as she knows, the cover is being looked at this year but, hitherto, was index-linked since 2001.

h) The tribunal also queried with Miss Mumford why the insurance costs for the year ended in 2003 did not include a Part A Proportion apportionment. Miss Mumford thought either that there had been no public liability cover for that year or that there had been an error.

53. The tribunal was most concerned that the Respondent chose to call Miss Mumford to give evidence about insurance. As helpful as she no doubt wished and tried to be, her evidence did not assist the Respondent or the tribunal's understanding of detail at all. Miss Mumford manifestly had no real knowledge about insurance procurement. Consequently, the tribunal entirely disregards her evidence on the Respondent's procurement of insurance. Mr Sandler offered, at the eleventh hour, to produce evidence from a more senior representative of the Respondent. The tribunal accepted Mr Tutt's strong objection to such late evidence. The tribunal considers that the Respondent should have anticipated the need to provide clear evidence on insurance matters.

54. Mr Tutt pointed out to the tribunal that the paucity of the Respondent's evidence on insurance, including Miss Mumford's ignorance of detail on many aspects, is relevant to the question about whether the insurance costs have been reasonably incurred under section 19 of the 1985 Act.

55. The tribunal accepts that section 19(1)(a) reasonableness is the key issue. It is mindful of the Court of Appeal's decision in *Berrycroft Management Co Limited v. Sinclair Gardens Investments (Kensington) Limited [1996] EGCS 143.* There, the court had to consider whether insurance premiums charged by the insurers of a new landlord were reasonably incurred under section 19, in the context that the premiums were higher than those charged by the previous landlord. The court held that, so long as the insurance was arranged in the normal course, it was not unreasonably incurred even though the premiums were higher than some alternative insurers would charge.

56. The tribunal considers that, as unsatisfactory as Miss Mumford's evidence was (the tribunal emphasises, through no fault of her own), there is no evidence before the tribunal that the insurance costs were not arranged in the normal course. The tribunal considers that the quotation which Mr Fernando and others obtained in 2004 is not, on its face, so comparable

with the detail of the actual insurance that material reliance should be placed on it.

57. **The tribunal therefore determines that the amount of service charges for insurance costs for the relevant years are as demanded by the Respondent.**

Insurance excess charge of £450 during the year ended 2006

58. Mr Fernando queries an item in the 2005/2006 service charge accounts of £450.

59. Miss Mumford was referred to three papers, each in pre-printed form, in the Respondent's bundle, relating to insurance excess sums totalling £450. The relevant claims were made in respect of burst water pipes, impact and malicious damage. She did not know about the provenance of the forms but confirmed they would have arrived on her desk in the form which had been presented to the tribunal. Mr Tutt asked the tribunal to give the matter careful consideration.

60. The tribunal has done so. It is conscious that the forms to which Miss Mumford was referred appear to be reasonable for their obvious purpose. They refer to excess sums in respect of the relevant risks. In particular, the service charge accounts have been audited by independent chartered accountants. The fact that the Respondent had to rely on the evidence of a witness who, through no fault of her own, did not know about the provenance of some forms, may go to the issue of the Respondent's handling of this case but, in the tribunal's opinion, it goes no further than that.

61. **The tribunal therefore determines that the amount of service charges for insurance excess for the year ended 2006 is as demanded by the Respondent.**

Electricity for the years ended 2003-2007

62. The Applicants' concerns about electricity consumption for the years 2003-2007 are all related to the cost of lighting.

63. The electricity related relevant costs for these years were:

Year ended 31/8/2003	
Schedule 1 (Part A Proportion)	£17.63
Schedule 2 (Part B Proportion)	£451.13
Total	**£468.76**
Year ended 31/8/2004	
Schedule 1 (Part A Proportion)	£95.04
Schedule 2 (Part B Proportion)	£500.00
Total	**£595.04**
Year ended 31/8/2005	
Schedule 1 (Part A Proportion)	£223.30
Schedule 2 (Part B Proportion)	£378.68
Total	**£601.98**

Year ended 31/8/2006	
Schedule 1 (Part A Proportion)	£206.92
Schedule 2 (Part B Proportion)	£689.71
Total	**£896.63**
Year ended 31/8/2007	
Schedule 1 (Part A Proportion)	£289.09
Schedule 2 (Part B Proportion)	£1,062.52
Total	**£1,351.61**

64. Part C of the Sixth Schedule provides at:
    a) paragraph 3, *paying all ... charges assessments and outgoings whatsoever ... in respect of the Maintained Property*; and
    b) paragraph 14, *operating maintaining and (if necessary) renewing any lighting ... and power supply apparatus from time to time in connection with the Maintained Property and providing such additional lighting ... or power supply apparatus as the Manager may reasonably think fit.*

65. The Applicants do not seek to question the apportionment of relevant costs between the service charge proportions A and B.

66. The Applicants are concerned that there has been a long standing dispute about lighting of the common parts of the Estate, including in particular the common corridors in the Block. The fundamental concerns are:
    a) The on/off phasing of the lighting has not been working. Lighting is left on for too long.
    b) Some broken light bulbs are not replaced for significant periods. Mr Fernando considered this might give rise to health and safety issues.
    c) Electrical contractors had observed that the lighting system had been poorly installed. Mr Fernando referred to a letter addressed to the Respondent dated 26th January 2004 from D&H Electrical Installations which reported "as mentioned earlier, the actual light fittings are not designed with long term maintenance in mind".

