RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL AND LEASEHOLD VALUATION TRIBUNAL
Case No. CHI/24UE/LSC/2009/0049

Premises: 16 The Chestnuts, Locks Heath Nr Southampton, Hants SO31 6DJ

IN THE MATTER OF An Application under section 27A Landlord and Tenant Act 1985 (Liability to pay service charges)

TRIBUNAL MEMBERS **Mr HD Lederman**
Mr R P Long LLB
Mr D Lintott FRICS

Applicants

(1) Michael Harris
(2) Mrs Katherine Mary Edge
(3) Mrs Marian Grace Kendall
(4) Mr Dennis Sivell Broadbridge
(5) Mrs Ella Verill
(6) Mrs Ellen N Southard
(7) Mr HJ Weaver
(8) Mrs Patricia Moore

and

Respondent Anchor Trust

Reasons for decision

1. This is a decision of a Leasehold Valuation Tribunal of the Southern Rent Assessment Panel on an application dated 22nd March 2009 made by the First Applicant under Section 27A Landlord and Tenant Act 1985 (the "1985 Act"). The First Applicant also applies for an Order under Section 20C of the Act. Subsequently in April 2009 each of the Second to Eighth Applicants were joined as Applicants at their request pursuant to regulation 6 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003. Accordingly the Tribunal also determines their liability to pay service charges.

DECISION OF THE TRIBUNAL ON SUMS DEMANDED AS SERVICE CHARGES FOR YEARS ENDING MARCH 2008 MARCH 2009 and MARCH 2010

2. The Tribunal does not find the service charges demanded and paid for the service charge year March 2007- March 2008 were unreasonable.

3. The Tribunal finds that the sums demanded and paid *in advance* for estate manager costs for the service charge year March 2008 - March 2009 were not reasonably

incurred within the meaning of section 19(1)(a) of the 1985 Act. This part of the costs was calculated on the basis of a full time estate manager, but a part-time estate manager was provided. The Tribunal is not in a position, at this stage, to make a determination as to whether the sums actually paid by the Applicants require any adjustment under section 19(2) of the 1985 Act. The accounts for the year ended March 2009 under the Lease under have not yet been provided by the Respondents or their accountants. Accordingly whether any adjustment needs to be made under section 19(2) of the 1985 Act is not an issue upon which this Tribunal makes a determination. This issue remains open to the Applicants to challenge under sections 19 and 27A of the 1985 Act, on another occasion, if agreement cannot be reached.

4. The Tribunal finds the annual sum demanded *in advance* as service charges for the estate manager costs in the total sum of £18,190.44 for the service charge year March 2009 - March 2010 (apportioned to £551.23 per annum for each Applicant) was not reasonable, and is not payable by the Applicants under the Lease. The estate manager costs demanded in advance for this year should be reduced to £12,940.00. This figure takes account of lower sums incurred for estate manager costs in the service charge year 2008/2009 and should be apportioned between the Applicants and the other lessees at The Chestnuts so that each lessee is charged the annual sum of £392.12 as an advance payment for this head of cost under clause 3(3) of the Lease.

5. The Tribunal orders that none of the costs incurred, or to be incurred, by the Respondent in connection with proceedings before this Tribunal, are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by any of the Applicants or any of the lessees at The Chestnuts.

6. The Tribunal orders the Respondent to reimburse the First Applicant (and any other Applicant who may have paid or contributed to such payment) the whole of any fees paid by in respect of these Leasehold Valuation Tribunal proceedings including any issue or hearing fees.

