LON/00AQ/LVM/2004/0008

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER SECTION 24 OF THE LANDLORD AND TENANT ACT 1987 (AS AMENDED) AND SECTION 20C OF THE LANDLORD AND TENANT ACT 1985 (AS AMENDED)

Applicants: Lessees of Orchard Court

Respondent: St Anthony's Homes Ltd

Re: Orchard Court, Stonegrove, Edgware, Middlesex HA8 7SX

Inspection date: 7 June 2005

Hearing dates: 7, 8 and 9 June 2005

Appearances:

Mr R Conway FRICS IRRV	(Flat 24)
Ms B Brooker	(Flat 21)
Mrs E Mendoza	(Flat 25)
Mr S Franses	(Flat 2)
Rabbi B Rabinowitz	(Flat 20)
Mr B Martin FRICS IRRV	
Mr G Swindles BSc FRICS	

For the Applicants

Mr K O'Connor ACIOB – Director, St Anthony's Homes Ltd

For the Respondent

Members of the Residential Property Tribunal Services:

Mrs J S L Goulden JP
Mr M A Mathews FRICS
Mr A D Ring

LON/00AQ/LVM/2004/0008

ORCHARD COURT, STONEGROVE, EDGWARE HA8 7SX

BACKGROUND

1. The Tribunal was dealing with applications in respect of:-

   (1) a variation of an Order appointing a manager under Section 24(9) of the Landlord and Tenant Act 1987 as amended.

   (2) limitation of landlord's costs of proceedings under Section 20C of the Landlord and Tenant Act 1985, as amended.

2. The original Order was dated 9 January 2001. Under that Order, Mr B Martin FRICS IRRV (hereinafter referred to as "the manager") of Martin Russell Jones, Chartered Surveyors, was appointed by the Tribunal as the manager for a period of 23 months from 1 January 2001.

3. By a further Order dated 31 October 2002, the original Order was renewed for a further period of 24 months from 1 December 2002.

4. On 21 January 2005, the existing Order appointing the manager having expired, the Tribunal made an Interim Order continuing the appointment of the manager pending the determination of the present application.

5. In 2002, during the period of the manager's appointment, two of the three blocks comprising Orchard Court (Blocks A and B) had been the subject of major works. A Notice of Intention dated 28 February 2005 in respect of major works to the third block (Block C) has been served on the tenants, but no further Notices under Section 20 have yet been served.

INSPECTION

6. The general layout of the three blocks of 47 flats comprising Orchard Court, Stonegrove, Edgware (hereinafter referred to as "the property") is as set out in an LVT Decision of 21 May 2001.

7. The Tribunal inspected the exterior of all three blocks on the morning of 7 June 2005, in the presence of Ms B Brooker (Flat 21), Mr R Conway (Flat 24) Mr B Martin, Mr G Swindles and Mr K O'Connor.

8. As stated in paragraph 5 above, two of the blocks, Blocks A and B, had been the subject of major works and Block C required major works to be carried out.

9. The Tribunal inspected the internal common parts of all three blocks and was invited to inspect the interior of Flat 18 in Block C where water damage was noted to the inside of the front door and the interior of a fitted wardrobe in one of the bedrooms.

10. The Tribunal inspected the balconies at roof level in Blocks A and C.

11. With regard to Block C, peeling external paintwork was noted on the rear access balconies, the condition of the balustrading was poor as was the parapet guttering. A considerable amount of pigeon droppings and feathers were noted on the balconies. Two large wooden doors to the water tanks at roof level were in poor condition and were poorly fixed and fastened. Severe damp was noted in the stairwell. The common parts were badly in need of redecoration, and chipped paintwork and peeling wall paper were noted.

12. Blocks A and B were generally in far better condition than Block C. The gutterings had been replaced with lead which was also to the parapet and cornice. The balcony railings had also been replaced. There was some evidence of damp in the stairwell of Block B. Carpeting in the common parts to both Blocks A and B was threadbare or removed.