67. Both Dr. Harkison and Miss Perry shared Mr Fernando's concerns.

68. In giving evidence for the Respondent, Miss Mumford:
    a) explained that the Respondent's estate accountant, in a 'new business' department, apportions overall electricity charges between the Parts A and B Proportions. For example, she is unaware of the detail of the apportionment of £95.04 referable to Part A for the year 2003/2004;
    b) confirmed that she is responsible for reading the electricity meters but that she could not explain why a bill based on an estimated reading in April 2004 had not been followed by a bill based on an actual reading;
    c) stated that there had been problems associated with the external bollard lighting. The Respondent's electrical contractors advised there had been an original installation defect. The developer had denied liability, alleging the fault lay with subsequent

breaking of the bollards. She agreed with Mr Tutt that the developer's denial of liability does not absolve the Respondent from its own obligation;

d) told the tribunal that repairs to light fittings and broken bulbs were replaced on an as and when basis. In reply to Mr Tutt's observation that Mr Fernando's complaint about a long standing problem of lights being left on for too long had gone unchallenged, Miss Mumford denied that the complaints had not been attended to; and

e) did not recollect querying the increase in electricity charges in respect of the year 2006/2007.

69. The tribunal considers that relevant costs associated with electricity are substantially a matter of amounts charged by the electricity supplier. The tribunal notes the Applicants' assertion that lighting is left on for too long; but it received no real or sufficient evidence of that assertion or that electricity costs were unreasonably incurred.

70. **The tribunal therefore determines that the amount of service charges for electricity costs for the relevant years are as demanded by the Respondent.**

Maintenance of landscaped areas for the years ended 2003-2007

71. The Applicants also seek a determination in respect of service charges, for the years 2003-2007, levied on relevant costs which the service charge accounts categorise as maintenance of landscaped areas, for which the apportioned amounts over the relevant years are:

Year ended 31/8/2003	
Schedule 1 (Part A Proportion)	£377.46
Schedule 2 (Part B Proportion)	£782.70
Total	**£1,160.16**
Year ended 31/8/2004	
Schedule 1 (Part A Proportion)	£371.20
Schedule 2 (Part B Proportion)	£768.08
Total	**£1,139.28**
Year ended 31/8/2005	
Schedule 1 (Part A Proportion)	£487.12
Schedule 2 (Part B Proportion)	£1,096.01
Total	**£1,583.13**
Year ended 31/8/2006	
Schedule 1 (Part A Proportion)	£594.01
Schedule 2 (Part B Proportion)	£1,199.36
Total	**£1,793.37**
Year ended 31/8/2007	
Schedule 1 (Part A Proportion)	£636.88
Schedule 2 (Part B Proportion)	£1,445.24
Total	**£2,082.12**

72. There is no reference to landscaped areas, as such, in the Sixth Schedule. Paragraph 1 of Part A states '*Keeping the Communal Areas generally in a neat ant tidy condition and tending and renewing any lawns flower beds shrubs and trees forming part thereof as*

necessary and maintaining repairing and where necessary reinstating any boundary wall hedge or fence (if any) on or relating thereto including any benches seats garden ornaments sheds structures or the like'. 'Communal Areas' is defined as meaning *'all gardens and grounds forming part of the Maintained Property'* which takes the reader back to paragraph 1.1 of the Second Schedule *' ... the gardens and grounds shown on Plan 1 ... '* (as referred to in paragraph 28 above).

73. The applicants' concerns were explained by Mr Fernando, who confirmed there had been some small improvements most recently in comparison with the standard of landscaping during the years in question, as follows:
    a) by reference to several photographs showing:
        i) an area to the left of and immediately adjoining the emergency exit by Flat 11, and another similar area opposite the water pump shed, showing water saturated soil, devoid of grass, with rough edges to a grassed area;
        ii) some shrubs which Mr Fernando considered had been poorly maintained;
        iii) a short stretch of wire mesh fencing which had been crushed below what appeared to be its intended height and showing uncollected fallen leaves; and
        iv) a small shrub near Flat 6 which, on any view, could not be described as luxuriant and which Mr Fernando considered showed poor maintenance.

        Mr Fernando did not know when or at what time of year the photographs were taken.
    b) The Applicants had not been provided with any information about what the Respondent's gardening contractors had actually done, even though Mr Fernando had seen a couple of uninformative invoices.

74. Dr Harkison confirmed that she agreed with Mr Fernando's evidence. She explained the photographs which had been referred to the tribunal had been taken in February and March 2008; that water saturation in some areas had been a problem for grass cultivation over some four years; and that she had never seen the contractors turning the soil by digging it. Dr Harkison stated that the improvement of one fairly extensive area of water-saturated ground had been improved by the laying of gravel but only as recently as April or May, 2008. She also referred to Dr Pitamber's written statement, drawing attention to failure to remove weeds and fallen leaves, no apparent attempts to turn or improve the soil and a lack of diligence by lazy gardening contractors.

75. Miss Perry also confirmed, but did not add to, the substance of Mr Fernando's evidence.

76. Miss Mumford gave evidence on behalf of the Respondent.
    a) She confirmed the Respondent tenders the gardening contract annually, in October; although she acknowledged that the Respondent's hearing bundle included no evidence of that fact. She referred to the Respondent's standard form of gardening specification. It required various items of work to be done fortnightly. She confirmed a copy of that specification would have been sent to Mr Fernando.
    b) Miss Mumford was asked what action had been taken to deal with the Applicants' complaints. She confirmed that, when the Respondent took the Estate over from the developer, some areas did not come up to scratch. She referred to the sterile area of

ground near the emergency exit adjacent to Flat 11 and to her correspondence with Mr Fernando confirming that grass "would never grow in this area", because of its location. She stated that the Respondent had made suggestions for improvements. She cited the laying of gravel on sterile areas. She confirmed the Respondent had not raised objection to some residents laying out their own flowers.

c) Miss Mumford confirmed that the gardeners visit the Estate fortnightly, in line with the standard specification. She considered that frequency of visits was in order, even though that would inevitably mean intervening leaf fall remaining on the ground.

d) She denied the substance of the Applicants' complaints. She drew attention to the Respondent having taken up the complaint concerning gardeners' indolence with the contractor and that the problem had not occurred subsequently, so far as she is aware. She visits the Estate monthly and considers the contractor does a reasonable job.

e) Mr Tutt asked Miss Mumford whether she could explain the year on year increases in the gardening expenditure. Her answer was that the increases were due in part to additionally required work and, in part, to the effect of re-tendering.