The parties and representation

7. The First Applicant is the lessee under long lease made on 12th July 1989 of No. 20/16 The Chestnuts 34-36, Locks Road, Locks Heath, Fareham, Hampshire SO31 6DJ ("the Lease"). That Lease granted a term of 99 years from 25th March 1988. Each of the other Applicants is a long lessee of the development known as The Chestnuts, Locks Heath Nr Southampton, Hants SO31 6DJ (in these Reasons described as "The Chestnuts"). The Respondent to this application is described as Anchor Trust, a registered social landlord and registered charity (Company No. 0314785) with properties all over England. Anchor Trust has several parts to its organisation and owns or manages properties nationwide. Anchor Trust has been represented by Guardian Management Services ("Guardian") in these proceedings. Guardian is part of Anchor Trust although the administrative support of some parts

of Anchor Trust such as the accounting functions appears to have been used by Guardian. It was common ground between the parties who were represented before the Tribunal that the predecessors to Anchor Trust transferred the ownership of the freehold to Anchor Trust so that Anchor Trust is the relevant landlord for the purposes of the 1985 Act and was for all the service charge years which are under consideration.

8. At the hearing on 19th June 2009, the First Applicant appeared accompanied by the Seventh Applicant. None of the other Applicants appeared at the hearing, nor were they represented. Those other Applicants had not made any written representations. The First and Seventh Applicants said that they had permission to speak on behalf of the other Applicants. Although no written authority was produced by the First and Seventh Applicants to speak on behalf of the other Applicants, the Respondents did not object and took no issue about the authority of the First and Seventh Applicants. In any event, the Tribunal considered the gist of the application on behalf of the absent Applicants was summarised in the application of the First Applicant. The Respondent was represented by Christopher Pope area manager and by Mrs Terri Wilkinson MCIH FIRPM Operations Manager, both employees of Guardian. Mrs Terri Wilkinson was the immediate manager of Mr Pope.

The property and the inspection

9. The Tribunal inspected the property on the morning of the hearing 19th June 2009. The Chestnuts is a purpose built development of 33 dwellings (described as self-contained cottages in the Lease) with a separate self contained dwelling for an Estate Manager/ Warden in the Locks Heath area outside Southampton, originally built or developed by another social housing landlord in about 1986. The 33 dwellings excluded the Estate Manager's accommodation.

10. The accommodation available for the Estate Manager / Warden at The Chestnuts as configured at the time of the inspection by the Tribunal, is a self-contained one bedroom dwelling house, near to the entrance to the development. The Tribunal found that it was a two storey dwelling (ground and first floors) which comprised a small ground floor room which contained provision for office equipment and cupboards/shelves for the manager's office. This ground floor room could just have contained a small single bed, but had it done so, another room would have had to been used in the Estate Manager's accommodation for a desk, files and other paraphernalia and equipment which would have been required for a manager to perform his or her duties in accordance with the Lease and other documents described. There were other small rooms and cupboards on the ground floor.

11. There was a larger main bedroom/living room upstairs.

12. The kitchen at the accommodation available for the Estate Manager/Warden at on the ground floor did not contain any white goods such a fridge or cooker. The

kitchen would have been very small for anyone but a couple without children or a single adult. The storage units were small and looked well used.

13. The garden area at the rear of the accommodation available for the Estate Manager/Warden was part of the communal garden at The Chestnuts. This had the potential to interfere significantly with the privacy of the accommodation available for the Estate Manager/Warden.

14. The Estate Manager's accommodation as a whole appeared sparse, unclean and small. This accommodation would have appeared unattractive to all but the most hardy or optimistic prospective tenants.

15. The Tribunal reached these preliminary views and findings upon its inspection. They were partly confirmed by views expressed by Guardian employees in correspondence dated 14th March 2008 produced at the hearing after the inspection.

16. Each of the Applicants holds a long lease of a two bed roomed cottage at The Chestnuts. Although there are some variations between dwellings at The Chestnuts, it was agreed by all parties present at the hearing at the outset of the hearing that the First Applicant's lease was standard or typical of all leases.

17. The gist of the Tribunal's observations and preliminary findings were put to the parties at the hearing for their comment.

Pre-hearing directions

18. On 25th March 2009 the Tribunal issued written directions for the preparation of the hearing. Those directions mentioned a target date for the hearing of 19th June 2009. On 8th June 2009 the Tribunal sent a written request to the Respondent's agents Guardian, inviting the production of additional documents.