13. The Tribunal inspected the grounds and noted areas of cracked paving and cracks in the boundary walls to certain communal parking areas. There was a mixture of old and replacement drain gulley covers. The replacements were heavier and bolted down over deeper gulleys. Tiling was missing outside the entrances to Blocks A and B

following two weeks. He explained that the original intention of the

Applicants had been to purchase the freehold of the property, but they had been advised that they were unable to do this and had therefore considered other avenues. In the interim, the manager's appointment should be extended.

17. Mr Martin, the manager, was questioned by the Tribunal about the new information introduced by Mr Conway. He confirmed that he had known of the Applicants' intention in respect of the right to manage application for some two weeks, but "*didn't think*" to advise the Tribunal.

18. Mr O'Connor, for the Respondent, said that he was very surprised to hear of the Applicants' intentions and this was the first that he had been aware of them. He said that the Applicants had failed to comply with the Directions issued with the Tribunal's Interim Order of 21 January 2005 and requested the Tribunal to dismiss the present application to vary the existing management Order.

19. The Tribunal did not dismiss the application before it. It was explained that there was a live application before the Tribunal which required a determination notwithstanding the fact that the Applicants may wish to pursue a right to manage application in the future. It was open to the Applicants to withdraw their present application and the consequences of their so doing was explained. Mr Conway confirmed that the Applicants wished to proceed with the application at present before the Tribunal.

20. The Tribunal indicated that in view of the matters which had only been brought to its attention at the commencement of the Hearing, it would consider the question of penal costs under Schedule 12 (Leasehold Valuation Tribunals: Procedure) to the Commonhold and Leasehold Reform Act 2002, paragraph 10. The Tribunal invited the parties to make representations on this issue at the end of the Hearing.

Evidence

21. Mr Conway reiterated that the Applicants were happy with Mr Martin's management of the property and wished it to continue. Only an extension of Mr Martin's appointment would be acceptable to the Applicants and any person appointed by the Respondent would be wholly unacceptable.

22. Although the Applicants conceded that Mr Martin had shown some leniency in the collection of the service charge arrears, and some tenants had continued to withhold their service charges for that reason, the Applicants were convinced that there would now be firm action against those tenants who had not paid their service charges, with the result that collection of arrears would be more successful in future.

23. In evidence, Rabbi Rabinowitz said that there was a general feeling that tenants would be "*unhappy and uncooperative*" if Mr Martin's appointment did not continue and "m*ight withhold some or all payments*". He confirmed he

was "*not overhappy*" with Mr Martin, but thought that he was the best and most honest available. He accepted that all arrears "*should be chased*".

24. In evidence, Mr Franses confirmed that he was in arrears with his service charges because "*we wanted a firmer stance by Mr Martin … we're letting people off the hook …. I wanted Mr Martin to send a solicitor's letter to ensure people make payments. Ultimately everyone must pay …. if he takes a firm line things will change ….. people who don't pay are not paying because they want to see a tough approach taken. He should have been tougher earlier.*" In his view, if Mr Martin's appointment did not continue, service charges would be withheld.

25. In evidence, Ms Brooker said, '*I'd rather have someone I trust*'. She accepted that Mr Martin had been lenient in the collection of arrears.

26. The Applicants requested that the Manager's appointment be extended for a further 24 months.

27. Mr O'Connor made it clear that he resisted the variation of the management order as he had resisted it in 2002. He said that the Respondent had not had contact with the tenants for over four years. He said that initially the Respondent company had done its best to assist Mr Martin recover service charge arrears. He thought the decision of the Tribunal in 2002 may have been different if the Tribunal had known that Mr Martin had not been acting as a receiver. He said that the Respondent company had been unable to

obtain monies due to it and it was an *"unnecessary and unfair burden"*. He cast doubts on Mr Martin's impartiality and said that Mr Martin had favoured the lessees. He said "*some of the residents are telling him what to do – there are stronger people than him … he is unduly influenced by the Residents Association*." Correspondence from the Respondent had not been answered. Mr Martin had not sent the Respondent a schedule of ground rents, merely a cheque on occasions, but without a full breakdown. Mr O'Connor said that he had never received a proper account. Mr Martin had failed to comply with the Tribunal's Directions. Mr O'Connor wished the present application to be dismissed and added that the Applicants' agenda was "*to obtain the freehold for nothing*". If Mr Martin's appointment was terminated he would appoint a new firm of established managing agents, Drivers and Norris, and remedial works would be carried out to Block C immediately.