77. Mr Tutt summed up the Applicants' concerns as centering around the Respondent's inability to provide a real explanation of the year on year increases in relevant costs; the fact that the Applicants had not been provided with evidence of competitive tendering; and, generally, poor husbandry.

78. In the tribunal's opinion, there are two fundamental questions on the service charges for landscaping over the relevant years. The first is whether the relevant costs are, in the widest sense, 'reasonable'. The second is whether the actual service charge for landscaping has been correctly calculated. Each is relevant to the determination which the tribunal must make.

a) As to the first:

i) the tribunal referred the parties to section 19 of the 1985 Act. The essence of section 19, even in its current form, was echoed (in advance of the repeal of section 19(2A) by the Commonhold and Leasehold Reform Act 2002, by the Lands Tribunal in *Forcelux Limited v Sweetman and another [2001] 2 EGLR 173* where Mr P R Francis stated, at paragraph 40: *But to answer that question [whether the charge that was made was reasonably incurred], there are, in my judgment, two distinctly separate matters I have to consider. Firstly the evidence, and from that whether the landlord's actions were appropriate, and properly effected in accordance with the requirements of the lease, the RICS Code and the 1985 Act. Secondly, whether the amount charged was reasonable in the light of that evidence.* That conclusion of the Lands Tribunal was referred to, without criticism, in the more recent Lands Tribunal decision in *A2 Housing Group v Spencer Taylor and others LRX/26/2006.*

ii) Although the tribunal was unimpressed by the Respondent's evidence concerning competitive tendering of the gardening contract, it received no evidence of alternative contract rates from the Applicants which it could test by applying the tribunal's own knowledge and experience. The evidence before the tribunal from the Applicants comprised several photographs and both written and oral assertion of

fact and opinion about gardening husbandry. The tribunal could not, on the basis of that evidence, form a view that the Respondent's actions were inappropriate and improperly effected under the lease. There was, for example, no evidence that fortnightly visits by contractors was inappropriate, apart from the complaints about ungathered fallen leaves. Clearly, that cannot, of itself, be safe evidence of appropriate frequency of gardening work on which the tribunal can or should rely.

iii) The tribunal is aware that paragraph 1 of Part A of the Sixth Schedule refers to *renewing any lawns ...as necessary.* Clearly, some quite large areas of lawn, mainly close to the buildings and in areas of poor drainage have failed and have not been renewed. It appears to be common ground that the reason for the failure of the grass in the relevant areas is connected with the physical conditions of the immediate locality. Certainly, the Applicants did not challenge that explanation from the Respondent. Whether it would be appropriate for the Respondent to take action under the covenant which, because of local conditions, would apparently be doomed to fail is not a matter for the tribunal's jurisdiction.

b) As to the second:

i) the landscaping service charges are the aggregate of the Part A Proportion and the Part B Proportion of the landscaping related relevant costs. That appears to be the inevitable conclusion from the service charge accounts which cover 'Maintenance of Landscaped Areas' under both schedules 1 and 2 – see paragraph 42(a) above. Before the close of the first day of the hearing, the tribunal invited Mr Sandler to explain on the following day which provision in Part B and/or Part C of the Sixth Schedule to the leases justified the 'schedule 2' reference to landscaping costs in the service charge accounts i.e. the landscaping relevant costs recoverable via the Part B Proportion. The tribunal explained that it could not, at any rate immediately, see any such reference. Although the Applicants did not question the apportionment of relevant costs between the service charge proportions A and B, this was an issue raised by the tribunal of its own volition in order that it might make the required determination.

ii) On the second day of the hearing, Mr Sandler referred the tribunal to paragraph 2 of Part B, which is expressed in these terms: *Inspecting rebuilding repointing repairing cleaning renewing redecorating or otherwise treating as necessary and keeping the external common parts of the Block comprised in the Maintained Property and every part thereof in good and substantial repair order and condition and renewing and replacing all worn or damaged parts thereof.* In Mr Sandler's opinion, that obligation of the Respondent is the justification for the application of the Part B Proportion.

iii) The Tribunal does not agree with Mr Sandler's interpretation of the lease. It considers that the paragraph referred to by Mr Sandler is a repairing obligation and one which mirrors paragraph 1 of Part B which is concerned, in otherwise identical terms, with the internal common parts of the Block. The tribunal agrees with Mr Tutt that the natural reading of paragraph 2 is that it is a repairing covenant and not a covenant to maintain landscaping. It is entirely distinct from the wording of Part A, paragraph 1 which is quoted in paragraph 72 above.