19. Under cover of letter of 15th June 2009 in response to the Tribunal's request Guardian produced additional documents including what was described as a "Report of KPMG LLP to Anchor Trust on the Chestnuts Southampton" ("the Report") dated 24th September 2008 and a version of the financial statements for The Chestnuts for the year ended 24th March 2008 which contained a copy of a signature of "TN Dominey" on behalf of Anchor Trust on 15th September 2008. In addition a copy of the artwork prepared for an advertisement in newspaper media for the post of Resident Estate Manager dated 3rd January 2008 was provided. The dates of insertion into local newspaper media were also noted on an accompanying document. The accuracy of the contents of those documents was not challenged.

Relevant provisions in the Lease

20. All parties proceeded on the basis that the Lease was a typical example of the leases at The Chestnuts and there were no relevant variations.

21. Clauses 2 and 3 of the Lease impose the obligation to pay service charges "monthly in advance". Clause 3(3) relates to the service charge accounting period and imposes the obligation to pay one thirty third of the "Landlord's estimate of the costs and expenses of providing the .....services [identified in the First Schedule to the Lease] during the year to which the service charge relates". Clause 3(3) further provides that "Such estimate shall be based upon the actual costs and expenses of providing the said services for the previous year ended 25th March (with due allowance being made for any excess or shortfall service charge actually paid in the previous year) together with provision for any expected increase of costs for the succeeding year." The same clause also provides "The Landlord shall so far as it considers practicable endeavour to equalise the amount from year to year of the service charge by charging against the costs and expenses in each year of providing the services and carrying out its obligations such sums as it considers reasonable by way of provisions for future expenses and liabilities *and shall carry such amount in a property repairs reserve fund for expending in subsequent years* which sum shall be held in trust for all Tenants in the Property" (emphasis added). The italicised part of this clause may be of some relevance to this case.

22. The purpose of the development and the expressed user of the Lease was to house persons of age 55 or over in accordance with criteria consistent with the objects of the original landlord set out in the Third schedule to the Lease: see clause 6(8)(c) of the Lease for example. One of the provisions in the Third Schedule is that the lessee "must be able to manage their own home". Paragraph 2 of the Third Schedule requires the landlord as landlord or managing agent to have "proper regard to the welfare of the tenants or occupiers of the dwellings and [to] carry out its management functions by reference to the highest standards and at reasonable cost."

23. The landlord covenants for the provision of a "warden service" (see clause 7(7)) and for "accommodation for the Warden" (paragraph 2(a) of the First Schedule). The Lease also refers to the lessees being "in need of and not unsuitable for sheltered housing" (clauses 6(8) and 10(1)(b)). The cost of management is limited to the sheltered management allowance permitted from time to time by the Department of the Environment (First Schedule to the Lease paragraph 2(f)). The Respondent's representative Mrs. Wilkinson agreed that this had been superseded by what was the Leasehold Schemes for the Elderly Management Charge published by the Housing Corporation until its recent dissolution and replacement by the Tenants Services Authority.

24. The property repairs reserve fund referred to in clause 3(3) of the Lease appears to be different from the sinking fund referred to in clauses 7(6) and 10(4)(e) of the Lease. The purpose of the sinking fund is said to be "for depreciation of the Property and without prejudice to the generality of the foregoing the costs or anticipated costs of renewal replacement or major overhaul of the lift (if any) and any plant (including the separate hearing installations in the flats in the Property)...." and other capital or non-revenue items: see clause 10(4)(e) of the Lease for the detail of this clause. In an apparent discrepancy the draftsman of the

Lease also referred to a reasonable provision for a *reserve* against expenditure on maintenance and repairs (and replacements) in clause 2(b) of the First Schedule to the Lease. Fortunately the Tribunal is not asked to resolve the precise difference, if any, between a reserve fund and the sinking fund in the provisions of the Lease. There is no lift on the development.

