BIR/00CN/LSC/2004/0004

THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE

DECISION OF THE MIDLAND LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER S27A OF THE LANDLORD AND TENANT ACT 1985

Property: **Flat 4, Regent House, 391 Birmingham Road, Sutton Coldfield B72 1AT**

Applicant: Miss E M Thornton (leaseholder)

Respondent: Portrust Holdings Limited (landlord)

Dates heard: 16 May and 11 July 2005, in Birmingham

Appearances: Miss E Thornton (Flat 4), the applicant
Miss L O'Sullivan (Flat 1)
Mrs L Cragg (Flat 3)
Miss S Higgins (Flat 6)
Miss S O'Sullivan (Flat 10)

for the applicant

Mr Angus Burden, counsel, instructed by Manby & Steward, solicitors
Mr P L Cassidy BSc (Est Man) MRICS and Mr D Chitty BSc MRICS
Woolley Pritchard & Co, chartered surveyors

for the respondent

Members of the leasehold valuation tribunal:

Lady Wilson
Mr N R Thompson FRICS
Mr M H Ryder

Date of the tribunal's decision: 24 September 2005

Background

1. This is a tenant's application under section 27A of the Landlord and Tenant Act 1985 ("the Act"), which seeks a determination of the applicant's liability to pay service charges in the years 2001, 2002, 2003 and 2004. The application was originally made in the name of six leaseholders, but was in the end pursued by one of them, Miss Thornton, the leaseholder of Flat 4, supported by the others. Miss Thornton and the other leaseholders who gave evidence will be referred to collectively as "the tenants" in this decision. It is agreed that the determination will affect the service charges paid by all the leaseholders of flats in the block.

2. Regent House is a three storey block, built in the 1960s, with six shops on the ground floor and five flats on each of the two floors above, and with an external staircase, and an external walkway to the rear of each of the first and second floors. The combined floor area of the shops is approximately one third of that of the whole building. The block is owned by Portrust Holdings Limited and managed on its behalf by Woolley Pritchard & Co, chartered surveyors. The block is situated on a corner site on a busy road. At the rear there is a courtyard with thirteen garages, some let with flats and others let to tenants of the shops. To the side there is a small shrubbery which is agreed to be a common part to the maintenance of which the leaseholders are obliged to contribute, and a small patch of lawn which is agreed to be the responsibility of the local council.

3. The flats are held on long leases which are in common form. They require the tenant to contribute 4% of "the Main Service Charge" and 10% of the "Flats Service Charge". The common parts are defined by clause1(10). The tenant covenants to pay the Interim Service Charge, Main Service Charge and the Flats Service Charge at the times and in the manner provided in the Fifth Schedule. The landlord's covenants to maintain and insure the building are at clause 5(6)(a) to (m). The first part of the Fifth Schedule defines the Main Service

Charge, of which the tenants of the flats must each pay 4%, to include the total expenditure incurred by the landlord in connection with the building but excluding those matters defined in clause 1 of Part II of the Fifth Schedule, namely the Flats Service Charge. Part II defines the Flats Service Charge, of which each tenant of a flat must pay 10%, to include the expenses incurred by the landlord in connection with the building *only in so far as they relate to the obligations imposed under 5(6) ... relating to matters or areas the use and benefit of which shall be exclusive to the private residential flats ...* .

4. The application and statement in support, in addition to complaints about specific service charges, such as those for cleaning, insurance etc, posed general questions such as "whether the service charges and maintenance expenditure reflect the upkeep of the block", "why are the administrative and management fees so expensive?", and "why are there two separate service charges and what are they for?". In their statements in support of the application, the tenants expressed a number of concerns about the level of the service charges, including "high maintenance costs", "poor management", that the service charges which they are asked to pay are the highest in the area. They also question the provision of a pitched roof in place of the previous flat roof.

5. Mr Burden of counsel, who appeared for the landlord, conducted the case with moderation and gave every possible assistance to the tribunal, as well as saying everything which could be said on behalf of his client. He agreed that all the service charges made in each of the years from 2001 to 2004 inclusive were open to challenge and could be considered by the tribunal. Miss Thornton, too, conducted the case with skill and moderation, and we pay tribute to them for the constructive and good humoured way in which the case was presented to us.

6. Miss Thornton said at the start of the hearing on 16 May 2005 that the tenants were dissatisfied with the pre-hearing disclosure made by the landlord, and were not in a position to

decide whether they wished to challenge certain of the charges until they had seen the invoices supporting them. A large bundle of invoices was produced by the landlord before the second day of the hearing on 11 July. Once they had seen the relevant invoices, the tenants were able to agree that some charges had been reasonably incurred. A possible issue which might have arisen in relation to costs charged in 2000 for external decoration carried out in 2001 was not investigated because we decided that it was outside the scope of the application in that the charge was not made in any of the relevant years. Save where particular service charges are considered and a determination made in this decision, it is now agreed that they were reasonably incurred and that they are payable. All the disputed charges, in the order in which they were considered at the hearing, are set out below under the heading "Decision". Mr P L Cassidy BSc (Est Man) MRICS and Mr D Chitty BSc MRICS of Woolley Pritchard & Co rightly conceded at the hearing that service charge demands made in the past and the subject of these proceedings had not been at all transparent; but, by the end of the hearing, we were reasonably confident that the full picture had emerged and that the managing agents had, in the end, done their best to put the facts before us.

7. The tribunal inspected the block in the morning of 16 May 2005 in the presence of Miss Thornton, Mr Cassidy and Mr D Chitty. The hearing began at noon on that day and occupied the remainder of the day and most of 11 July. Miss Thornton gave evidence in support of the application, together with Mrs L Cragg (the leaseholder of Flat 3), Miss S O'Sullivan (the leaseholder of Flat 10), Miss L O'Sullivan (the leaseholder of Flat 1) and Miss S Higgins (the leaseholder of Flat 6). Mr Burden called Mr Cassidy and Mr Chitty to give evidence.