79. **Accordingly, the tribunal determines that:**

a) **a service charge is payable in respect of the maintenance of landscaped areas in respect of each of the accounting years ended 2003-2007;**

b) **there having been no evidence to the contrary put before the tribunal at the hearing which the tribunal could test, the relevant costs in connection with the maintenance of landscaped areas for each of the years in question should be as stated in both schedules 1 and 2 of the certified service charge accounts ; but that**

c) **the amount which is payable as service charge by each of the Applicants in respect of maintenance of landscaped areas for each year should be limited to the Part A Proportion, that is 4.17%, of the aggregate (under both schedules 1 and 2) of those relevant costs.**

General repairs for the years ended 2003-2007

80. The Applicants also seek a determination in respect of service charges, for the years 2003-2007, levied on relevant costs which the service charge accounts categorise as general repairs, for which the apportioned amounts over the relevant years are:

Year ended 31/8/2003	
Schedule 1 (Part A Proportion)	£254.89
Schedule 2 (Part B Proportion)	£1,717.46
Total	**£1,972.35**
Year ended 31/8/2004	
Schedule 1 (Part A Proportion)	£79.24
Schedule 2 (Part B Proportion)	£951.08
Total	**£1,030.32**
Year ended 31/8/2005	
Schedule 1 (Part A Proportion)	£273.77
Schedule 2 (Part B Proportion)	£1,259.14
Total	**£1,532.91**
Year ended 31/8/2006	
Schedule 1 (Part A Proportion)	£98.81
Schedule 2 (Part B Proportion)	£346.37
Total	**£445.18**
Year ended 31/8/2007	
Schedule 1 (Part A Proportion)	£62.61
Schedule 2 (Part B Proportion)	£1,901..87
Total	**£1,964.48**

81. The Sixth Schedule includes:

a) under Part A, two repairing obligations (paragraphs 2 and 3). One obliges it to keep the footpaths, any common parking areas, access areas and private roads on the Estate in repair. The other is an obligation to repair, maintain, inspect and, as necessary, to reinstate or renew *Service Installations* (see paragraph 27 above) which form part of the external common parts of the Estate;

b) under Part B, several repairing obligations relating to various internal and external common parts or components of them (e.g. paragraphs 1,2,4 and 5); and

c) under Part C, at least one repairing obligation relating to the Estate (paragraph 15).

82. The Applicants do not seek to question the apportionment of relevant costs between the service charge proportions A and B.

83. According to Mr Fernando, the Applicants' case in outline is that repair work is carried out too slowly. He then referred to various photographs which he asserted demonstrated that work carried out to the internal common parts of the Block had been either expensive, dangerous, inefficient or too slow. He stated that much of the repair work had been repetitive and inefficiently organised. Mr Tutt asked the tribunal to consider various specific invoices as illustrative of Mr Fernando's concerns. However, the Applicants did not put forward any expert or other actual evidence of what they considered would have been appropriate action or appropriate cost. In reply to Mr Sandler's question about what specific points were of concern to Mr Fernando, he explained he was querying the cost and the repetitive nature of some of the work.

84. Dr. Harkison expressed similar concerns, specifically about the slow response time on the repair of the external bin store which had been damaged in December 2007. But she did not provide any evidence of what the Applicants considered, or had been advised, would have been an appropriate timescale for repair in the circumstances.

85. The tribunal was concerned about the nature of the Applicants' evidence on these matters. It pointed out to the parties that a leasehold valuation tribunal has an inquisitorial function and, to that extent, will examine service charge considerations objectively; but cannot justify a decision as to reasonableness in a vacuum. The tribunal's expertise is not aimed at reaching an independent and market place valuation but, instead, at testing expert evidence and applying the tribunal's own knowledge and experience to the facts put before it. On that basis, Mr Tutt was asked to consider how, more specifically, the Applicants wished to present their concerns on the matter.

86. Mr Tutt was able to obtain further instructions and invited the tribunal and the Respondent to accept, which they did, that the most pragmatic approach would be to examine, on the following day, only four specific matters falling under the umbrella of General Repairs. That would be acceptable to the Applicants in the context that Mr Fernando was unable to attend the second day of the hearing.

87. Mr Tutt subsequently invited the tribunal to consider only the following issues:
    a) an invoice, included in the Respondent's hearing bundle, which had been posted to the 'general repairs' relevant costs account in December 2002 for £40, in connection with a contractor's attendance on site to remove various "For Sale" boards.
        i) The Respondent clarified the matter by explaining that a contractor would have been required to remove the boards, because the Respondent did not know which tenant to charge.
        ii) The tribunal does not accept the Respondent's explanation. Irrespective of the fact that removing an estate agent's sale board is not an item of repair (but

recognising that any proper associated cost might qualify as relevant costs under some other head), the tribunal considers that it is not reasonable to treat expenditure in these circumstances as relevant costs for service charge purposes, without first exhausting all reasonable attempts at cost recovery from relevant third parties. The Respondent may not have been able to identify the relevant owners; but it was certainly able to identify their agents. The Respondent did not assert to the tribunal that it had made any strenuous attempts to get the agents to remove their own sale boards.

iii) Accordingly, the tribunal determines that no service charge is payable in respect of the expenditure of £40 comprised in 'Map Builders' invoice dated 15th November 2002 for order no. 6056, scheme 39118, ref A842.

b) an invoice, included in the Respondent's hearing bundle, which had apparently been posted to the 'general repairs' relevant costs account in September 2003 for £345, in connection with a contractor's attendance on site to check the shutting of doors. The invoice is itemised as to 'screw to push plate' and removing, replacing, supplying and fitting other items. The total of that itemised cost on the invoice is £75. The invoice is noted 'total price inclusive of all plant, materials and labour' and has a manuscript addition above the total price, 'labour'. It is clear that whoever made that manuscript addition has linked it with the specific references to 'supply and fit', which is one of the itemised amounts.

i) The invoice appears on its face to be odd. For an invoice to be specific as to some items, it would be reasonable to expect the labour cost to be specified as well, notwithstanding the note about inclusivity. The Respondent had no observations on the invoice.

ii) The tribunal considers that there is a reasonable doubt on the face of this invoice, issued by 'Map Builders' on 18th August 2003, for order no. 35315, scheme 39118 and numbered 9016, and determines that the service charges which are payable in connection with it should be the respective Part B Proportions of relevant costs limited to £75.

c) two invoices, included in the Respondent's hearing bundle, one dated 27th August 2004 from Franchi Locks and Tools Limited, numbered 177036 relating to a call out charge of £150, excluding VAT, for work on the front and rear doors of the Block; and the other dated 22nd August 2005 from Grayland Building & Roofing Contractors Limited, numbered 133 relating to a charge of £80, excluding VAT, for removing some rubbish and mending a rubbish bin.

i) Mr Tutt observed that the amount of each invoice appeared high but was unable to adduce any evidence to that effect.

ii) The invoiced amounts do not, on their face, appear to be unreasonable to the tribunal which accordingly determines that service charges are payable in respect of them and that the amount of each service charge is to be calculated on the basis of the respective Part B Proportions.