The issue to be decided

25. The First Applicant complained in the application that the full time estate manager left in November 2007 but lessees had been charged for the whole year on the footing that that the estate manager was in place. A refund was claimed for the service charge year ended March 2008.

26. In relation to the service charge year 2008-2009 the First Applicant complained that a full time estate manager had been agreed in an Estate Agreement (09.00 to 17.00) but only a temporary part time estate manager (3 hours a day) was provided. For the service charge year 2009-2010 he complained that the charge for the Estate Manager on a full time basis was too high, as no full time manager is envisaged.

27. The First Applicant also seeks an order that none of the costs incurred by the Respondent in connection with proceedings before the Tribunal are to be regarded as relevant costs under section 20C of the 1985 Act.

Relevant legislative provisions

28. Sections 18–30 of the 1985 Act refer to restrictions on "Service Charges". The relevant provisions are:

> "18— (1) In the following provisions of this Act "service charge" means 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 ... or insurance or the landlord's cost of management and
> (b) the whole or part of which varies or may vary according to the relevant costs.
> (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord or a superior landlord in connection with the matters for which the service charge is payable.
>
> 19— (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—
>
> (a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provisions 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 ...

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise."

29. Section 27A(1) of the 1985 Act provides the Tribunal with jurisdiction to determine whether a service charge is payable and, if it is, as to—

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

Subsection 27A(2) provides that jurisdiction applies whether or not any payment has been made.

Section 27A(3) of the 1985 Act provides:

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

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

Jurisdiction - Agreement or admission of matters in issue

30. The sums claimed by Anchor Trust for each of the service charge years in issue are service charges within the meaning of section 18 of the 1985 Act. The Tribunal has jurisdiction to consider the payability of these charges under section 27A of the 1985 Act. Guardian said the surplus from service charges for year 2007/2008 was

"reinvested into the Property Repairs fund for the benefit of resident and with their agreement" (emphasis added, Response sent under cover of undated letter from Guardian received by the Tribunal on 30th April 2009). At the hearing Mrs Wilkinson suggested that projected or budget figures for service charges including the estate manager's costs had been agreed by the majority of lessees at a meeting in February 2009. The Individual Estate Agreement for April 2009/2010 referred to an Annual Review Meeting which took place on 29th October 2008 at which 25 residents attended. It is unclear who attended.

31. No minutes or agreed record of those meetings were produced.

32. There was nothing before the Tribunal in the documents or other evidence which would justify a finding that any of the Applicants had agreed or admitted that part of the service charges which related to the Estate Manager's costs within section 27A(4) of the 1985 Act. The Tribunal is not satisfied that if any of the Applicants agreed or approved the decision at the Annual Review Meeting or the Individual Estate Manager Agreement for 2009/2010 they understood or agreed that the service charges for any of the years in issue before this Tribunal had been agreed or admitted.

Jurisdiction - Payment of service charge

33. Payment of any of the service charges for the service charge year 2009/2010 does not deprive the Tribunal of jurisdiction to consider the payability of the service charges demanded: see sections 27A(4) and (5) of the 1985 Act.

Jurisdiction – power of Tribunal to consider matters in issue

34. The Tribunal reminds itself that the task before it under section 27A of the 1985 Act, is not to determine what it believes the rights and liabilities of the parties to the leases should be, but to make a determination of their respective rights and liabilities under the Lease.

Relevant standards and criteria

35. The Respondent's manager Guardian is a member of the Association of Retirement Housing Managers ("ARHM") and subscribes to the Code of Practice relating to Private Retirement Housing. The latest version of that Code was published in 2005 and was approved under section 87 of the Leasehold Reform Housing and Urban Development Act 1993 (as amended) ("the 1993 Act") and approved under SI 2005/3307.

The factual background

36. Most, if not all, of the lessees at The Chestnuts are in the 75-85 age group. Some of them are single. Unfortunately one has recently passed away. None of the lessees appeared to be professionally represented. The Tribunal formed the impression that the First Applicant had struggled to get his complaint addressed by Anchor Trust and despite a number of earlier complaints (including a complaint to the Ombudsman) and was left with no other means of resolving the issue than this application.