8. Page references in this decision are to the landlord's bundle and supplemental bundle of documents unless otherwise stated. The final service charge accounts for 2004 are to be found only in the tenants' bundle. The service charge year in each of the relevant years is the calendar year.

Decision

General

9. By section 27A of the Act, an application may be made to the tribunal for a determination whether a service charge is payable, and of the amount which is payable. By section19(1), relevant costs shall be taken into account in determining the amount of a service charge (a) only to the extent that they are reasonably incurred, and (b) where they are incurred for services or the carrying out of works, only if the services or works are of a reasonable standard. The landlord's duty to provide services and to recover their costs is governed by the lease, and the fairness or unfairness of the provisions of the lease are not a matter for the tribunal in this application.

Issue 1: Cleaning of car park and common parts

General

10. The landlord's covenant to clean the common parts is contained in clauses 5(6)(a)(iii) and 5(6)(d) of the lease. In each of the relevant years a charge for cleaning the car park has been included in the Main Service Charge, and a charge for cleaning the common parts has been included in the Flats Service Charge. In 2001 the contractor employed to clean both the car park and the common parts of the residential part of the block was West Midlands Cleaning Services, and in 2002, 2003 and 2004 it was a contractor called Rochelle. The costs thus charged in the relevant years were:

	Main(car park)	**Flats (common parts)**

2001:	£118.39	£897.97
2002	£253.09	£2443.87
2003	£168.09	£2443.87
2004	£168.09	£2443.87

The tenants' case

11. The tenants said that the charges for these services were grossly excessive and the standard of cleaning very poor. They said that they had never seen the car park being cleaned until about two months before the tribunal's inspection. They said that the car parking area was used by members of the public and employees of the shop tenants, and that a good deal of litter was often to be found there. Of the cleaning of the common parts to the flats, they said that, as far as they were aware, the only common part of the block which was cleaned was the external staircase and its two landings, and that the external walkways leading from it were hardly ever cleaned and were usually filthy. Mrs Cragg said that she had seen broken glass in a walkway which was still there one and a half weeks later, although she agreed that the cleaner came every Monday. Miss Thornton said that she had, exceptionally, seen the cleaner at the block on the Friday before the first day of the tribunal hearing (which was on a Monday), and he said that he had "just popped in to clean the lights because he was in the area". Asked by Mr Burden whether they had ever complained about the standard of the cleaning, all the tenants they said that they were frightened to complain about anything because the managing agent seemed to charge them for every letter.

The landlord's case

12. Mr Burden referred to the cleaning specification (page 86), which showed that the cleaning

of the car park was supposed to take place only monthly, and the cleaning of the common parts of the flats weekly. Mr Chitty denied that the cleaning had suddenly improved prior to the tribunal hearing or that the cleaner had been made aware of the date of the tribunal hearing, and he said that the frequency of the cleaning had been the same for several years. Mr Burden submitted that it was reasonable for the landlord to retain commercial cleaners, and that it was not reasonable for the tribunal to assume that the cleaners had not been discharging their specified duties simply because individual tenants had not seen them at any given time. He also said that the tenants had not provided alternative quotations to establish that the work could have been done more cheaply.

The tribunal's decision

13. We accept that it is reasonable for the landlord to have employed commercial cleaners, and that it cannot be assumed that the cleaners did not attend when they were supposed to attend just because the tenants did not see them. It is in our view likely that they did attend the premises when they were supposed to do so. We are not surprised that there was frequently litter in the car park, which was required to be cleaned only monthly, and we are satisfied that the standard of cleaning of the car park was adequate and that the charge made for doing so was reasonable.

14. We accept the tenants' evidence that the cleaning of the common parts of the flats was not always carried out to an adequate standard. These areas were adequately clean when we inspected them, but we accept Miss Thornton's evidence that, for whatever reason, the cleaner had made an additional visit the previous Friday, and in any event an inspection can reveal only the position at the time. We have concluded that the cost for the year 2001 was reasonable in amount, but that the cost for subsequent years was excessive for the standard provided, and that a reasonable charge in each of these years would have been £2000. The balance of £443.87 in

each of those years was excessive and is not payable.

Issue 2: Landscape maintenance

General

15. The relevant landlord's obligation is in clauses 5(6)(a)(iii) and/or 5(6)(v). The "landscape" in respect of which the charges are made comprises the patch of shrubbery mentioned at paragraph 2 above, which is 92 sq m in area and is densely planted with gorse and other low-growing hardy shrubs, and the car park. The contractor employed in each year to maintain the shrubbery was Midshires Landscape, and Complete Weed Control was employed in each of the years 2002, 2003 and 2004 to spray the car park with weedkiller once a year at a cost of £120 plus VAT. Midshires Landscapes Limited's quotation for the year 2002 is at page 264, and its further quotation dated March 2004 is at page 92. The documents show that the contractor was obliged to attend monthly from April to November, but not from December to March. The charges for maintaining the shrubbery and spraying the car park in the relevant years were:

	Main	**Flats**
2001:	£404.16	-
2002:	£629.80	-
2003:	£622.71	-
2004:	£620.40	-

The tenants' case

16. Even Mr Chitty and Mr Cassidy did not appreciate until the second day of the hearing that part of these charges related to spraying the car park, although it is fair to say that their partner, who died earlier this year, has in the past undertaken most of the responsibility for the management of the block. The tenants had understandably not understood prior to the hearing to which areas this charge related, and believed that they might have related to the grassed area, which was the council's responsibility, rather than to the shrubbery and car park. When the facts were revealed, the tenants said that the shrubbery neither needed nor, to their knowledge, received any maintenance and that, if it did, the costs were wholly excessive for the maintenance required. They said that in any event the shrubbery was of no value to anyone, attracted litter, and would be better cleared.