Communal area cleaning for the years 2003-2007

88. The Applicants also seek a determination in respect of service charges, for the years 2003-2007, levied on relevant costs which the service charge accounts categorise as communal area cleaning, for which the apportioned amounts over the relevant years are:

Year ended 31/8/2003	
Schedule 2 (Part B Proportion)	£1,680.00
Year ended 31/8/2004	
Schedule 2 (Part B Proportion)	£1,445.14
Year ended 31/8/2005	
Schedule 2 (Part B Proportion)	£1,376.96
Year ended 31/8/2006	
Schedule 2 (Part B Proportion)	£1,483.32
Year ended 31/8/2007	
Schedule 2 (Part B Proportion)	£1,548.25

89. Part A of the Sixth Schedule imposes an obligation on the Respondent to keep footpaths and other common parts of the Estate clean. Part B of the Sixth Schedule to the leases contains several cleaning obligations. They cover the internal and external common parts of the Block (paragraphs 1 and 2) and the refuse storage facilities (paragraph 4).

90. The Applicants do not seek to question the apportionment of the communal area cleaning component of the service charge accounts exclusively to the Part B Proportion, notwithstanding the Part A obligation to clean and the fact that various cleaning invoices include reference to the bin store which forms part of the Maintained Property. It was not tested before the tribunal whether the five freehold houses, which contribute towards the Part A relevant costs, have rights to use the bin store. Perhaps the Applicants know they do not or perhaps they regard the matter as of too small relevance.

91. The essence of Mr Fernando's concerns were that the internal common parts of the Block and the refuse area were cleaned badly and that the tenants do not receive value for the amount of the service charge. He cited poor vacuuming, the presence of cobwebs, poor window cleaning, dirty walls and a smelly and untidy bin store. He stated that cleaners attend irregularly and fail to deal with tenants' observations on lack of quality. He has not seen evidence of a competitive quotation and complains at poor response from the Respondent to tenants' complaints.

92. Dr Harkison voiced similar concerns. She concurred with Dr Pitamber's written statement, included in the Applicants' hearing bundle, concerning slipshod and superficial cleaning work to the internal common parts and the refuse area. Dr Harkison also explained that all the Applicants are concerned about the build-up of leaflet and 'junk' mail behind the front door to the Block.

93. Both Mr Fernando and Dr Harkison acknowledged that there has been some recent improvement in the condition of cleaning. Dr Harkison, in particular, observed that cleaning improved earlier in 2008 and the standard as seen at the tribunal's site inspection bears no comparison with the standard some three years ago.

94. Miss Perry confirmed she shares the other Applicants' concerns.

95. Miss Mumford gave evidence for the Respondent and stated:
    a) that the cleaning contract, with its specification, is tendered every other year. The former contractors had declined to re-tender because of the residents' attitude towards them and the current contractors remarked that the common parts appeared to have been attended to properly in the past;
    b) the contractors are required to visit the Estate fortnightly. Miss Mumford said that, inevitably, there will be some deterioration between visits but she has never observed a material accumulation of 'junk' mail. Although the internal common parts look better since they were redecorated in early 2008, she disagrees with the Applicants' assertions about slipshod standards; and, in reply to questions from Mr Tutt:
        i) the Respondent had declined, despite the tribunal's repeated requests, to provide it with the addresses of other residents of the Block because the Respondent is not obliged, and considered it would be inappropriate, to do so;
        ii) it is possible that some of the tenants, probably about six of them, who are not applicants in this case might be ignorant of the applications to the tribunal;
        iii) she disagrees with Mr Fernando's otherwise unchallenged evidence about poor quality cleaning. She explained that external surfaces of communal windows are cleaned quarterly which she considers adequate and that the cleaners replace broken light bulbs or report faults, as appropriate; and
        iv) the "full details of the cleaners attendance" which Mr Sandler's statement of case referred to under paragraph 2(e) as having been sent to Mr Fernando, are not included in the Respondent's hearing bundle but they were, nevertheless, sent to him.

96. Mr Tutt observed that it was not enough for the Respondent to assert, against the Applicants' complaints, that the cleaning cost was reasonably incurred, because the Respondent had failed to provide evidence about the extent of the work which had been carried out.

97. **The tribunal appreciates that the findings of its site inspection on the morning of the first day of the hearing, on which it found no fault in respect of cleaning, are not the be all and end all of the matter. Having heard the submissions of the parties but no actual evidence of comparative costs or standards, the tribunal considers that the principal issue on cleaning is whether fortnightly or weekly visits would be appropriate. More frequent visits by the cleaners might deal with some of the Applicants' concerns on the quality of cleaning. However, the tribunal heard no evidence to indicate that more frequent visits would provide value for money on relevant costs. In the absence of evidence which the tribunal could test and although it considers the Respondent should have been able to demonstrate more clearly its efforts at, and the results of, competitive tendering, it does not consider it would be appropriate to determine any reduction of the service charges.**

98. **Accordingly, the tribunal determines that:**
   a) **a service charge is payable in respect of the cleaning of communal areas in respect of each of the accounting years ended 2003-2007; and**
   b) **there having been no evidence of contractors' costs to the contrary put before the tribunal at the hearing which the tribunal could test, the relevant costs in connection with the cleaning of communal areas for each of the years in question should be as stated in schedule 2 of the certified service charge accounts.**

Plant and machinery maintenance for the years ended 2003-2007

99. Mr Fernando had queried, in his written statement submitted to the tribunal following the Directions of 15th February 2008, various issues on the service charge accounts, for the years 2003-2007, relating to plant and machinery maintenance. However, Mr Tutt confirmed to the tribunal at the hearing that the Applicants had no dispute on those matters.