37. Initially there was a difference a to the date when the full time resident Estate Manager identified as SallyAnne Daniel left employment at The Chestnuts. The First Applicant thought she had left in November 2007 (page 7 of his application form). Guardian asserts that the Estate Manager left her position in February 2008 (see the Response). The Tribunal finds (and the First Applicant agreed) that she had given notice in November but left in about February 2008. It was unclear how much if any of her full time duties she was performing after she had given notice.

38. It was common ground that this Estate Manager was Sallyann Daniels. After she left, it was agreed a relief manager had attended at The Chestnuts for about 15 hours a week over 5 days a week (see the Response of Guardian).

39. The letters produced to the Tribunal show that an interview for a replacement for Sallyann Daniels took place in December 2007. The candidate was successfully interviewed but declined the offer of the job due to the size of the Estate Manager's accommodation: see Guardian's letter of 4th January 2008. The Tribunal finds the candidate rejected the offer of the post on that ground.

40. Guardian then arranged for the Resident Estate Manager post to be re-advertised in newspaper media. The advertisement in the form in which the Tribunal has seen it said that a 2 bed roomed house was offered, and hours of work were 35 hours per week at £6.97 per hour plus benefits. The Tribunal finds that description was at best misleading about the number of bedrooms at the accommodation then available. An earlier candidate had just rejected the job on account of the accommodation. Sallyann Daniels extended her leaving date to 29th February 2008. Interviews for further candidates took place on 22nd February 2008. A suitable candidate was found but he declined to take up the offer: see Guardian's letter of 7th March 2008. That letter recognised that it would be necessary "to undertake some upgrading of the accommodation to include redecoration and re-carpeting throughout". The Tribunal finds no significant works of the kind envisaged by that letter to the Estate Manager's accommodation have been carried out since that date. The Tribunal finds the events which occurred were as described in the letters from Guardian recited in this paragraph.

41. Christopher Pope and Mrs. Wilkinson gave evidence and the Tribunal finds the procedure adopted for the fixing of the budget for the forthcoming service charge

year was to consider projected figures in about December/January of each year based upon service charge budget figures from the previous service charge year. These budget figures were based upon internal and estimated costs calculated by the Respondent.

42. The First Applicant's evidence was he objected to the proposed budget figure in early 2009 and when he did so the service charge budget was reduced by Guardian.

43. The amount budgeted for the Estate Manager for the service charge year 2007/2008 was £16,175.00 according to undated Breakdown of Service Charge and Support costs provided to the Tribunal. This figure excludes the central control link of £746.00 and a figure of £250 described as "recruitment fund contribution". The comparable figures for the Estate Manager for service charge year 2007/2008 in the financial statements prepared by Guardian were £15,418.71 and £987.49 respectively. Those financial statements bear a printed date of 29th October 2008. The comparable figures for the service charge year 2006/2007 were (according to those same statements) £11,963.10 and £901.58.

44. The Respondent's evidence through Mr Pope of Guardian was that the budget for service charge for the forthcoming service charge year was considered and fixed in December and/or January of the previous service charge year. Thus Mr Pope's evidence was that he prepared the budget for the 2008/2009 service charge in December 2007 and he prepared the budget for the 2009/2010 service charge in December 2008. There was no documentary evidence to confirm that assertion but the Tribunal finds that it was more likely than not.

45. Mr Pope's evidence was that the undated document at appendix 8 of the Respondent's bundle (described as Service Charge Budget for financial year 2009/2010) had taken the budget figure of £18,190.00 as an annual cost of the Estate Manager's Service had been produced in about December 2008/January 2009. The Tribunal accepts Mr Pope's evidence about the date of the document which was unchallenged. Mr Pope accepted that at the time when the budget figure of £18,190.00 was produced, he and the Respondent were working on the assumption that a full time Estate Manager would be engaged for The Chestnuts for the 2009/2010 service charge year.