28. The Tribunal appointed manager, Mr Martin, gave evidence of his dealings with the Property as from his initial appointment in 2001 and his intentions with regard to the future of the property if he was permitted to continue as manager.

29. Mr Martin confirmed that when he had originally been appointed in 2001, there had been a history of non payment of service charges and impending litigation in respect of thereof. Although invited on his appointment to join in such litigation, he had declined on the grounds that his solicitor had told him that he did not have to become involved in trying to recover service charges for any period before his appointment. He said "*it is very difficult to get money*

from lessees. Even now I have only £20,000 on the service charge account. I use it for practical matters. I did not have money for court cases". He said that he had been content to start with "*a clean slate*" and tried to collect as much of the service charge as possible by persuasion. Mr Martin said that works to Block C would follow collection of the necessary service charges.

30. The main issues of concern to the Tribunal are set out below, with the Tribunal's views under each head.

Arrears

31. The Tribunal is critical of Mr Martin's approach. Mr Martin was appointed on 9 January 2001. The terms of his Order are unambiguous – he was appointed as manager and receiver. In the view of this Tribunal, he has been reactive, rather than proactive, with the result that even some of those supporting the variation of this application and who appeared at the hearing to support his continuance as manager had been, or are still, in arrears with service charge payments due to his inability or reluctance to force the issue and institute legal proceedings. It appears to this Tribunal that Mr Martin has chosen which parts of the Order should be carried out, whilst rejecting other parts of the Order which may possibly provide him with some difficulty. It is not fully understood why a more determined effort was not made to collect arrears not only from resistant lessees but also from the Respondent company or members of Mr O'Connor's own family (see para 34). In respect of the latter, Mr Martin's explanation was that there were "*special circumstances*" in

respect of Mr O'Connor and Mr Martin had received legal advice that it might be difficult to collect monies from Mr O'Connor. The Tribunal finds this attitude difficult to accept and would surely encourage those not paying service charges to continue and those paying service charges to consider withholding them.

32. There are at present arrears of approximately £56,000 which Mr Martin has done little or nothing to recover. It is over four years since his appointment and there is only £20,000 in the service charge account (which he said he intended to spend on paving).

33. It is noted that the criticisms in this respect raised by Mr O'Connor during the present Hearing are similar to those raised in the earlier application to the LVT as noted in its decision dated 31 October 2002. The Tribunal in 2002 expressed some criticism of the manager in that decision.

34. The Tribunal is also critical of Mr O'Connor under this head in that he conceded that service charges on flats owned by either the Respondent company or members of his own family were not paid to the manager but directly to the Respondent by way of set off. This action had the effect of increasing the amount of arrears on the service charge account. His justification for this was that Mr Martin had refused to account for monies properly due to the Respondent company. Mr O'Connor accepted that the Order of the Tribunal had been flouted in this respect.

Responsibility of a Tribunal Appointed Manager

35. It appears to this Tribunal that Mr Martin has, even after such a long period of time after his initial appointment in 2001, no real understanding of the rights and duties of a manager. This is borne out by his failure to advise the Tribunal of material matters which should have been brought to its attention, for example the Applicants' intention to make a right to manage application. Mr Martin was appointed by the Tribunal. His first duty is to the Tribunal but it does not appear that this is fully appreciated or accepted.

Leniency

36. Undue leniency which results in unfairness to one party or another is deprecated. In the view of this Tribunal, Mr Martin has shown undue leniency to some of the tenants to the disadvantage of the Respondent. He has not been even handed in this respect. In this respect it is noted that a very large sum in service charge arrears of approximately £56,000 has been allowed to accrue.

Works to be Carried Out

37. Mr Martin knew that he was to attend the Tribunal and ought reasonably to have anticipated that he would have to answer questions in respect of the works to be carried out to Block C. However, it did not appear that he had a firm grasp on those works nor, when questioned by the Tribunal, whether

Section 20 Notices had been served. His files were in some disarray and he was unable to answer certain questions from the information in the files which he had brought with him.