Water and sewerage supply for the year ended 2005

100. Mr Fernando's statement made pursuant to the Directions of 15th February 2008 sought a determination in respect of the service charge accounts for the year ended 31st August 2005 in relation to a water and sewerage charge of £5,953.03.

101. There was some confusion about this charge:
   a) Mr Fernando's statement referred to a malfunctioning water pump and resultant loss of pressure. He was also concerned about the amount of the service charge;
   b) Mr Sandler's statement confirmed that the amount is purely water used by the Block and that the cost is allocated to the leasehold flats, based on the number of bedrooms provided by the developer when the Block was constructed; and
   c) because of that basis of allocation, the item appears in the service charge accounts under schedule 3, reflecting neither the Part A Proportion nor the Part B Proportion. Schedule 3 is exclusively concerned with water and sewerage supply. The reference to sewerage appears to be in conflict with Mr Sandler's statement that the £5,953.03 is purely for water used by the Block.

102. Mr Fernando's evidence was limited to a quotation which had been made to the Respondent in October 2003 in connection with a failed water pump. He complained that there had been a lack of consultation on the matter and that it would not have arisen, had maintenance been carried out earlier.

103. Mr Sandler stated on behalf of the Respondent that the amount in question (£5,953.03) is limited to the cost of water supplies and sewerage charges and had nothing to do with the failed water pump.

104. The tribunal, having received no evidence which it could examine or test concerning the water pump, nevertheless needed to determine the amount of the service charge, about which Mr Fernando had expressed concern. The hearing was referred to a minute of a meeting between Mr Fernando and

Miss Mumford on 26th January 2004, from which it was clear that none of the residents had received water bills and that the Respondent was unaware that 'provision should have been added to your service charge' to deal with this issue.

105. The tribunal was not clear from the evidence before it how the amount in question in the service charge accounts justified payment of a service charge at all. The tribunal therefore invited Mr Sandler to consider, for the following day of the hearing, which provision of the Sixth Schedule to the leases covered water and sewage supplies to the lessees' flats.

106. On the following day, Mr Sandler drew attention first to the definition of Maintained Property in the Second Schedule to the leases (see paragraph 28 of this Decision) and, second, to paragraph 3 of Part C of the Sixth Schedule. That paragraph states *Paying all rates taxes duties charges assessments and outgoings whatsoever (whether parliamentary parochial local or of any other description) assessed charged imposed upon or payable in respect of the Maintained Property or any part thereof except in so far as the same are the responsibility of an individual transferee or lessee of any of the Dwellings.* Mr Sandler said the Respondent relies on that provision to justify the water and sewage supply cost. He referred to two accounts from Three Valleys Water. They were the result of meter readings taken at the pump house which was a *Service Installation* within the Maintained Property.

107. The tribunal's immediate reaction, with which Mr Tutt agreed, was that there appeared to be some doubt about Mr Sandler's analysis because the definition of Maintained Property excluded 'Service Installations' utilised exclusively by individual dwellings; and because of the individual tenants' obligation under the leases to pay rates and other assessments in respect of their own premises. However, the tribunal, as it indicated it would, has reflected on the matter very carefully and it accepts Mr Sandler's analysis for these reasons (which answer the questions which had occurred to the tribunal itself, as distinct from having been raised by the Applicants):

a) The pump house is located within the Estate. It contains *apparatus for the supply of water.* The pump house is therefore a *Service Installation* (see paragraph 27 of this Decision). In particular, the meter from which the utility company derived its readings (described on the accounts as 'Bulk Meter to 6 to 24 St Johns Waterside Copse Road') is not excepted from the Maintained Property definition by virtue of being used exclusively by any individual dwelling. From the title of the water company's accounts, the meter is used for a collection of dwellings.

b) Nor could it be said that the pump house and its bulk meter is excepted from the Maintained Property by virtue of being *'utilised exclusively by individual Dwellings'.* In the tribunal's opinion, the true meaning of those words is that an item of plant does not form part of the Maintained Property if, but only if, it is utilised only by an individual dwelling. But, here, the bulk meter does have a wider use. It is used to measure water supplied to the collection of all the flats, not to them individually.

c) It is, finally, necessary to consider whether the exception, stated in paragraph 3 of Part C, concerning a tenant's own responsibility to pay for water serves to disapply that

paragraph. If it does, Mr Sandler's analysis would appear incorrect Such a responsibility is expressed in paragraph 7 of Part One of the Eighth Schedule to the leases. It is expressed in terms which in all material respects mirrors the Respondent's obligation under paragraph 3 of the Sixth Schedule Part C. The former relates to individual dwellings, the latter to the Maintained Property. The tribunal considers that responsibility under paragraph 7 of Part One of the Eighth Schedule could not arise, so as to serve as an exception to the Respondent's own obligation, unless the tenant could, in practice, discharge the responsibility, by having a separate meter and by receiving and paying water bills. The evidence before the hearing was that tenants of the flats have not received any water bills directly from the utility company and that the only water meter is the bulk one located within the pump house. Accordingly, the tribunal does not consider that the exception stated within paragraph 3 of Part C of the Sixth Schedule applies in this case.