46. The document at appendix 8 of the Respondent's bundle shows that the Respondent's own calculations showed that the sum of £11,473.00 had been spent on the Estate Manager for the service charge year 2008/2009 (excluding recruitment costs and central control link). The Tribunal finds this document (described as Service Charge Budget for financial year 2009/2010) was prepared before its accounts department had prepared financial statements but was nevertheless the best information available to Guardian acting on behalf of the Respondent in December 2008/January 2009.

47. Mrs. Wilkinson's evidence was that the appropriate hourly rate for a person performing the role of Estate Manager had increased for the service charge year 2009/2010 to £7.25 per hour. This was the rate offered by Anchor Trust and Guardian based upon their researches and increases in RPI. The Tribunal so finds.

48. The figures taken from the financial statements where available and from budgets where actual figures are not available may be illustrated as follows:

Service charge year	Estate manager cost £	Central control link £	Recruitment fund balance £
2006/2007	11,963.10	901.58	(741.25)
2007/2008	15,418.71	987.49	(1915.25)
2008/2009 (projected charge)	11,473.32	816.80	835.00
2009/1010 (budgeted charge)	18,190.44	1348.32	

49. The Service Charge Budget for financial year 2009/2010 (produced in December 2008 confirming the figure in the financial statements the Tribunal has seen) showed a surplus of £3567.00 for the service charge year 2007/2008 which according to the Individual Estate Agreement for 2009/2010 was to be transferred partly to the recruitment fund (£2500) and partly to the Property Repairs Fund (£1067.20).

50. Mr Pope accepted that at the time when the budget figure of £18,190.00 was produced for the service charge year 2009/2010, had he known that a part time Estate Manager was going to be employed, he would have taken the estimated cost of that part-time Estate Manager into account.

51. A part time non-resident manager had been in place for 15 hours a week since February 2008. The Respondent through Guardian is consulting with the lessees about proposal for the future of the Estate Manager. The financial statements for the service charge year ended March 2009 were not available at the date of the hearing.

52. Mrs. Wilkinson in her evidence and submissions referred to the need to equalise the service charge under clause 3(3) of the Lease and to take account of the fact that the outcome of the consultation with the residents about the number of hours required for the Estate Manager's service at The Chestnuts was undecided. The gist of her submission was it was prudent to allow for a higher figure when estimating service charge for the service charge year 2009/2010 so that funds were in place should the lessees decide a full time Resident Estate Manager was in place. The letter of 20th April 2009 to Mr and Mrs Weaver confirms this issue was being consulted upon.

53. Mrs. Wilkinson in her evidence stated that the issue of adjustments to the electricity and water supply between the laundry and the Estate Manager's accommodation were still under consideration.

54. Mrs. Wilkinson gave evidence that the projected figure of £11,473.00 for 2008/2009 estate manager's costs (see Service Charge Budget 2009/2010 Respondent's Appendix 8) was based upon an hourly rate of £7.11 per hour for a 15 hour week. The Tribunal finds this equated to about £5,545.80 for salary and the balance for other costs such as employer's national insurance contributions and taxation, pension contributions and the like.

Analysis

55. The Tribunal finds that it was not reasonable to take into account the costs of a full time service Estate Manager in December 2008/January 2009 when determining the service charge payable in advance for 2009/2010. By that time, from the evidence presented to the Tribunal, it was evident that Guardian's calculation of actual costs for the Estate Manager for the year 2008/2009 was £11,473.00 - see appendix 8 service charge budget document for year 2009/2010. By December 2008/January 2009 the Tribunal finds that no active steps had been taken by the Respondent or Guardian to recruit a full time Estate Manager or to redecorate or take other steps to improve the accommodation for such a Manager, to improve the prospects of such recruitment since February 2008.