The landlord's case

17. Mr Chitty said that he considered the standard of maintenance and the charges to be reasonable, and said that if the contracts were re-tendered the costs might increase. Questioned by Miss Thornton, he agreed that the shrubbery did not require much in the way of hand-weeding. Mr Burden submitted that it was reasonable for the landlord to employ commercial contractors, and that monthly maintenance could not be equated with intensive horticulture.

The tribunal's decision

18. We are satisfied that it was reasonable for the landlord to employ Complete Weed Control to spray the car park with herbicide once a year, and that their charge for so doing was reasonable. However, we regard the cost for attending to the shrubbery as excessive. It is obvious that the shrubbery requires little more than trimming with a hedge cutter twice a year,

and the removal of litter, although the latter cannot have been a priority since the shrubbery is attended to only for eight months of the year. The charge made by Midshires Landscape for the year 2001 appears to be reasonable in amount for the service provided, but we determine that a reasonable charge for the occasional visits required in each of the three subsequent years would have been £250 plus VAT, a total of £293.75. A reasonable charge for landscape maintenance in these three years, including the charge made by Complete Weed Control, plus VAT, is thus £434.75, of which each of the tenants is liable to pay 4%.

Issue 3: Insurance premiums

General

19. The landlord's covenant to insure is at clause 5(6)(c) of the lease. The premiums paid were:

	Main	**Flats**
2001:	£4230.18	-
2002:	£4514.15	-
2003:	£4939.63	-
2004:	£7004.93	-

20. Mr Chitty said that the block has been insured throughout with Royal and Sun Alliance, and on the second day of the hearing he confirmed that the managing agent receives a commission equivalent to 25% of the premium.

The tenants' case

21. Miss Thornton challenged in particular the large increase in the premium in 2004. She believed that this had been caused by the provision of a pitched roof in 2003, which she regarded as an improvement. (This question is considered below.) She did not challenge the landlord's choice of insurer, or the quality or amount of the cover, or the premiums for the years 2001, 2002 and 2003, although, when the commission paid to the landlord was revealed, she invited us to consider whether it should be deducted from the premium payable by the tenants. The documents produced before the second day of the hearing showed that the building was insured for £1,878,750 from August 2003 to August 2004 (page716) and £2,032,500 from August 2004 to August 2005 (page 801).

The landlord's case

22. Mr Chitty said that the policy covered all the properties in the landlord's portfolio, and was re-broked each year. He said there were about 100 properties in the landlord's portfolio, all in commercial use but some with a residential element. He said that, in return for the commission, the managing agents dealt with all the small claims but received an additional payment for dealing with large claims. They also inspected the property weekly. He said that the pitched roof was put on in 2003 and he believed that it had had little or no effect on the premium paid.

23. Mr Burden submitted that the insurance was negotiated at arm's length with a reputable insurer and its cost was therefore likely to have been reasonably incurred as held by the Court of Appeal in *Berrycroft Management v Sinclair Gardens Investments* (1997) 29 HLR 444. He said that it should be remembered that the insurance related partly to commercial premises, with high value, which inevitably increased the premiums.

The tribunal's decision

24. We accept that where insurance has been placed with a reputable insurer in the ordinary course of business it will generally be held to have been reasonably incurred unless the premium is outside the range of reasonable premiums. We consider that these premiums are on the high side, even given the commercial element in the block, and our experience suggests that it should be possible to negotiate a lower premium from another reputable insurer, but we are not satisfied that the premiums paid are so outside the market norm as to be unreasonably high. The only real challenge to these costs relates to the effect of the pitched roof, but the evidence does not establish that it has had a significant effect on the premium at a time when premiums were rising generally. Nor are we satisfied that the cost of the insurance to the tenants would have been less if the managing agent had not received a commission. Accordingly, we are satisfied that the cost of insurance was reasonably incurred, although we consider that the landlord should look again at the cost of insurance to see if it can be provided at a lower cost in the future.

Issue 4: Management and administration

General

25. The relevant landlord's covenant is at clause 5(6)(g)(i)(a) and provides that the landlord is to employ, at its discretion *a firm of Managing Agents to manage the Building and discharge all proper fees salaries charges and expenses payable to such agents or such other person who may be managing the Building including the cost of computing and collecting the rents in respect of the Building or any parts thereof.* The Main Service Charge demands for each year include a cost for "administration charges including rent collection", and the Flats Service Charge demands include a cost for "management fees". In addition, further management fees have been

deducted in each year directly from the sinking fund, allegedly for managing the fund. The propriety of this is considered at paragraphs 29 - 32 below. It was agreed by the landlord at the hearing that all these charges fall (insofar as they are reasonably incurred) within the landlord's covenant set out above. The charges made are set out below. All fees include VAT.

2001:	Administration charges	£5507.31
	Management fees main building	£1762.52
	Management fees flats	£1762.52
	Sinking fund management fee	£543.44
	Total	**£8577.79**
	Total for each flat	**£488.77**
2002:	Administration charges	£5377.35
	Management fees main building	£2115.00
	Management fees flats	£1850.64
	Sinking fund management fee	£542.65
	Total	**£9885.64**
	Total for each flat	**£506.44**
2003:	Administration charges	£6856.18
	Management fees main building	£2115
	Management fees flats	£2115
	Sinking fund management fee	£570.41
	Total	**£11,656.59**
	Total for each flat	**£593.17**
2004:	Administration charges	£6605.69

Management fees main building	£2115
Management fees flats	£2115
Sinking fund management fee	£618.81
Total	**£11,454.50**
Total for each flat	**£585.08**

None of these fees appear to include the supervision of major works to the roof, considered below, for which £3525 was deducted from the sinking fund in 2003.