108. The tribunal saw no evidence which justified, on its face, the total of the utility relevant costs of £5,953.03. The total of the two utility bills comprised in the Respondent's evidence, covering periods less than the service charge accounting year, totalled £4,314.78. That lack of evidence, therefore, begs the question (which was not answered at the hearing) whether £5,953.03 or some other amount is the true cost of water and sewerage referred to in generality in paragraph 110(b) below.

109. The construction of the leases offered by Mr Sandler and referred to in paragraph 106 above serves only to explain how the cost of water and sewage supplies is covered by the Sixth Schedule to the leases, that is to say, how the cost may be get into the frame of the Respondent's obligations, to which a service charge proportion may be attached. Mr Sandler did not go on to explain how, in the Respondent's opinion, the actual service charge proportion is applied, under the terms of the leases, to the overall cost, in order to quantify the actual service charge payable by each tenant. It is necessary to be clear about the service charge proportion because, otherwise, the tribunal cannot determine, under section 27A(1)(c) of the 1985 Act, the amount which is payable by the Applicants. Mr Sandler did not need to justify the service charge proportion under the leases because he says that, following the Respondent's realisation that 'provision should have been added to your service charge' (paragraph 104 above), the Respondent and the flat tenants had agreed, outside the express terms of the leases, that the tenants should each pay a proportion of the costs, based on a formula which fixes the proportion according to the number of bedrooms originally comprised in the relevant flat. Hence Mr Sandler's statement referred to in paragraph 101(b) above. The Respondent did not provide the hearing with a copy of the agreement. The tribunal heard no evidence from the Applicants that they either accept or deny the existence of such an agreement.

110. If the position is that the Applicants and the Respondent have agreed the basis on which the cost of water and sewage should be apportioned between the various flats, that basis should be applied in order to arrive at each tenant's service charge. The tribunal has no jurisdiction under section 27A in relation to a matter which has been agreed by the parties: see section 27A(4)(a).

111. If, on the contrary, the Applicants and the Respondent have not agreed any such basis, the tribunal considers that it is not possible, under the express terms of the leases, to determine any service charge proportion at all. The proportion could only be either the Part A Proportion or the Part B Proportion. For a cost arising under Part C of the Sixth Schedule, the cost must be "*expenses properly incurred by the Manager which are relative to the matters mentioned in Part "A"* [or *Part "B"*] *of the said schedule*". See paragraphs 39 and 40 of this Decision. Part A seems to be irrelevant because the Respondent's obligation to pay these metered charges applies, in the context of this dispute, to a meter which serves the Block. The tribunal can find no "*matter*" mentioned in Part B (or in Part A) of the Sixth Schedule to which these water and sewage costs could be said to be "*relative*". The only reference in Part A to Service Installations is a repairing obligation. Part B of the Sixth Schedule comprises six paragraphs. The first five are each concerned, in one form or another, with repair and condition. The sixth is concerned with insurance. Not one of the paragraphs is written in terms to which payment of a utility bill could be said to be "*relative*". If a Part C expense could not be said to have been properly incurred relative to a Part A or B matter, it is not possible to ascribe the Part A or B Proportion to the expense.

112. **The tribunal:**

a) **makes no determination concerning the issue described in paragraph 102 above because no further evidence was put to the hearing concerning it and the issue was not pursued by the Applicants (who nevertheless remained interested in a determination of the service charge amount);**

b) **determines that:**

i) **if an agreement, as asserted by the Respondent and referred to in paragraphs 109 and 110, subsists in respect of the service charge accounting year ended 31st August 2005, a service charge is payable in respect of the cost of water and sewerage charged by the local water utility company, via the bulk meter located at the pump house comprised in the Maintained Property, and duly apportioned in respect of that year, pursuant to paragraph 3 of Part C of the Sixth Schedule to the leases;**

ii) **the service charge proportion, relevant to paragraph (i) above, should be in accordance with the agreement referred to in that paragraph; but**

iii) **if no such agreement subsists, no service charge is payable in respect of that water and sewerage cost for the reason stated in paragraph 111 above.**

Management fees for the years ended 2003-2007

113. The Applicants' concern relates to the increase in management fees, from 2003 to 2007:

Year ended 31/8/2003	
Schedule 1 (Part A Proportion)	£1,692
Schedule 2 (Part B Proportion)	£670
Total	**£2,362**

Year ended 31/8/2004	
Schedule 1 (Part A Proportion)	£1,743
Schedule 2 (Part B Proportion)	£690
Total	**£2,433**
Year ended 31/8/2005	
Schedule 1 (Part A Proportion)	£1,795
Schedule 2 (Part B Proportion)	£710
Total	**£2,505**
Year ended 31/8/2006	
Schedule 1 (Part A Proportion)	£1,854
Schedule 2 (Part B Proportion)	£737
Total	**£2,591**
Year ended 31/8/2007	
Schedule 1 (Part A Proportion)	£1,974
Schedule 2 (Part B Proportion)	£893
Total	**£2,867**

114. That is an increase of £505 over the period, equating to 21.38%

a) Paragraph 12 of Part C of the Sixth Schedule to the leases provides for *The reasonable and proper fees of the Manager from time to time as to its general management of the Estate.*

b) Mr Fernando queried whether the management fees are too high. He was, also, concerned at the level of annual increases in the management fees. He had requested independent quotations from three firms of managing agents to see, as he put it, whether what the Respondent was charging was, in fact, fair and reasonable. Mr Fernando produced copies of three letters, one from each of the agents. None affords anything other than evidence of what the particular firm proposed, with varying degrees of certainty, for charges for managing the Estate should they be appointed to do so. In particular, none of the letters comments subjectively on what the agent would have charged over the period 2002 to 2007

c) Mr Fernando gave evidence that he believed one of the quotations included the cost of cleaning and landscape gardening as part of the proposed management charge. He also confirmed that he had not sought to negotiate any of the quotations, which had been put forward to him following his recent oral enquiries of the agents. Mr Fernando had not provided any of the agents with a copy of any of the flat leases.