56. The Tribunal finds the sum demanded and paid *in advance* for the Estate Manager costs for the service charge year 2008/2009 was not reasonable. However there is no provision for repayment or refunding of any surplus in the Lease. Whether an adjustment for the sums actually paid in service charge years 2008-2009 and 2009/2010 is appropriate under section 19(2) of the 1985 Act, may turn upon the amounts actually expended. This is not an issue this Tribunal can decide. The financial statements for 2008/2009 have yet to be produced. That issue could be reconsidered when they are produced. The Tribunal makes no finding on this issue and it remains open to the Applicants or other lessees to challenge the 2009/2010 service charge year or other service charge years on the basis that the sums actually paid by the lessees for the service charge 2008/2009 for Estate Manager's costs significantly exceeded the sums demanded from March 2008 estimated in December 2007.

57. In respect of the service charge year 2009/2010 as at December 2008 the Tribunal finds it was very clear that the sums demanded and paid for the service charge year 2008/2009 would largely exceed the sums due for a 15 hours a week Estate Manager's service. It would also have been apparent to Guardian and the Respondent that no decision was going to be made to recruit a full time manager in the near future after December 2008. The Tribunal finds that it was apparent to Guardian in February/March 2008 following 2 unsuccessful recruitment attempts, it would be difficult to recruit a full time resident estate manager without further work or expenditure. The Tribunal finds that the decision to demand service charges based upon the costs of a full time resident estate manager in December 2008

failed to make "due allowance" for the service charge actually paid in the previous year for such a service, as clause 3(3) of the Lease required.

58. The Tribunal also finds it was not reasonable in December 2008 to estimate under clause 3(3) of the Lease a charge payable in advance based upon a full time estimated costs of £18,190.44 for the estate manager, given the projected figure for estate manager costs of £11,473.00 for 2008/2009, and the fact that the chances of recruiting a full time manager had receded dramatically since March 2008. To Guardian's knowledge nothing had changed and no steps had been taken to recruit a candidate.

59. The Tribunal was not provided with the material parts of Guardian's file of documents relating to the period in issue (2008-2009) or documents which would enable the Tribunal to gauge by reference to the contemporaneous documents, the process by which the estimated figure of £18,190.00 for estate manager's costs was reached.

60. As a consequence and taking into account the evidence of Mr Pope about how he reached the Budget figure of £18,190.44 for estate manager's costs for 2009/2010, the Tribunal concludes that Guardian and/or the Respondent failed to take into account the following factors in December 2008/January 2009 when estimating the service charge for 2009/2010 in respect of the estate manager. Firstly the fact that the sums demanded and paid during the service charge years 2008/2009 (£17,125.00 based upon the service charge budget 2008/2009 Appendix 1 Respondent documents) was considerably in excess of the projected costs for the estate manager (£11,473.00) known costs as at December 2008 – appendix 8. Secondly that for the entirety of the service charge year 2008-2009 at December 2008 and for the foreseeable future a part time estate manager was envisaged at The Chestnuts.

61. Mrs Wilkinson did refer to the need to equalise the amount of service charge in accordance with clause 3(3) of the Lease. The Tribunal had no contemporaneous evidence that the need to equalise the service charge payments demanded was in the mind of the Respondent or Guardian at December 2008 or January 2009 when the 2009/2010 advance service charge demands were formulated. This was not something which the Respondents mentioned in their document entitled the Response. No documents were produced which indicated this was a factor taken into account at that stage. In any event the method of equalisation of service charges from year to year in clause 3(3) is intended to be by way of carrying forward an amount in the property repairs reserve fund for expenditure on maintenance, repairs and replacements: see clause 3(3) and paragraph 2(2)(b) of the First Schedule to the Lease. There is no provision in the Lease for equalisation of the service charge from year to year by increasing the costs for the provision of the Estate Manager or Warden. If this is what occurred, this was an erroneous interpretation of clause 3(3) of the Lease.