Failure to Answer Correspondence

38. Mr O'Connor complained that Mr Martin had failed to answer correspondence, and produced in support a bundle of nine letters written to Mr Martin either from the Respondent or the Respondent's solicitors from January to October 2003 which have been considered by the Tribunal. A letter dated 6 September 2003 from the Respondent's solicitors to Mr Martin stated, inter alia:-

"*We write further in connection with the orders dated 9 January 2001 and 31 October 2002, the second of which renewed your appointment as manager and receiver of Orchard Court until 30 December 2004. The order of 9 January 2001 authorised you to receive rents, ground rents, service charges and other monies payable by the lessees and to provide our client with an itemised account of the ground rents received and any interest thereon. Paragraph 4 of that order requires you to provide information to our client within 21 days of any request. Our client has, as you know, written to you on numerous occasions but has not had a response. You will recall the Land Valuation Tribunal* (sic) *having expressed the view that during the initial period of your appointment you should have made more effort to communicate with our client and, in particular, respond to letters. Since the*

date of the order we and/or our client have written to you seeking information about the collection of ground rent but we have not had a response and, notwithstanding the Tribunal's observations, our letters to you of 26 March, 10 April and 8, 15 and 22 May have gone unanswered. As you will be aware, despite the fact that your appointment effectively prevents our client from managing the premises itself, our client remains liable under its leasehold convenants and retains an interest in the premises. Our client would thus be directly affected by any mismanagement of the premises by you. Moreover, failure by you to collect service charge arrears will result in there being insufficient funds available to our client to carry out its obligations on termination of your term of appointment. It is for those reasons that our client has an interest in your management of the premises and is entitled to be kept informed with regard to it. Paragraph 4 of the Order expressly recognises this entitlement. We would be interested to learn the basis upon which you are ignoring our requests ...."

39. A further letter from the same solicitors to Mr Martin dated 6 October 2003 stated:-

"We have to say that we are genuinely surprised not to have heard from you in answer to our letter of 16 September. We say this having regard to the fact that we had reminded you of our unanswered letters of 26 March, 10 April, 8, 15 and 22 May. We must now insist on having your detailed response by 10.30 am, 13 October."

40. Only one letter appears to have been received in response from Mr Martin. This was dated 10 October 2003 and was merely a "holding" letter which stated "*I am continuing to obtain legal advice on the matters contained therein and will communicate with you as soon as this had been obtained*".

41. Mr O'Connor's version was not challenged. No acceptable explanation was offered by Mr Martin. It is noted that the LVT Determination of 31 October 2002 criticised Mr Martin on the same grounds.

Failure to Cooperate in Production of Documentation

42. The Directions of the LVT dated 13 January 2005 directed Mr Martin, to "*make available … the documents relating to the management of Orchard Court and afford copying facilities to Mr O'Connor*". Mr O'Connor said that he had attended Mr Martin's offices and requested to inspect a number of files, but was told that they were not available or were not at the office. Mr Martin did not challenge Mr O'Connor's contention but said that he had acted on solicitor's advice. In view of this Tribunal, the Tribunal's Directions of 13 January 2005 had not been complied with by the manager.

Failure to Provide Schedule of Ground Rents

43. The Order of 9 January 2001 clearly provides for the manager to provide the Respondent with an itemised account of the ground rents received and any interest thereon. Mr Martin had, by a letter dated 23 October 2002, been

provided by the Respondent with a schedule of all leaseholders who had not paid their ground rents. Mr O'Connor's assertion that he had had no information on the ground rents since 2002 was not challenged by Mr Martin. In the view of this Tribunal, the manager failed to supply financial information to the Respondent under this head which the Respondent was entitled to receive.

Impartiality

44. There is an unfortunate perception by the Tribunal of some partiality by the manager towards the tenants. This has been reinforced by the forthright views of Mr Conway expressed at the Hearing as to what was or was not going to be done in the future, although all relevant decisions should be those of the manager and manager alone.

45. In the view of this Tribunal, there has been ample time for Mr Martin to demonstrate firmness and fairness in dealings both with the landlord and tenants. He has failed to do so.