The tenants' case

26. The tenants said that the standard of management was very poor and that the costs were grossly excessive and out of all proportion to the standard of service provided. As to the standard, they said that the managing agent was often curt and unhelpful, that the service charge demands were not clear, and that the building was looked after poorly as far as the residential occupants were concerned, certainly until they had made the present application, and at too high a cost. They said that the service charges they paid were notoriously the highest in Sutton Coldfield, the service charges for other similar blocks being around £800 per annum including management, accountancy and other charges, and that their flats were consequently difficult to sell. They had obtained a quotation from another managing agent, Sarah Breeze, who would be prepared to manage the building for less.

The landlord's case

27. Mr Chitty produced a time sheet showing the hours which his firm had taken in managing

the block; he said that they had not charged all their time by any means, and that they could justify higher fees. Questioned by the tribunal, he agreed, however, that his firm was accustomed to dealing with commercial premises, he did not disagree that criticisms could be made of the style of management, that the fees "need to be looked at", that "we maybe have something to learn", that "mistakes have been made", and that there was a need to "consult people", although he considered that the firm managed the block "reasonably well". He said that the rent roll from the shops was about £55,000 to £60,000 per annum.

28. Mr Burden reminded us that we had to judge the reasonableness of these charges by reference to the nature of the building, and that what appeared to inflate them was the tenants' liability to pay for rent collection. He also said that Sarah Breeze's quotation was not much lower than the amounts charged by Woolley Pritchard & Co.

The tribunal's decision

29. We consider that the standard of management of the residential element in this block has hitherto been, on the whole, poor, although in the light of Mr Chitty's acknowledgement of past failings we are reasonably optimistic that the standard will improve in the wake of these proceedings. Particular failings include the conduct of the roof replacement and the operation of the sinking fund, both considered below, and the correspondence produced to us which tends to support the tenants' evidence that the managing agents' attitude has at times been more brusque than it should have been. We accept that the management of this block is relatively onerous because of the commercial element, and that the provisions in the residential leases which entitle the cost of rent collection to be charged for will be bound to increase the cost to which the tenants are required to contribute.

30. From our own knowledge and experience to which, as an expert tribunal we are not only entitled but bound to have regard, we are aware that a reasonable management fee for a block of this type, properly managed, would be in the region of £150 to £175 per flat per year, plus VAT, and we accept that an increasing factor in the present case is the landlord's somewhat unusual entitlement, in a residential lease, to charge residential leaseholders for rent collection. If the block had been managed to a reasonable standard, we would have determined the total fees for management and administration to equate to around £295 per flat per year plus VAT. On any view, therefore, the fees charged were wholly excessive and way outside the band of reasonable fees for management and administration.

31. However, given the generally poor standard of management to date, we determine that the reasonable charges payable by the tenants for the aggregate of the administration charges, main building management fees, flats management fees, and management of the sinking fund, at a total of £250 per annum plus VAT per flat in each of the relevant years. We emphasise that this is higher than the norm, though the standard of management was lower than the norm, only because the tenants are liable to contribute 4% towards the (reasonable) cost of collecting the rents.

Issue v: accountancy

General

32. The relevant covenant in the lease is at clause 5(6)(g)(ii): *to employ such ... accountants or other professional persons as may be necessary or desirable for the proper maintenance safety and administration of the building.* The landlord has throughout employed Crombies, chartered accountants, to prepare the service charge accounts and the sinking fund accounts. Their charges

in the relevant years, including VAT, were:

		Main	Flats
2001:	service charge	£528.75	-
	sinking fund	£117.50	-
2002:	service charge	£587.50	-
	sinking fund	£117.50	-
2003:	service charge	£587.50	-
	sinking fund	£117.50	-
2004:	service charge	£587.50	-
	sinking fund	£117.50	-

33. Miss Thornton considered that, as happens in some other cases, the accountancy function should have been part of management and no extra fee should be charged, but said that she would leave this matter to the tribunal. We are satisfied that it was reasonable and necessary for the landlord to employ an independent firm of chartered accountants and that their fees were not unreasonable for the work done, given the commercial element in the block.

Issue vi: the operation of the sinking fund

General

34. The landlord's covenant at clause 5(6)(m) of the lease is *To set aside (which setting aside shall for the purposes of the Fifth Schedule be deemed an item of expenditure incurred by the Lessors) such sums of money as the Lessors shall reasonably require to meet such future costs as the Lessors shall reasonably expect to incur of replacing maintaining and renewing those items which the Lessors have hereby covenanted to repair replace maintain and renew.*

35. In each relevant year the managing agent set aside sums to meet future costs, as to which no objection is made. However, in each year it withdrew from the fund thereby created not only sums required to meet the costs of replacing, maintaining and renewing the items which they had covenanted to replace, maintain and renew, but also management fees and accountancy charges. Miss Thornton made no allegations on this issue, but the tribunal was concerned about the way the fund was operated, and considered whether in the circumstances the tenants were liable to pay charges based on what might be unauthorised deductions from the fund. Submissions on the issue were therefore invited from Mr Burden.

The landlord's case

36. Mr Burden submitted that, since the setting aside was an item of expenditure for the purpose of the Fifth Schedule, and "total expenditure" was defined in paragraph 1(1) of the Fifth Schedule to include, specifically, "the cost of employing Managing Agents" and "the cost of any Accountant ... employed to determine the Total Expenditure and the amount payable by the Tenant ... ", clause 5(6)(m) permitted the landlord to apply part of the sinking fund to management fees and accountancy charges.