d) The tribunal did not find anything in any of the letters from three firms of agents which showed the Respondent's level of management fees to be unreasonable or improper. Beyond that observation, the tribunal draws no comparison or evidential value from any of the three quotations because it is not possible to contrast them with the Respondent's functions under the leases on a like for like basis.

e) Mr Tutt summed up the Applicants' concerns that the amount of the management fees are unreasonable having regard to the Respondent's alleged shortcomings on handling insurance, the persistent complaints about lighting, the failure to obtain gardening

quotes and to the other delays and failures referred to in the Applicants' evidence on other matters.

f) Mr Sandler submitted that the Respondent's current management fees are £130 plus VAT per dwelling unit per annum, apportioned as to £80 plus VAT on the Part A Proportion and as to £50 plus VAT on the Part B Proportion. He also observed that the quotations which Mr Fernando had obtained do not apparently cover the five freehold houses, unlike the Respondent's current charges. He submitted that the Respondent's management fees are competitive and reasonable.

115. The Applicants do not seek to question the apportionment of management fees between the A and B proportions.

116. **The tribunal determines that:**

a) **the historical management fees appear to be, and the current management fees are, competitive and reasonable;**

b) **even though there may have been some shortcomings in management, it does not appear to the tribunal that they are of such a magnitude as to justify a reduction of the management fees for any year; and**

c) **accordingly, the amount of service charges in connection with management fees for the relevant years are as demanded by the Respondent.**

Increase in service charge reserves from 2003 to 2007

117. The Applicants expressed concern that contributions to reserves on the service charge account had increased by 108.9% from 2003 to 2007. They do not seek to question the apportionment of any reserve between the A and B proportions.

118. The Respondent stated that reserve sums are set after a consideration of prospective major works, cyclical work and the cost effect of new legislation and on the basis of a resultant forward plan.

119. The Applicants adduced no evidence and made no submission questioning the amount or purpose of any particular reserve.

120. **The tribunal determines that the fact that reserve funds may increase year on year may be justified by various estate management considerations; and, the tribunal having heard no evidence or submission from the Applicants on any specific issue relating to the service charge reserves apart from the factual increase of 108.9%, there is no basis on which the tribunal can make any further determination on the amount of the reserves.**

The bin store and the service charge accounting period 2007-2008

121. The final issue covered by Mr Fernando's statement of case concerns his complaint surrounding damage to the rubbish bin store which occurred in December 2007. This was the same complaint referred to by Dr

Harkison under paragraph 84 above. In the absence of evidence which the tribunal would be in a position to test, as stated in paragraph 85 above, not least evidence concerning the service charge proposed for the relevant accounting period, the tribunal is unable to make a determination on the matter.

THE APPLICATION UNDER SECTION 20C OF THE LANDLORD AND TENAT ACT 1985

122. In approaching the issue of whether or not to make an Order, the tribunal must consider what is just and equitable in the circumstances. The circumstances are not limited to the outcome of the decisions under section 27A. As was recognised in the Lands Tribunal decision in *Schilling and Others v. Canary Riverside Developnment PTE Limited and Others [LRX/65/2005]* there is no automatic expectation of an Order under s.20C in favour of a successful tenant; and, so far as an unsuccessful tenant is concerned, it requires some unusual circumstances to justify an order under s.20C in his favour.

123. The Applicants have, by no means, been successful before the tribunal under section 27A. In the majority of their complaints against the Respondent, the Applicants assertions were not supported by evidence which the tribunal was able to test or evaluate. It was necessary for the tribunal to invite Mr Tutt to address that problem, in particular, on the issue of general repairs. The Applicants did not pursue the issue of service charges ascribed to plant and machinery before the tribunal at all, even though that issue had been covered by Mr Fernando's written statement, causing the Respondent to deal with it in Mr Sandler's own statement. The tribunal is, however, conscious that the Applicants were not legally represented for much of the time leading up to the hearing.

124. The tribunal had considerable concerns about the Respondent's conduct of its own evidence. It has been clear since the s. 27A application was made that one of the Applicants' concerns related to the tendering of contracts. Whilst the tribunal had no reason to disbelieve Miss Mumford's oral evidence concerning tendering, much time over the two day hearing would have been saved, had the Respondent shown the foresight of including the written evidence, which the Respondent stated was available, in its bundles.

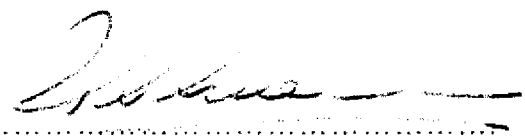
125. It was necessary, on several occasions sometimes but not always at the insistence of Mr Tutt, for the tribunal to interrupt the Respondent's case in order to distinguish between legal submission and subjective evidence.

126. In particular, on the issue of insurance, the Respondent chose that its evidence should be given by Miss Mumford who, through no fault of her own, was an entirely inappropriate witness on insurance procurement. On her own admission, she had no relevant or first-hand knowledge of issues which manifestly would be brought into focus at the hearing. Indeed, one reason why the already considerable time taken up at the hearing on the insurance issue was curtailed was because of Miss Mumford's open recognition that she did not know the answer to the most basic insurance procurement matters. The paucity of the Respondent's evidence was clearly recognised by Mr Sandler whose request, during the hearing and after much time had been

spent on the matter, to call further expert evidence on insurance found considerable objection by Mr Tutt, with whom the tribunal agreed.

127. Weighing all these matters together, the tribunal considers that the justice and equity of all the circumstances merits that on Order under s.20C should be made as to 80% of the Respondent's costs. The tribunal so orders.

Dated 7th November 2008



C.H.Harrison Chairman