THE TRIBUNAL'S DETERMINATION UNDER SECTION 24(9) OF THE 1987 ACT

46. The view of the Tribunal is that to strip a landlord of his property right is a draconian measure. Persons putting themselves forward as a Tribunal appointed manager must fully understand and accept the onerous responsibilities attached thereto and be fully prepared to carry out the terms of

the Order without fear or favour. Mr Martin has had a considerable length of time in order to prove himself but his "softly softly" approach and his apparent adherence to the views and/or wishes of some of the Applicants does not seem to have produced equitable results. The Tribunal has also noted Mr O'Connor's confirmation that he would appoint well known managing agents who would oversee immediate works to Block C and the Applicants' clearly expressed (and unreasonable) view that they would refuse to countenance any manager other than Mr Martin.

47. This landlord was stripped of its property right in 2001, but for the reasons as set out above and, after careful consideration, the Tribunal does not consider it just and convenient that this should continue. The Tribunal therefore declines to vary the Order.

APPLICATION TO LIMIT LANDLORD'S COSTS OF PROCEEDINGS UNDER SECTION 20C OF THE 1985 ACT

48. The Tribunal requested the parties to submit written representations in respect of this application.

49. In his written representations, Mr Conway said inter alia:-

"*It is accepted by the Applicants that there was delay on their part in submitting their Statement of Case, supporting evidence and the bundle in readiness for the hearing. Obviously, the delay is regretted, but this is not*

something which caused any prejudice to the Respondent in that the information contained in the Response (submitted by Mr Conway) together with the information contained in Mr Martin's Witness Statement are all matters which the Respondent was well aware of. In addition, the majority of the documents contained within the bundle had already been made available to the Tribunal and to the Respondent. Certainly, the Respondent was put to no additional costs due to the Applicant's failure to comply to the timetable set out in the directions. The Respondent submitted a list of documents upon which it intended to rely to the Applicants' solicitors under cover of its letter dated 12 May 2005 and received 17 May 2005. The Applicants' solicitors asked the Respondent for copies of these documents by their letter dated 26 May 2005. The documents in question were only received on 3 June 2005 and were incomplete and during the course of the Hearing the Applicants actually had to borrow a set of the documents from the Tribunal. If an Order under Section 20(c) is not made, the Applicants contend that the Respondent will seek to impose costs upon an already over burdened service charge fund which is grossly disproportionate to any expenditure actually incurred by the Respondent. This will therefore have to form the basis of a further hearing before the Leasehold Valuation Tribunal for a determination as to the level of these costs. The Respondent, has throughout these proceedings, been represented by its director and therefore has not incurred legal costs".

50. In his written representations, Mr O'Connor said, inter alia:-

"Mr B Martin the LVT appointed manager's term of office expired on the 1 December 2004. The Residents Association's application to vary the order was not made until the 25 November 2004, in the knowledge that there would have to be a hearing to avoid a Lacuna. Mr Martin's term was extended at the pre-trial review until the decision of the Tribunal at the hearing commencing 7 June 2005. We attended the pre-trial review in January 2005 with our proposed managing agents Messrs Drivers Norris. Throughout the period from when the directions were issued, and to the hearing commencing the 7 June 2005, the Applicants:

(A) Failed to adhere to every single direction.

(B) Announced at the opening of the hearing the proceedings were superfluous, as they had set in motion via Messrs Juliet Bellis solicitors an application for the right to manage, some 2 months prior to the hearing.

During the course of the directions period, the Respondents wrote to the Applicant's solicitors and the Manager and the Tribunal regarding their failure to comply with directions. The Manager's statement dated the 3 June 2005, was never served on the Respondents and only appeared in the Applicants bundle on the first day of the hearing. Given the Applicants stated intention to apply for a right to manage the property, this option could have been exercised approximately some 2 years ago or any time up to the expiration of Mr Martin's appointment and rendered these hearings unnecessary and not put the Tribunal and Respondents to the expense that they have incurred as a direct result of this application. We therefore request that our costs are recoverable through the service charge".

51. In applications of this nature the Tribunal endeavours to view the matter as a whole including, but not limited to, the degree of success, the conduct of the parties and as to whether, in the Tribunal's opinion, resolution could or might have been possible with goodwill on both sides.