The tribunal's decision

37. While Mr Burden's argument is attractive, we do not think it is correct. To us, the clear meaning of clause 5(6)(m) is that the sinking fund is ring-fenced for the purposes of replacing, maintaining and renewing the items which the landlord has covenanted to replace, maintain and renew. If we are wrong to say that the meaning is clear, then, at least, the clause is ambiguous and must be construed against the grantor. In any event, our decision does not affect the result, because we have considered the reasonableness of the global charges made for management and accountancy, although we have taken this issue into account to a limited extent in connection with our consideration of the quality of the management. We also observe in passing that the interest paid on the sinking fund appears to have been between 1 and 1.25% throughout the relevant period, which in our view is too low and also reflects on the quality of the management in this period.

Issue vii: the roof - (a) section 20 consultation, (b) repair or improvement, and (c) the cost of borrowing

General

38. The landlord covenants at clause 5(6)(a) of the lease *To maintain and keep in good and substantial repair and condition (i) the main structure of the building including ... the roof... .* In late 2001 or early 2002 it appears that the managing agents formed the view that the existing virtually flat roof of the block needed to be replaced, and that it would be sensible to replace it with a pitched roof. In letters to the tenants dated 4 February 2002 (page 154) Mr Cassidy wrote:

> *We are writing to advise you that the roof of the property is coming to the end of its life expectancy and requires replacement. Our clients are proposing to replace it with a*

pitched roof and have instructed architects to prepare a scheme and make a formal planning application.

The cost of the works will be met from the sinking fund and will not require any additional payments from the tenants. We will keep you advised as matters progress.

In the meantime if we can be of any further assistance please do not hesitate to contact us.

39. On 17 October 2002 a purported notice under section 20 of the Act (at page 160) was given to the tenants. It made no reference to section 20, but said:

Further to our letter of 4 February 2002, we have obtained the following quotations to carry out works to replace the existing roof at the above property with a pitched roof.

CONTRACTOR	***TENDER***
	£
Classic Roofing Ltd	*£74,700.00*
P J Smith & Sons Ltd	*£75,238.18*
Howard Evans Roofing Ltd	*£78,888.00*
Brooks Construction Ltd	*£87,500.00*

Please note that all prices are subject to VAT. As previously indicated, the cost of the works will be met from the sinking fund, the shortfall will be made up by a bank loan to the sinking fund.

We are proposing to instruct the lowest tenderer, Classic Roofing Ltd, to proceed with the contract as a matter of urgency as we have been advised that a recent failure of part of the roof above one of the flats is beyond economic repair.

We would be pleased to receive any comments which you may wish to make within 28 days from the date hereof.

40. The work was duly carried out. The 2002 accounts for the sinking fund show that architect's fees of £4294.46 and building regulation fees of £217.38 were deducted in that year; and the 2003 accounts of the sinking fund show that a bank loan of £45,000 was obtained, and that £78,466.15 was deducted for the works, together with council inspection fees of £652.12 and supervision fees of £3525 paid to Woolley Pritchard & Co. The total cost of the works, including supervision and other fees, therefore appears to have been in excess of £86,500.

41. The issues which appear to arise in relation to these works, the cost and standard of which was not challenged, are the adequacy of the consultation, whether the works come within the landlord's covenant to repair, or went beyond it and were an improvement, and whether the leases permit the landlord to borrow and recover interest from the tenants as a service charge.

The tenants' case

42. Miss Thornton said that the tenants did not challenge the standard of the works or their cost, but they did challenge the adequacy of the consultation and whether the works were an improvement. She made no submissions on whether the lease allowed recovery of the cost of borrowing, but left that issue to the tribunal.

43. Miss Thornton said that the letter dated 17 October 2003 did not comply with the requirements of section 20 of the Act partly because work started on the roof one week after it was received. She said that she and other tenants had been under the impression that, since the roof would be paid for from the sinking fund, the tenants would not have to pay, because they did not understand at the time that the sinking fund was the tenants' money. She said that she considered that the pitched roof was an improvement, which added value to the landlord's, but not the tenants', interest in the block. She considered that if any leaks had been identified and dealt with earlier, the roof could have been repaired rather than replaced.

The landlord's case

44. Mr Chitty said that the roof had been the original 1960s roof, which had been re-felted at some time in the past. He said that the maximum life to be expected for such a roof was between 15 and 30 years, and it had outlasted its expected span. He said that ACP Limited, architects, had advised and the view was formed that it would be better in the long term for all parties if the flat roof was replaced with a pitched roof, which would mean that the life of the roof would exceed the balance of the terms of the leases and would avoid the need for periodic renewal. The pitched roof, he said, enhanced the value of the building and therefore the value of the flats. He said that if the roof had been replaced with another flat roof it would have been necessary to move the tenants of the top floor out of the block while the work was in progress, and that this factor, which would have increased the costs significantly, should be taken into account.

45. On the issue of the adequacy of the consultation, Mr Burden submitted that, despite the failure to include copies of the estimates with the letters of 17 October 2003, the letters complied with the requirements of section 20 because they achieved the purpose behind the

section, which was to ensure that the tenants knew the costs of the work to be done and its nature.

46. On the issue of whether the works constituted a repair or were an improvement, Mr Burden submitted that the obligation in clause 5(6)(a) to keep the property in "good ... condition" was wider than the obligation to keep it in repair. It was, he said, trite law that whether something was a repair or an improvement was a question of degree, and that a relevant question was whether the effect of alterations to the building was to produce a building of a wholly different character from that which had been let, in which case it was an improvement. He drew attention to a number of relevant authorities, including the decision of the Lands Tribunal in *Wandsworth London Borough Council v Griffin* [2000] 26 EG 147, where the provision of pitched roofs was held, after consideration of costs-in-use calculations, to come within the landlord's covenant to repair.