62. Doing the best it can on the evidence available, the Tribunal finds that a reasonable manager with the evidence available in December 2008 would have allowed a rate of £7.25 per hour for 15 hours for 26 weeks (amounting to £2827.50) and £7.25 per hour for 25 hours a week for the remaining 26 weeks (amounting to £4712.50) for the service charge year 2009/2010 to make due allowance for the excess demanded for the estate manager's costs 2008/2009 under clause 3(3) of the Lease. To that must be added the additional costs of employing an estate manager which can be estimated at £5,400.00 (based upon the actual additional costs for 2008/2009 taken from the projected costs figure) producing a final total for estate manager costs to be demanded in advance for 2009/2010 of £12,940.00, instead of the figure of £18,190.44.

Section 20C of the 1985 Act application

63. Section 20C of the 1985 Act provides in its material parts:

"(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court or leasehold valuation tribunal, or the Lands Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application."

.....

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

64. The Lease contains provision for the costs of management to be charged to the lessee under clauses 3 and 1(2)(f) of the First Schedule. The Respondent through Guardian has taken an active role in the defence of these proceedings. There does not appear to be provision for the Respondent or any landlord to charge legal costs to the Applicants under the terms of the Lease. The Tribunal expresses no view on this issue. The Respondent did not oppose an order under section 20C of the 1985 Act but nevertheless the Tribunal has considered whether it is right to make such an order.

65. The Tribunal bears in mind the proposition it is unattractive that a tenant who has been substantially successful in litigation should find himself having to pay any part of the landlord's costs through the service charge.

66. The Tribunal also has in mind there is no automatic expectation of an order under section 20C in favour of a successful tenant, although a landlord who has behaved improperly or unreasonably cannot normally expect to recover his costs of defending such conduct.

67. The Tribunal has looked at these considerations carefully and finds that it is right to make an order under section 20C of the 1985 Act in view of the success which the Applicants have had and the fact that the need to have these proceedings at all stemmed from the flawed process in which the Respondent or its agents exercised its powers under clause 3(3) of the Lease.

Reimbursement of fees

68. Under paragraph 9(1) of the Leasehold Valuation Tribunal (Fees)(England) Regulations 2003, the Tribunal "may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings". The First Applicant applies for reimbursement of fees by the Respondent. Those Regulations contain no indication of the criteria to be regarded by the Tribunal and there is no longer any requirement that notice must be given that such an application will be considered. However, essentially for the reasons outlined in granting the section 20C application, the Tribunal orders reimbursement of fees by the Respondent. In addition however the Tribunal has regard to the failure of the Respondent to take steps to resolve this complaint which was made well before the issue of these Tribunal proceedings by the First Applicant. There was no evidence put before the Tribunal that the Respondent had put in place or followed a complaints procedure of the kind recommended by 13.0 of the ARHM Code of Practice, or that if there was such a procedure in place, it had addressed the concerns raised by any of the Applicants. Given the longstanding nature of the complaint and the financial consequences to the Applicants, an order for reimbursement is plainly warranted.

Other issues raised

69. The Tribunal cannot leave these reasons without clarifying the scope of its decision. This Tribunal has not determined the following issues which were not raised directly by the application.

70. The Tribunal has not decided whether the financial statements provided contained what could be described as a certificate from the landlord's accountants complying with clause 3 and paragraph 1 of the First Schedule to the Lease or whether any certificate is valid.

71. The Tribunal has not decided whether any of the other costs claimed in any of the service charge budgets prepared by Guardian for years 2007/2008, 2008/2009 and 2009/2010 are reasonable or whether any of those costs are recoverable under the Lease.

72. The Tribunal makes no decision or ruling on these issues. Both the Applicants and the Respondents would be well advised to seek independent professional advice about all of the issues raised in these Reasons with a view to minimising the scope for disputes in the future and seeing if any differences can be resolved by agreement or mediation. If the parties are unable to agree these or other issues they might form

the subject of a separate application by the Applicants or other lessees. Free advice to lessees is available from the Leasehold Advisory Service. The Tribunal has been told the Respondent had access to legal advice.

Howard Lederman
Chairman
15 07 2009