52. In the judgement of His Honour Judge Rich in a Lands Tribunal Decision dated 5 March 2001 (**The Tenants of Langford Court v Doren Ltd**) it was stated, inter alia "*where as in the case of the LVT, there is no power to award costs, 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, in my judgement the primary consideration that the LVT should keep in mind is that the power to make an order under section 20C should be used only in order to ensure that the right to claim costs as part of the service charge is not be used in circumstances that makes it use unjust*".

53. In accordance with Section 20C(3), the applicable principle is to be the consideration of what is just and equitable in the circumstances. Of course excessive costs unreasonably incurred would not be recoverable by the landlord in any event (because of Section 19 of the 1985 Act) so the Section 20C power should be used only to avoid the unjust payment of otherwise recoverable costs.

54. In his judgement, Judge Rich indicated an extra restrictive factor as follows:

"Oppressive and, even more, unreasonable behaviour however is not found solely amongst landlords. Section 20C is a power to deprive a landlord of a property right. If the landlord has abused his rights or used them oppressively that is a salutary power, which may be used with justice and equity; but those entrusted with the discretion given by Section 20C should be cautious to ensure that it is not itself turned into an instrument of oppression".

55. The relevant clause in the lease is contained in Clause 2 of the Seventh Schedule. This states that the landlord is entitled to recover within the service charge *"a sum equal to the fees and disbursements paid to any account solicitor or other professional person"* in respect of inter alia, maintenance contributions.

56. The Tribunal considers that the lease does entitle the Respondent, prima facie, to recover through the service charge the reasonable costs of proceedings before this Tribunal but limited only to the class of persons specifically referred to in that clause.

57. The Tribunal has considered carefully the written representations of both sides and must consider what is just and equitable on the facts and merits of this particular case.

58. The Tribunal does not consider that the Respondent has abused its rights or used them oppressively and determines that it is just and equitable that the costs 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, but only insofar as they have been incurred by those persons referred to in Clause 2 of the Seventh Schedule of the lease and to no other persons.

APPLICATION FOR COSTS

59. The Tribunal, of its own motion, indicated that it would consider an application for costs under Schedule 12 (Leasehold Valuation Tribunals; Procedure) of the Commonhold and Leasehold Reform Act 2002, paragraph 10 of which states:-

(1) a leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).

(2) The circumstances are where-

(a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or

(b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

(3) The amount which a party to proceedings may be order to pay in the proceedings by a determination under this paragraph shall not exceed-

(a) £500, or

(b) such other amount as may be specified in procedure regulations

(4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.

60. Written representations were requested from both parties

61. In his written representations, Mr Conway said, inter alia:-

"The Tribunal is only able to make an award of costs if the Tribunal takes the view that any parties has "acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings". The Applicants contend that neither parties to these proceedings have acted in such a manner. The Applicants have acted perfectly reasonably in seeking the extension of Mr Martin's term. The Applicants have for a considerable period had the joint aims in mind of acquiring the freehold and also ensuring that the management never reverts to the Respondent. As the Tribunal is aware, after a manager has been appointed under the 1987 Act and has been in place for a period of 2 years, it is open to lessees to enfranchise the block under the provisions of the 1987 Act. The Applicants have taken advice as to the advantages and disadvantages of this route and have only recently come to the conclusion that it would be more sensible for them to seek to enfranchise using the 1993 Act. It follows, therefore, that they are not free to utilise the right to manage procedure set out in the Commonhold and Leasehold Reform Act 2002 and a company is current being formed for this purpose. At the time when the application was made, however, the Applicants had not reached that decision and it was therefore wholly reasonable for this application to be made. The Tribunal will also recollect that the Respondent has indicated that he will contest the claim made by the Applicants to exercise their right to manage under the 2002 Act. The Applicants would, in addition, prefer the added protection of a manager appointed by the Tribunal, particularly now the major works are underway, as they feel that this will materially assist in completing the major works and ensuring that the blocks are brought up to a proper standard. The Applicants

would intend to continue Mr Martin's appointment even after the exercise of their right to manage. The Applicants therefore contend that neither the conduct of the Applicants nor of the Respondent in this matter could justify the Tribunal making any award under Schedule 12".