47. On the issue of whether the lease permitted recovery of interest, Mr Burden relied on the sweeping up provision in the Fifth Schedule, which extended the meaning of "Total Expenditure" to include *any other costs and expenses reasonably and properly incurred in connection with the building.* He submitted that a loan to fund a roof repair was "in connection with" the building, and that, since the landlord could in theory have required the tenants to pay their contribution to the sums paid to the builder in the year in which they were paid, the decision to obtain a loan to defer the cost to them over a period at a lower rate of interest than individual tenants might be able to obtain was both "reasonable" and "proper" within the meaning of the Fifth Schedule. He very properly drew our attention to a number of authorities, including *Frobisher (Second Investments) Ltd v Kiloran Trust Co Ltd* [1980] 1 WLR 425, in which Walton J held that in the absence of an express term in the lease permitting the landlord to recover interest on borrowing moneys to meet the cost of maintaining the property, no term could be implied in the lease to permit recovery of interest and the tenants were therefore not

liable to pay it.

The tribunal's decision

(a) Section 20

48. We are satisfied that the landlord did not comply with the requirements of section 20(4)(b) of the Act which provides:

> *A notice accompanied by a copy of the estimates shall be given to each of those tenants concerned* ... .

In our view this subsection clearly requires a copy of the estimates to be included with the notice, and the setting out of the figures within them is insufficient. We note that the President of the Lands Tribunal said, on an application by the landlord for permission to appeal from the London Leasehold Valuation Tribunal on this very point, in relation to *12A Campden House, Sheffield Terrace London W8* (LRX/76/2004) that "a list of the amounts tendered is insufficient, and the contrary is not in my view reasonably arguable". We recognise that this does not constitute binding authority but, with respect, we think that the President was correct. Nor do we regard compliance with this subsection as an unimportant formality. In our view the requirement to enclose a copy of the estimates, rather than to recite a list of names and figures, is a significant protection against possible fraud (which is not, of course, suggested in the present case).

49. While we do not doubt Miss Thornton's veracity, the documents produced at the hearing appear to show that the works were not commenced before the expiry of the 28 day consultation

period. We think that she is mistaken in her recollection on this issue, and we do not hold the landlord in breach of section 20 on this ground.

50. The works having been carried out before the coming into force of section 20ZA of the Act, we have no power to dispense with the requirements of section 20, as only the county court can grant dispensation under section 20(9). This should not be taken as an indication that we would have dispensed with the requirements of section 20 if we had been able to do so, for in our view the tenants were treated with disdain, and were seriously misled into thinking that the roof would be replaced at no cost to them, when the truth was very different.

51. The consequence of our decision is that unless the landlord obtains an order from the county court under section 20(9) of the Act, no more than a total sum of £1000 is recoverable for the works to the roof, including all the supervision and other fees, and, of this, each residential tenant is liable for a maximum of 4%, or £40.

(b) Repair or improvement

52. We proceed to make a finding on the other issues under this head in case the landlord seeks and obtains an order under section 20(9).

53. We have come, on balance, to the conclusion that these works fall within the landlord's covenant. We accept, on the limited evidence we have, that the roof had reached the end of its life and needed to be replaced. It is clear on the authorities that replacement or repair can include an element of improvement, in that modern methods or materials can be used. It is, these days, generally considered unwise to install a flat roof on a substantial building, and we consider that the installation of a pitched roof, given that the replacement of the roof appears to

have been necessary, was a reasonable method of keeping the block in good condition and in repair in accordance with the landlord's covenant. We also regard it as relevant that the installation of a flat roof would have cause upheaval to the tenants of the top floor and would undoubtedly have added to the cost of the works.

(c) Interest

54. We have also come to the conclusion that the lease permits the landlord to borrow and incur a liability for interest if to do so is reasonable and proper and the loan is obtained in connection with the building. We note that in *Frobisher v Kiloran* (above) Walton J said (at page 431D) "It does not seem to me that one can fairly say ... that there is any general phrase which one could fairly read as including interest payments ... ". We infer that there was in the lease under consideration in that case no sweeping up provision similar to that in the Fifth Schedule of the present lease. We are satisfied that if funds are needed for necessary works it may be reasonable and proper for the landlord to borrow them and pass on the interest as a service charge, provided that it is itself reasonable in amount. We therefore determine that the loan interest, which appears to have been reasonable in amount, would have been recoverable if the cost of the roof had been recoverable.

Issue viii: section 20B

General

55. The service charge accounts for the year 2003 were signed off on 14 February 2005, and, the tenants say and we accept, were received by them in March 2005. In these circumstances

the tenants argued that all or some of the costs incurred in 2003 were irrecoverable by virtue of section 20B of the Act, which provides:

> *(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.*
>
> *(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.*

56. Mr Burden said that the lease provided for the payment of interim service charges, and submitted that section 20B had no application to such charges, which were provided for by section 19(2). For this proposition he cited a judgment of Etherton J in *Gilje v Charlegrove Securities Ltd* [2004] 1 All ER 91. In that case the actual expenditure did not exceed the interim payments on account, but Mr Burden submitted that where, as in the present case, there was a charge in excess of the interim payments, the excess charge could only meaningfully be said to have been incurred on 31 December 2003, at the end of the accounting year, so that, pursuant to section 20B, the demand for payment of the excess, which was made on production of the accounts, was within 18 months.

The tribunal's decision

57. While Mr Burden's argument has the merit of simplicity, it does not accord with the

wording of the subsection, which clearly relates the running of time to the costs incurred and not the preparation of the accounts based on them. Section 20B clearly refers to *any of the relevant costs taken into account in determining the amount of any service charge* being incurred, and not to the service charge demands themselves. It is cleat, therefore, that time starts to run when the costs are incurred. When they are incurred (when the work is done? when the landlord is liable to pay for them?) may be an argument for another day, but for present purposes we are prepared to assume in the landlord's favour that they were incurred at the date of the invoices.

58. Although the principles were considered at the hearing, they were not applied to the costs incurred in the year in question. We have attempted to determine for ourselves which of the which, if any, of the costs are irrecoverable by virtue of section 20B, but have decided on balance to invite written submissions on this issue from the parties. They must be provided within 21 days of the date of this decision, and a supplementary decision on this issue will be issued shortly thereafter.

Section 20C

59. Mr Burden said that the landlord, rightly in our view, did not seek to place its costs incurred in connection with these proceedings on the service charge of any of the tenants.

CHAIRMAN.....

DATE.....24 September 2015.....

BIR/00CN/LSC/2004/0004

THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE

FURTHER DECISION OF THE MIDLAND LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER S27A OF THE LANDLORD AND TENANT ACT 1985

Property: **Flat 4, Regent House, 391 Birmingham Road, Sutton Coldfield B72 1AT**

Applicant: Miss E M Thornton (leaseholder)

Respondent: Portrust Holdings Limited (landlord)

Dates heard: 16 May and 11 July 2005, in Birmingham

Appearances: Miss E Thornton (Flat 4), the applicant
Miss L O'Sullivan (Flat 1)
Mrs L Cragg (Flat 3)
Miss S Higgins (Flat 6)
Miss S O'Sullivan (Flat 10)

for the applicant

Mr Angus Burden, counsel, instructed by Manby & Steward, solicitors
Mr P L Cassidy BSc (Est Man) MRICS and Mr D Chitty BSc MRICS
Woolley Pritchard & Co, chartered surveyors

for the respondent

Members of the leasehold valuation tribunal:

Lady Wilson
Mr N R Thompson FRICS
Mr M H Ryder

Date of the tribunal's decision: 21 DEC 2005

1. On 27 September 2005, after a hearing lasting two days, the tribunal issued a decision determining all the issues raised in this application with the exception of the tenants' assertion that, because of the provisions of section 20B of the Landlord and Tenant Act 1985 ("the Act"), some of costs incurred by the landlord in the year 2003 could not be the subject of a recoverable service charge.

2. This issue was considered at paragraphs 55 to 58 of our decision, but in the light of our views about the effect of section 20B we decided that we needed further written submissions on those costs incurred in the year 2003 which could and those which could not be the subject of a recoverable service charge. The landlord's solicitors, Manby & Steward, have sent written representations on this issue in the form of a letter dated 13 October 2005. The tenants have not made further written submissions on the issue but have asked, in letters dated 5 October 2005 and 1 November 2005 from Ms S O'Sullivan, the tenant of Flat 10, for a concise explanation of all the sums which they are required by the decision to pay. They have also asked for an indication of the service charges they will have to pay for the year ended 31 December 2005 and in future years, and the sums which they are entitled to have reimbursed to them in the light of our decision.

Section 20B

3. In their written submissions, Manby & Steward say that in their view the late demand for service charges for the year 2003 will affect only the amounts over and above the amounts demanded on account for the year 2003. We do not accept that interpretation of section 20B. Section 19(2) of the Act provides a separate mechanism for challenging the reasonableness of demands for payments on account, which was not the issue we had to decide. We had to decide the reasonableness of and the tenants' liability to pay the final service charges. It is clear to us,

as we said in the decision, that, in order to recover service charges (other than on account payments), a landlord must demand payment of the final service charges not more than 18 months after the costs were incurred. Section 20B(2) sets out what a landlord must do in order to avoid the consequences of section 20B(1) if, for example, the service charge accounts have not been finalised; namely he must, within 18 months, serve a written notice on the tenant that costs have been incurred and that the tenant will subsequently be required to contribute to them by payment of a service charge. The fact that he has previously demanded service charges on account is not in our view sufficient to avoid the consequences of section 20B, which is an important provision which requires landlords to prepare itemised service charge demands within a reasonable time, so that tenants can know where they stand.

4. Section 20B(1) of the Act provides:

> *If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.*

5. The tenants said at the hearing that they did not receive the accounts and final service charge demand for the year 2003 (the service charge and the calendar year being the same in this case) until March 2005, and the landlord has now confirmed, and we accept, that the final service charge demand for that year was served on the tenants on 3 March 2005.

6. We said in our decision that we would assume that each of the relevant costs were incurred on the date of the relevant invoice for those costs. No other approach is in our view practical, since it will generally be impossible to discover when the work which was the subject of an invoice was actually carried out, and a consistent approach is required.

7. The landlord produced for the hearing a supplemental bundle containing all the invoices for all services provided in each of the years under review, including 2003. These were said to be all the relevant invoices, and we have assumed for present purposes that that is correct. We have therefore reviewed all the invoices for the year 2003 which are in the landlord's supplemental bundle and have disallowed, as not recoverable by virtue of section 20B, all costs which were the subject of invoices between 1 January and 3 September 2003. Where no invoices have been produced (for example, in relation to management charges) we have assumed that the costs are time-barred.

8. On this basis we determine that, of the Main Service Charge, of which the tenants are each required to pay 4%, £7638.76 is time-barred by section 20B and £2061.69 is not and may form the subject of a recoverable service charge. Of the Flats Service Charge, of which the tenants are each required to pay 10%, £3764.04 is time-barred and £1472.29 is not. By applying percentages to the costs which are time-barred we arrive at individual amounts which are disallowed of £305.55 (Main Service Charge) and £376.40 (Flats Service Charge) per tenant, a total of £681.95. To that sum must be added £593.17 for management, in respect of which, wrongly in our view, there are no invoices. This gives a total figure of £1275.12 per flat to be disallowed for the year 2003. The actual charge per flat for that year was £1331.62, and the service charge payable by each tenant for the year 2003 is thus capped at £56.50.