62. In his written representations Mr O'Connor said inter alia:-

"We consider in the light of the Applicants opening statement to the Tribunal at the hearing commencing 7 June 2005, that these proceedings are superfluous, can only be deemed as having complete disregard for the Tribunal and the Respondents. Mr Conway stated he was and had set in train the process for the Right to Manage application to the Leasehold Valuation Tribunal, but neither he, nor Juliet Bellis solicitors considered notifying the Tribunal or the Respondents. Mr Martin as an officer of the Tribunal similarly failed to advise the Tribunal even though his knowledge may have been for a lesser period. This attitude has been evident from the Applicants, by their failure to comply with any of the Tribunal's directions issued after the pre-trial review. The evidence given by representatives of the Applicants present in relation to the future, if the order is not varied is an attempt to morally blackmail the Tribunal to grant their application or they will move for a Right to Manage application, in an attempt to render these proceedings meaningless. We consider this an abuse of the process both vexatious and frivolous actions by the Applicants and that costs should be determined against the Applicants."

63. At the commencement of the Hearing, Mr Conway expressed the view that the Hearing was "*superfluous*" because Mr Martin would continue as a manager under the Applicants' proposed right to manage application.

64. Mr Conway stated in evidence that some two months before the present Hearing it had been decided to make a right to manage application and documentation was to be prepared "*with two weeks*". Mr Conway said the wheels were in motion and the application "*cannot be resisted*".

65. The Tribunal had not been informed of the Applicants' intention either by the Applicants, the Applicants' solicitors or from Mr Martin, the Tribunal appointed manager who had known of the Applicants intentions for some two weeks. Mr Martin said that he had not realised that he had an obligation to inform the Tribunal.

66. Mr O'Connor said that he was surprised not to have been informed that the Applicants were proposing an application for the right to manage and, given the failure of the Applicants to comply with Directions, he requested the Tribunal to dismiss the application.

67. In the event, the Tribunal went on to consider the application, but the failure to notify the Tribunal of relevant changes of circumstances which may possibly have resulted in an adjourned hearing, with a consequent saving to the public purse, is deprecated.

68. The power to award penal costs is a draconian measure and should be exercised with reluctance but in the view of this Tribunal, the Applicants, have acted frivolously, and/or vexatiously and/or unreasonably in connection with the proceedings before the Tribunal.

69. As stated in paragraph 59 above, the maximum amount of penal costs which can be ordered is £500. In this case, the Tribunal orders that the Applicants do pay to the Respondent penal costs of £200.

Post Hearing

70. After the Hearing had concluded and all the evidence had been adduced, the Tribunal received a letter from Mr Conway dated 27 June 2005. This letter contained enclosures including a copy of a Notice of administrator's appointment dated 21 June 2005 from which it appeared that Mr T J Branston of Kensington South & Partners, Licensed Insolvency Practitioner, had been appointed as administrator of St Anthony's Homes Ltd, the Respondent in the case before this Tribunal.

71. Mr Conway, in his letter of 27 June 2005 stated, inter alia:

"Obviously this will affect the future management of the property and it is, therefore, imperative that Mr Martin be retained as Manager as it is quite apparent that St Anthony's Homes Limited can no longer carry out this task".

72. Whilst the Tribunal appreciates the possible ramifications in making its determination and is of the view that administration of the Respondent company may well have been a matter within the knowledge of the Respondent at the time of the Tribunal Hearing in May, the Tribunal can only deal with the evidence presented to it during the Hearing. Its Determination is made on the basis of its consideration of such evidence.

73. It is noted, with regret, that it was Mr Conway who brought this matter to the Tribunal's attention, rather than the then Tribunal appointed manager, Mr Martin who, from the correspondence supplied, had clearly been made aware of the situation. Indeed nothing has been heard from Mr Martin. This reinforces the Tribunal's view that Mr Martin did not and does not fully appreciate the nature of the appointment as manager.

CHAIRMAN .....
Mrs J S L Goulden JP

DATE 3 August 2008