Ms O'Sullivan's request for clarification

9. We are afraid that we cannot say what reimbursement is due to the leaseholders. We do not have evidence about the amounts which the tenants actually paid, and, furthermore, restitution of sums overpaid, if the amounts are disputed, is a matter for the county court, although we hope that this issue can be resolved by agreement in the present case. Nor can we indicate what

service charges are payable by the leaseholders for the year 2005 or subsequently, since these were not the subject of the dispute and were therefore not dealt with at the hearing (although we hope and would expect that the landlord will bear in mind our determination in relation to 2001, 2002, 2003 and 2004 in formulating the service charge for the current and future years).

10. In the light of our decision and of the present decision, it appears to us that the amounts to be deducted for the years 2001 to 2004 inclusive are as follows:

	Original sc	LVT decision`	2001	2002	2003	2004	Total
Demanded per flat			896.38	1148.14	1331.62	1312.84	4688.98
Cleaning (10%)							
2001	897.97	897.97					
2002	2443.87	2000		- 44.38			
2003	2443.87	2000			- 44.38		
2004	2443.87	2000				- 44.38	
							- 133.14
Landscaping (4%)							
2001	404.16	404.16					
2002	629.80	434.75		- 7.80			
2003	622.71	434.75			- 7.52		
2004	620.40	434.75				- 7.42	
							- 22.74
Mgmt & Admin (per flat)							
2001	488.77	293.75	- 216.75				
2002	506.44	293.75		- 234.38			
2003	593.17	295.75			- 322.24		
2004	585.08	293.75				- 316.08	
							- 1089.45
Total deduction by LVT			**216.75**	**286.56**	**374.14**	**367.88**	**1243.33**

New service charge (per flat)	**679.63**	**861.58**	**957.48 (but capped at 56.50; see para 10)**	**944.96**	**3443.65**

11. As far as the roof is concerned (considered at paragraphs 38 to 54 of the decision), we determined that only £1000 in total is payable by all the tenants, including the commercial tenants, and that each residential tenant's liability to pay for those works is £40. The balance of the cost of the works to the roof (including professional and other fees and VAT) is not recoverable from the tenants and any element which they have already paid should be repaid to the sinking fund.

12. We hope that the above is reasonably clear. The situation is inherently complex, however, and it may be that the tenants will wish to seek advice about the sums to be repaid to them.

CHAIRMAN.....

DATE.....

BIR/00CN/LSC/2004/0004

THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE

DECISION OF THE MIDLAND LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION BY THE LANDLORD UNDER S175 OF THE COMMONHOLD AND LEASEHOLD REFORM ACT 2002 FOR PERMISSION TO APPEAL

Property: **Flat 4, Regent House, 391 Birmingham Road, Sutton Coldfield B72 1AT**

Applicant: Miss E M Thornton (leaseholder)

Respondent: Portrust Holdings Limited (landlord)

Dates heard: 16 May and 11 July 2005, in Birmingham

Appearances: Miss E Thornton (Flat 4), the applicant
Miss L O'Sullivan (Flat 1)
Mrs L Cragg (Flat 3)
Miss S Higgins (Flat 6)
Miss S O'Sullivan (Flat 10)

for the applicant

Mr Angus Burden, counsel, instructed by Manby & Steward, solicitors
Mr P L Cassidy BSc (Est Man) MRICS and Mr D Chitty BSc MRICS
Woolley Pritchard & Co, chartered surveyors

for the respondent

Members of the leasehold valuation tribunal:

Lady Wilson
Mr N R Thompson FRICS
Mr M H Ryder

Date of the tribunal's decision:

1. This is an application by the respondent landlord for permission to appeal to the Lands Tribunal from a decision of this tribunal dated 25 September 2005 and supplemented by a decision dated 21 December 2005. The latter decision relates to an issue under section 20B of the Landlord and Tenant Act 1985 and it is only in relation to this issue that the landlord seeks permission to appeal.

2. The issue under section 20B was the subject of a supplementary decision because further written submissions were required from the parties in order that the disallowed costs could be properly quantified in the light of our decision as to the meaning of section 20B of the 1985 Act.

3. It was agreed at the hearing, which, together with the inspection of the property, occupied two days, that the accounts for the service charge year 2003, which equates to the calendar year, were not served on the tenants until March 2005. In their supplementary written submissions the landlord's solicitors said that the accounts were served on 3 March 2005, the tenants did not disagree, and we accepted it. (Although the application under section 27A was made in the name of only one of the tenants, she was acting on behalf of herself and five others.)

4. The service charges for the year 2003 had been the subject of an interim demand for service charges on account, as the leases permitted. We held in our supplementary decision that the meaning of section 20B of the 1985 Act was that such an interim demand in advance did not absolve the landlord from its obligation to quantify and demand the service charges within 18 months of their having been incurred, or, if the accounts cannot be finalised within that period, at least to give the tenants a general indication in the form of a notice under section 20B(2).

5. Mr Burden for the landlord submits in the application for permission to appeal that our

interpretation of section 20B was incorrect, but it is our view that our decision is correct in law and that the landlord does not have a reasonable prospect of success on this issue.

6. Mr Burden also submits that we were in any event wrong to exclude management and administration charges incurred before 3 September 2003 in the light of the fact that these were included on the interim demands. That is not our reading of the interim demands, and we consider that the landlord does not have a reasonable prospect of success on this issue.

7. Finally, Mr Burden submits that we in any event miscalculated the aggregate of the invoices between January 2003 and 3 September 2003 which we disallowed by virtue of our decision under section 20B. He says that the correct figure, on the basis of our approach, is £930.77, as against our figure, which was based on the copy invoices provided to us by the landlord and was £1275.12. It appears to us that our calculation was correct, but even if that is not the case, we would regard an appeal on this issue alone as disproportionate.

8. According, permission to appeal is refused.

CHAIRMAN.....

DATE.....22 January 2006.....